



# ARMY TABLES

## MISCELLANEOUS SERVICES

### PART I

*By Authority*



*Government of India, Army Department*









These Tables are published by order of the Government of India.

B. HOLLOWAY,

*Major-General,*

*Secretary to the Government of India.*

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## SECTION I

**ESTABLISHMENT.**

**Table 1.—Establishment and distribution of Mounted Infantry in Burma.**

Details.		STATIONS.			REMARKS.
		Bhamo.	Mandalay and Maymya.	McDiara.	
<b>COMBATANTS—</b>					
1	Burkhs (a)—				
	Serjants . . . . .	..	2	..	
	Corporals . . . . .	..	2	..	
1	Lance Corporals . . . . .	..	4	..	
	Privates . . . . .	..	42	..	
<b>Indian (a)—</b>					
	Indian Officers . . . . .	..	..	2	
	Headclars . . . . .	..	..	2	
	Nahks . . . . .	..	..	2	
	Sepoys . . . . .	40	41	44	
<b>FOLLOWERS—</b>					
0	Lahiks . . . . .	1	2	1	
	Cooks . . . . .	..	1	..	
1	Mochi . . . . .	1	2	1	
	Salutrs . . . . .	1	2	1	
	Eyces . . . . .	(b)	(b)	(b)	
4	Sweepers . . . . .	1	2	1	
5	Interpreters . . . . .	(c)	(c)	(c)	
<b>ANIMALS AND SADDLERY—</b>					
6	Ponies (d) . . . . .	50	100	50	
7	Saddlery . . . . .	50	100	50	

RE 1.—In case of an officer providing himself with two suitable gun chargers he will be allowed to draw double horse allowance per manum and will provide his own eye. Both double horse allowance will be inclusive of any horse allowance drawn as a separate item under regulations.

2.—The proportion of N.C. Os. may, when necessary, be kept up by appointing acting N.C. Os with the pay of the acting ranks.

**Table 2.—Establishment for the Cavalry School, Saugor.**

Details.	No.	REMARKS.	Details.	No.	REMARKS.
<b>OFFICERS</b>			<b>INDIAN RANKS.</b>		
Commandant (Colonel on the staff)	1		Instructors (Duffadars) . . .	4	
Adjutant and Quartermaster . . .	3		Rough Riders (Duffadars) . . .	2	
a) Instructor . . .	1		Trumpeters (Indian Cavalry) . . .	2	
b) Officer . . .	1		<b>TOTAL</b> . . .	<b>8</b>	
<b>TOTAL</b> . . .	<b>7</b>		<b>FOLLOWERS.</b>		
<b>INDIAN OFFICERS.</b>			Clerks . . .	4	
(Ressaldar) . . .	1		Indian Cavalry Pensioners . . .	13	Supervision of stable duties One with status of Kot Dafadar
<b>TOTAL</b> . . .	<b>1</b>		Carpenters . . .	1	Temporary on petty rates of pay. Services to be dis- penssed with when not ac- tually required.
<b>BRITISH RANKS</b>			Moochi . . .	1	
Personal Assistant . . .	1	On cadre of India Miscal- laneous List.	Tindal . . .	1	
Surgeon . . .	1	Permanent Borne on Non-Departmental Section 1 U. List. Acting rank only.	Storemen . . .	1	
or Serjeant . . .	1		Flickmen . . .	2	
Quartermaster Ser- jeant . . .	1		Hammomen . . .	2	
on Serjeant Major Riders) . . .	2		Flickman . . .	1	
Serjeant Major (In- tending and gym- nast) . . .	2		Syces . . .	169	
Smiths . . .	1		Daffri . . .	1	
Duffadars . . .	1		Chowkidar . . .	1	
Smiths (including ve- terinary establishment)	3		Chowdri . . .	2	
<b>TOTAL</b> . . .	<b>17</b>		Peons . . .	2	
			Kalck . . .	1	
			Drover . . .	1	
			Ward Servant . . .	1	
			Cook . . .	1	
			Dhobi . . .	1	
			Sweepers . . .	10	
			Palkhali . . .	4	
			<b>TOTAL</b> . . .	<b>222</b>	
			Rubbish cart with driver and one pair of bullocks . . .	1	
			Hand cart with sweepers . . .	1	
			Sulage cart with one driver and bullock . . .	1	

## SECTION I.

## ESTABLISHMENTS.

Table 3.—Establishment of Remount Depôt.

Item No.	Details.	Saharanpur.	Calcutta.	Uspur.	Mona and Sargodha.	Ahmednagar.	Hosur.	Item No.	Details.	Saharanpur.	Calcutta.	Uspur.	Mona and Sargodha.	Ahmednagar.	Hosur.
	<i>Overseers.</i>								<i>Hospital.</i>						
1	W O or N.-C. O., 1st grade.	3	..	1	2	..	2	37	Asst Surgeon " No.	..	..	1	1	..	..
2	W.-C. O. 2nd grade	..	..	2	1	1	..	38	Hospital Assistant " "	1	..	..	..	..	..
3	" 3rd " "	..	1	..	1	2	..	39	Compounder " "	1	..	1	2	..	..
4	Farm overseer (civilian)	1	..	1	1	1	1	40	Cook " "	1	..	1	1	..	..
5	Asst " " "	..	..	..	1	..	..	41	Ward servant " "	..	..	1	1	..	..
6	Farm overseers (Indian)	..	..	..	3	..	..	42	Ward coolies " "	..	..	..	..	..	1
	<i>Office Establishment</i>							43	Sweeper " "	1	..	1	1	..	1
7	Head clerk " "	1	1	1	1	1	1	44	Bhisti " "	1	..	..	..	..	..
8	2nd " " "	1	..	2	1	1	1	45	Chowdri " "	1	..	1	1	..	1
9	3rd " " "	1	..	1	1	1	1	46	Chowkidar " "	1	..	..	..	..	..
10	Additional or Vety. clerk.	1	..	1	1	1	1	47	Sweepers " "	4	1	4	5	3	4
11	Treasurer and Munshi	1	..	1	1	1	1	48	Carts and Bullock Establishment Chowdri " No	1	..	..	..	..	1
12	Godown clerk " "	..	2	..	..	..	..	49	Hackery or Cartmen " "	14	..	..	..	8	25
	<i>Servants</i>							50	Horse Cartmen " "	12	..	12	23	8	8
13	Daftra " "	1	..	3	1	..	1	51	Wellmen " "	..	..	..	..	6	..
14	Prons " " "	..	2	2	4	2	3	52	Remount Darogah " "	3	..	1	4	1	2
15	Chowkidars " "	..	2	4	13	8	..	53	Jemadars " "	5	1	5	4	4	2
16	Bhatis " "	..	..	..	..	..	3	54	Mates " " "	5	..	7	4	4	10
17	Farraah " " "	..	1	..	..	..	..	55	Syces " " "	198	..	210	546	142	159
18	Dafadar of peons. " "	..	..	..	..	..	1	56	Nalbanda " "	5	1	7	4	5	5
19	Sweeper " " "	..	..	..	..	..	1	57	Mate for cornmill " "	1	..	1	4	..	..
	<i>Godown</i>							58	Master writer " " "	1	..	1	2	..	1
20	Overseer " " "	1	..	1	1	1	1	59	Grain boiler " " "	..	..	..	..	..	3
21	Munshi " " "	1	..	1	2	1	1	60	Trumpeter " "	..	..	..	..	..	1
22	Weighman " " "	2	..	..	3	1	1		<i>Riding Establishment</i>						
23	Purchar " " "	..	..	1	4	1	..	61	Jemadar of sowars " "	2	..	1	..	..	1
24	Peons " " "	4	..	..	..	..	..	62	Dafadars " " "	2	..	2	2	1	2
	<i>Workshop</i>							63	Sowars, 1st class " "	18	..	38	18	30	28
25	Blacksmiths " "	3	..	2	1	2	2	64	" 2nd class " " "	10	..	17	18	..	18
26	Bellowsman " "	1	..	..	..	..	2		<i>Farm Establishment.</i>						
27	Carpenters " " "	3	..	2	1	2	2	65	Cultivator " " "	1	..	1	2	1	1
28	Mochis " " "	1	..	1	1	1	1	66	Asst. " " " "	1	..	1	2	..	1
	<i>Veterinary Hospital.</i>							67	Mate " " " "	6	..	2	4	..	..
29	Vety Assistant, 1st grade.	1	..	1	2	1	..	68	Farm mumbi " " "	1	..	1	..	..	1
30	Vety. Assistant, 2nd grade	1	..	1	3	..	..	69	Head mull " " "	1	..	1	..	2	..
31	Vety. Assistant, 3rd grade.	1	..	1	4	1	2		Asst. " " " "	11	..	1	..	..	..
32	Stable Jemadar " "	1	..	..	..	..	..	71	Mate bilidar " " "	1	..	..	..	..	..
33	Salutri " " "	..	..	..	..	..	1	72	Bilidars " " "	4	..	..	..	6	..
34	Dressers " " "	2	..	2	6	2	4	73	Chowkidars " " "	17	..	..	..	..	..
35	Syces " " "	6	..	7	18	4	..	74	Farm labourers " " "	..	..	2	..	2	..
	Bhisti " " "	1	..	..	..	1	..	75	Ploughmen " " "	..	..	..	..	..	30





## ESTABLISHMENTS.

Table 4.—Quatermasters', conservancy, marching and other establishments authorized for British troops serving in the 1st, 2nd, 3rd, 7th and 8th Divns., the 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 105th, 106th, 107th, 108th, 109th, 110th, 111th, 112th, 113th, 114th, 115th, 116th, 117th, 118th, 119th, 120th, 121st, 122nd, 123rd, 124th, 125th, 126th, 127th, 128th, 129th, 130th, 131st, 132nd, 133rd, 134th, 135th, 136th, 137th, 138th, 139th, 140th, 141st, 142nd, 143rd, 144th, 145th, 146th, 147th, 148th, 149th, 150th, 151st, 152nd, 153rd, 154th, 155th, 156th, 157th, 158th, 159th, 160th, 161st, 162nd, 163rd, 164th, 165th, 166th, 167th, 168th, 169th, 170th, 171st, 172nd, 173rd, 174th, 175th, 176th, 177th, 178th, 179th, 180th, 181st, 182nd, 183rd, 184th, 185th, 186th, 187th, 188th, 189th, 190th, 191st, 192nd, 193rd, 194th, 195th, 196th, 197th, 198th, 199th, 200th, 201st, 202nd, 203rd, 204th, 205th, 206th, 207th, 208th, 209th, 210th, 211st, 212th, 213th, 214th, 215th, 216th, 217th, 218th, 219th, 220th, 221st, 222nd, 223rd, 224th, 225th, 226th, 227th, 228th, 229th, 230th, 231st, 232nd, 233rd, 234th, 235th, 236th, 237th, 238th, 239th, 240th, 241st, 242nd, 243rd, 244th, 245th, 246th, 247th, 248th, 249th, 250th, 251st, 252nd, 253rd, 254th, 255th, 256th, 257th, 258th, 259th, 260th, 261st, 262nd, 263rd, 264th, 265th, 266th, 267th, 268th, 269th, 270th, 271st, 272nd, 273rd, 274th, 275th, 276th, 277th, 278th, 279th, 280th, 281st, 282nd, 283rd, 284th, 285th, 286th, 287th, 288th, 289th, 290th, 291st, 292nd, 293rd, 294th, 295th, 296th, 297th, 298th, 299th, 300th, 301st, 302nd, 303rd, 304th, 305th, 306th, 307th, 308th, 309th, 310th, 311st, 312th, 313th, 314th, 315th, 316th, 317th, 318th, 319th, 320th, 321st, 322nd, 323rd, 324th, 325th, 326th, 327th, 328th, 329th, 330th, 331st, 332nd, 333rd, 334th, 335th, 336th, 337th, 338th, 339th, 340th, 341st, 342nd, 343rd, 344th, 345th, 346th, 347th, 348th, 349th, 350th, 351st, 352nd, 353rd, 354th, 355th, 356th, 357th, 358th, 359th, 360th, 361st, 362nd, 363rd, 364th, 365th, 366th, 367th, 368th, 369th, 370th, 371st, 372nd, 373rd, 374th, 375th, 376th, 377th, 378th, 379th, 380th, 381st, 382nd, 383rd, 384th, 385th, 386th, 387th, 388th, 389th, 390th, 391st, 392nd, 393rd, 394th, 395th, 396th, 397th, 398th, 399th, 400th, 401st, 402nd, 403rd, 404th, 405th, 406th, 407th, 408th, 409th, 410th, 411st, 412th, 413th, 414th, 415th, 416th, 417th, 418th, 419th, 420th, 421st, 422nd, 423rd, 424th, 425th, 426th, 427th, 428th, 429th, 430th, 431st, 432nd, 433rd, 434th, 435th, 436th, 437th, 438th, 439th, 440th, 441st, 442nd, 443rd, 444th, 445th, 446th, 447th, 448th, 449th, 450th, 451st, 452nd, 453rd, 454th, 455th, 456th, 457th, 458th, 459th, 460th, 461st, 462nd, 463rd, 464th, 465th, 466th, 467th, 468th, 469th, 470th, 471st, 472nd, 473rd, 474th, 475th, 476th, 477th, 478th, 479th, 480th, 481st, 482nd, 483rd, 484th, 485th, 486th, 487th, 488th, 489th, 490th, 491st, 492nd, 493rd, 494th, 495th, 496th, 497th, 498th, 499th, 500th, 501st, 502nd, 503rd, 504th, 505th, 506th, 507th, 508th, 509th, 510th, 511st, 512th, 513th, 514th, 515th, 516th, 517th, 518th, 519th, 520th, 521st, 522nd, 523rd, 524th, 525th, 526th, 527th, 528th, 529th, 530th, 531st, 532nd, 533rd, 534th, 535th, 536th, 537th, 538th, 539th, 540th, 541st, 542nd, 543rd, 544th, 545th, 546th, 547th, 548th, 549th, 550th, 551st, 552nd, 553rd, 554th, 555th, 556th, 557th, 558th, 559th, 560th, 561st, 562nd, 563rd, 564th, 565th, 566th, 567th, 568th, 569th, 570th, 571st, 572nd, 573rd, 574th, 575th, 576th, 577th, 578th, 579th, 580th, 581st, 582nd, 583rd, 584th, 585th, 586th, 587th, 588th, 589th, 590th, 591st, 592nd, 593rd, 594th, 595th, 596th, 597th, 598th, 599th, 600th, 601st, 602nd, 603rd, 604th, 605th, 606th, 607th, 608th, 609th, 610th, 611st, 612th, 613th, 614th, 615th, 616th, 617th, 618th, 619th, 620th, 621st, 622nd, 623rd, 624th, 625th, 626th, 627th, 628th, 629th, 630th, 631st, 632nd, 633rd, 634th, 635th, 636th, 637th, 638th, 639th, 640th, 641st, 642nd, 643rd, 644th, 645th, 646th, 647th, 648th, 649th, 650th, 651st, 652nd, 653rd, 654th, 655th, 656th, 657th, 658th, 659th, 660th, 661st, 662nd, 663rd, 664th, 665th, 666th, 667th, 668th, 669th, 670th, 671st, 672nd, 673rd, 674th, 675th, 676th, 677th, 678th, 679th, 680th, 681st, 682nd, 683rd, 684th, 685th, 686th, 687th, 688th, 689th, 690th, 691st, 692nd, 693rd, 694th, 695th, 696th, 697th, 698th, 699th, 700th, 701st, 702nd, 703rd, 704th, 705th, 706th, 707th, 708th, 709th, 710th, 711st, 712th, 713th, 714th, 715th, 716th, 717th, 718th, 719th, 720th, 721st, 722nd, 723rd, 724th, 725th, 726th, 727th, 728th, 729th, 730th, 731st, 732nd, 733rd, 734th, 735th, 736th, 737th, 738th, 739th, 740th, 741st, 742nd, 743rd, 744th, 745th, 746th, 747th, 748th, 749th, 750th, 751st, 752nd, 753rd, 754th, 755th, 756th, 757th, 758th, 759th, 760th, 761st, 762nd, 763rd, 764th, 765th, 766th, 767th, 768th, 769th, 770th, 771st, 772nd, 773rd, 774th, 775th, 776th, 777th, 778th, 779th, 780th, 781st, 782nd, 783rd, 784th, 785th, 786th, 787th, 788th, 789th, 790th, 791st, 792nd, 793rd, 794th, 795th, 796th, 797th, 798th, 799th, 800th, 801st, 802nd, 803rd, 804th, 805th, 806th, 807th, 808th, 809th, 810th, 811st, 812th, 813th, 814th, 815th, 816th, 817th, 818th, 819th, 820th, 821st, 822nd, 823rd, 824th, 825th, 826th, 827th, 828th, 829th, 830th, 831st, 832nd, 833rd, 834th, 835th, 836th, 837th, 838th, 839th, 840th, 841st, 842nd, 843rd, 844th, 845th, 846th, 847th, 848th, 849th, 850th, 851st, 852nd, 853rd, 854th, 855th, 856th, 857th, 858th, 859th, 860th, 861st, 862nd, 863rd, 864th, 865th, 866th, 867th, 868th, 869th, 870th, 871st, 872nd, 873rd, 874th, 875th, 876th, 877th, 878th, 879th, 880th, 881st, 882nd, 883rd, 884th, 885th, 886th, 887th, 888th, 889th, 890th, 891st, 892nd, 893rd, 894th, 895th, 896th, 897th, 898th, 899th, 900th, 901st, 902nd, 903rd, 904th, 905th, 906th, 907th, 908th, 909th, 910th, 911st, 912th, 913th, 914th, 915th, 916th, 917th, 918th, 919th, 920th, 921st, 922nd, 923rd, 924th, 925th, 926th, 927th, 928th, 929th, 930th, 931st, 932nd, 933rd, 934th, 935th, 936th, 937th, 938th, 939th, 940th, 941st, 942nd, 943rd, 944th, 945th, 946th, 947th, 948th, 949th, 950th, 951st, 952nd, 953rd, 954th, 955th, 956th, 957th, 958th, 959th, 960th, 961st, 962nd, 963rd, 964th, 965th, 966th, 967th, 968th, 969th, 970th, 971st, 972nd, 973rd, 974th, 975th, 976th, 977th, 978th, 979th, 980th, 981st, 982nd, 983rd, 984th, 985th, 986th, 987th, 988th, 989th, 990th, 991st, 992nd, 993rd, 994th, 995th, 996th, 997th, 998th, 999th, 1000th.

SCALE OF CONSERVANCY CARTS (FOR REMOVAL OF SULLAGE WATER)																							
Item No.	Unit, etc.	A				B				C				Special scales, additional to unit scale.	Additional establishment allowed.					Details.	No. of carts authorized.	REMARKS.	
		Quartermaster's establishments for the removal of British troops in all situations (a)	Subs.	Sweepers	Extra establishments allowed when marching	Subs.	Subs.	Subs.	Subs.	Conservancy establishments for troops in quarters only (a), (b) and (c).	Subs.	Subs.	Subs.		Subs.	Subs.	Subs.	Subs.	Subs.				Subs.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	
1	Hd. Qrs. of a R. A. Det. gade of group	..	..	..	..	..	..	..	..	..	..	..	..	When a cavalry or infantry unit furnishes one or more squadrons on detached duty.	1	2	..	1	23	R. A. batts. or cos. Detachments.	1	1 for one or more units in garrison and located together. 1 each.	The service at Fort Gwyndar is performed by a cart allowed jointly for the detachments R. G. A. and British Infantry. Only one cart will be allowed where there is more than one detachment. 4 additional carts are allowed for British Cavalry for each battery. One extra allowed for each British Infantry battalion at Lucknow and Allahabad; also for British Cavalry lines at Lucknow and the British Infantry lines at Cawnpore and for the R. A. lines at Lucknow.
2	R. H. A. battery on field army establishment	1	1	1	1	1	1	1	1	1	1	1	1	When a cavalry or infantry unit furnishes detachments of between 40 to 80 men from more than one company or squadron.	1	6	..	..	24	Regimental battery, as detached or as per 100 men, cavalry, or infantry.	1	1	
3	R. V. A. howitzer battery	3	1	2	2	2	2	2	2	1	1	1	1	Battalion of infantry and company. Deployed at Koonpur, Kanlihar, for 7 months annually if necessary.	1	12	..	4	..	..	..	..	One extra allowed for each British Infantry battalion at Lucknow and Allahabad; also for British Cavalry lines at Lucknow and the British Infantry lines at Cawnpore and for the R. A. lines at Lucknow.

(a) Establishments for detachments must be found *ad hoc* from the authorized establishments of the unit, proportionate to the strength detached. The extra establishments admissible under the head of "Details attached to corps" and "Special scales" should only be authorized when absolutely necessary. (b) When a detachment of British troops is authorized to march, the authorized conservancy establishments are insufficient, a H. Coy. is empowered to sanction an increase not exceeding one sweeper in the case of a R. A. battery or coy, two sweepers in the case of a L. V. A. battery or battery, and three sweepers in the case of a H. A. battery or battery. (c) Units in Fort William are not authorized to have a H. Coy. or a L. V. A. battery or battery. (d) The additional baggage water cart is authorized for the baggage cart, A. at Nowshera. (e) The additional baggage water cart is authorized for the water cart at Duna.



## ESTABLISHMENTS.

Table 4.—Quartermasters', conservancy, marching and other establishments authorized for British troops serving in the 1st, 2nd, 3rd, 7th and 8th Divns., the Kohat, Rawul, Jhelum and Jalandhar Divs.

Item No.	A				B	C				Special reinforcements to unit scales.	Additional establishment allowed						SCALE OF CONSERVANCY CARTS (FOR REMOVAL OF SULLAGE WARE).		REMARKS.
	Quartermaster's establishment (a) for British troops in all establishments (b)	Sweepers	Wholes	Labourers (c)	Extra establishments allowed when marching	Engineers	Conservancy establishment (b) and (c) for troops in quarters only (d)	Bull carts	Bullock carts		Bull carts	Bullock carts	Bull carts	Bullock carts	Bull carts	Bullock carts	Details	No of carts authorized.	
1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
2	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
3	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

(a) Establishments for detachments must be found ordinarily from the authorized establishments of the unit, proportionate to the strength detached. The extra establishments admissible under the heads of "details" and "special reinforcements" should only be authorized when absolutely necessary.

(b) Where local conditions are such that the conservancy establishment is insufficient, a 100 Comdr is empowered to sanction an increase not exceeding one sweeper in the case of a B. A. battery or coy, two or one and one bullock in the case of a battery, and one bullock in the case of a 100 Comdr.

(c) Units in Port W Ulm are not allowed bullocks or bullock carts.

(d) One additional sillage water cart is authorized for the 100 Comdr of B. A. at Lucknow.

(e) One additional sillage water cart is authorized for the 100 Comdr of B. A. at Lucknow.



## ESTABLISHMENTS

**the Kohat, Bannu, Jhansi and Jubbulpore Edes.—cont'd.**

SCALE OF CONSERVANCY CARE (FOR REMOVAL OF SULLAGE WATER).																						
Item No.	Unit, etc.	A				B		C				Special scales, additional to unit scales.	Additional establishment allowed.					Item No.	Details.	No of cattle authorized.	REMARKS.	
		Publicans.	Private.	Sweepers.	Quartermasters' establishments.	Publicans.	Private.	Sweepers.	Quartermasters' establishments.	Publicans.	Private.		Sweepers.	Quartermasters' establishments.								
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	
4	M. T. A. battery on international defence establishment, R. F. A. howitzer heavy and mountain batteries.	(1)	(1)	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	The camp at Kailasa, Dalmoula and Cherat will be served by the cart or its equivalent allowed for the British Infantry units at those stations.
5	Company of R. G. A. (1)	(1)	(1)	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	At the following stations the Infantry detachment will be served by the cart allowed for the R. A. unit— Forti, Ferozepore, Attock, Allahabad, Multan, Delhi, Peshawar, and at Campbell, Peshawar, Nowgong, Delhi, and Suget.
6	R. H. A. ammunition column.	3	1	1	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	At the following stations the Infantry detachment will be served by the cart allowed for the R. A. unit— Forti, Ferozepore, Attock, Allahabad, Multan, Delhi, Peshawar, and at Campbell, Peshawar, Nowgong, Delhi, and Suget.
7	R. F. A. howitzer ammunition column.	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	At the following stations the Infantry detachment will be served by the cart allowed for the R. A. unit— Forti, Ferozepore, Attock, Allahabad, Multan, Delhi, Peshawar, and at Campbell, Peshawar, Nowgong, Delhi, and Suget.
8	R. F. A. ammunition column.	4	1	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	At the following stations the Infantry detachment will be served by the cart allowed for the R. A. unit— Forti, Ferozepore, Attock, Allahabad, Multan, Delhi, Peshawar, and at Campbell, Peshawar, Nowgong, Delhi, and Suget.











**Table 4.—Quartermasters', conveyance, marching and other establishments authorized for British Troops serving in the 1st, 2nd, 3rd, 7th and 8th Divns., the Kohat, Pannu, Khansi and Jubbulpore Bdes.—cont'd**

[illegible]







Summer camps of *Balkh*, *Farah*, *Kandahar* and *Chahab*.  
 —Quartermasters' establishments will be provided from establishments of units sending details to those camps, being temporarily replaced by such number of men proportionate to the strength detached added to the conservancy establishment, and may be required to complete the establishment of the camp in the absence of the conservancy establishment. Conservancy establishments for the camps will be engaged locally on the *litti* *annaf* scale.

The following scale of conservancy carts is authorized for British troops when encamped on the Maidan at Calcutta

Strength	Bullock carts		Cool-house carts
	Full carts	Half carts	
Regiment, British Cavalry	4	3	3
Detachment of 2 squadrons	2	2	2
1	1	1	1
Battery of Royal Horse or Royal Field Artillery	3	2	1
Company R. G. A.	3	2	1
Section or 1/2 Battery of Company	1	1	1
Battalion of British Infantry	2	3	3
Head quarter Wing, British Infantry	2	2	2
Two Companies, British Infantry	1	1	1

The above scale is in excess of, and not supplementary to, the ordinary scale admissible for troops in barracks

(a) Establishments for detachments must be found ordinarily from the authorized establishments of the unit, proportionate to the strength detached. The extra establishments admissible under the heads of "details attached to corps" and "special services" should only be taken advantage of when absolutely necessary.  
 (b) Where local conditions render the authorized conservancy establishments inadvisable, the number of carts may be increased to such extent as may be required, but not exceeding one sweep for each battery of 2 A. battery of 200, two sweeps for each battery of 100, and three sweeps for each battery of 50. The number of carts may be increased to such extent as may be required, but not exceeding one sweep for each battery of 200, two sweeps for each battery of 100, and three sweeps for each battery of 50.  
 (c) Quartermasters' and conservancy establishments required for the Maidan Hall Depot, between the 15th April and 15th October annually, will be entertained on the "Company" scale, is less of the "Wing" scale.  
 (d) Quartermasters' and conservancy establishments shall be regulated by the actual daily strength of the depot.

SECTION  
ESTABLISH

Table 5.—Quartermasters' and conservancy establishments authorized

Item No.	FOLLOWERS, ETC.	CONSERVANCY ESTABLISHMENTS																																			
		QUARTERMASTERS' ESTABLISHMENTS, BOTH DIVISIONS. (g)								SECUNDERABAD.										BANGALORE.					BELLARY.					FORT ST. GEORGE.		ST. THOMAS' MOUNT.					
		Mid Qm R. A. Bde. of group W H A Bde. on field army establishment. Total defence establishment - Heavy and mountain 3 column in column 2 column 1 column quarters 1 Infantry. 5 Infantry. A. 																																			

NOTES—(a) Establishments at these stations are for joint use in barracks and hospitals.

(b) The cavalry regiment at Secunderabad has 14 sweepers only.

(c) Two additional bildars allowed for eight months annually.

(d) Where filth or cesspool carts are not used three sweepers and three receptacles are allowed in lieu.

(e) For not more than four months annually.

(f) Batteries of Royal Horse and Field Artillery at Secunderabad and Bangalore (stations with pipe water supply) are allowed 3 bhistas in lieu of pakhalis and bhistas.





for British troops serving in the Secunderabad and Burma Divs.

SECUNDERABAD DIVISION.

COLONY AND ESTABLISHMENTS, BURMA  
DIVISION.

[illegible]

(g) The following Quartermasters' establishment is allowed at Mchikila — Pakhalis 6, bhicties 8, sweepers 8. Mandalay :— Pakhalis

## SECTION I.

## ESTABLISHMENTS.

Table C.—Quartermasters', conserrancy and other establishments allowed for British troops serving in the 4th, 5th (excluding the Jhansi and Jubbulpore Bdes.), and 6th Divns., and Agra Brigade.

Item No.	General note applicable to units located at Ahmednagar (a), Ahmedabad, Indore, Kemptee, Lucknow, Marath, Mhow, Narmuch, Nasirabad and Poona.	In cantonments.										Marching.		
		Conserrancy.						Water.		Conserrancy.			Water.	
		Sweepers.	Toilets.	Buddies.	Mubblish carts.	Bulch carts (b).	Carts for removing sullage water from (a).	Palkhies.	Bhallas.	Coolies for pumps.	Buddies.	Buckets.	Palkhies.	Bhallas.
1	2	8	5	5	7	5	1	10	11	12	13	14	15	16
1	1st Qm. R. A. Bde. or group	1	1	1	1	1	1	1	1	1	1	1	1	1
2	Battery R. H. A. on field army establishment	1	1	1	1	1	1	1	1	1	1	1	1	1
3	Company R. H. A. on field army establishment	1	1	1	1	1	1	1	1	1	1	1	1	1
4	Company R. H. A. on field army establishment	1	1	1	1	1	1	1	1	1	1	1	1	1
5	Company R. H. A. on field army establishment	1	1	1	1	1	1	1	1	1	1	1	1	1
6	R. H. A. ammunition column (b)	1	1	1	1	1	1	1	1	1	1	1	1	1
7	R. H. A. ammunition column (b)	1	1	1	1	1	1	1	1	1	1	1	1	1
8	British cavalry regiment	25	1	1	1	1	1	1	1	1	1	1	1	1
9	British infantry battalion (a), (d), (f), (m), (p)	25	1	1	1	1	1	1	1	1	1	1	1	1
Special at other stations.														
9	1st Qm. R. O. A. group, 3 cos R. O. A.	19	1	1	1	1	1	1	1	1	1	1	1	1
10	Aden and coast defence barracks.	1	1	1	1	1	1	1	1	1	1	1	1	1
11	Each Company R. O.	20	1	1	1	1	1	1	1	1	1	1	1	1
12	British infantry battalion	22	1	1	1	1	1	1	1	1	1	1	1	1
13	1st Qm. R. O. A. group, 3 cos. R. O. A.	13	1	1	1	1	1	1	1	1	1	1	1	1
14	Colaba and coast defence barracks.	1	1	1	1	1	1	1	1	1	1	1	1	1
15	1st wing British infantry	3	1	1	1	1	1	1	1	1	1	1	1	1
16	Belgaum { British infantry battalion	10	1	1	1	1	1	1	1	1	1	1	1	1
17	Carlisle Guard, Belgaum	1	1	1	1	1	1	1	1	1	1	1	1	1
18	1st Qm. R. O. A. group	1	1	1	1	1	1	1	1	1	1	1	1	1
19	Quetta { British infantry battalion	1	1	1	1	1	1	1	1	1	1	1	1	1
20	R. O. A. group	1	1	1	1	1	1	1	1	1	1	1	1	1
21	R. O. A. group	1	1	1	1	1	1	1	1	1	1	1	1	1
22	R. O. A. group	1	1	1	1	1	1	1	1	1	1	1	1	1
23	Detachment B 1 at A. H. Co. (e) employed at Kohat Arsenal.	1	1	1	1	1	1	1	1	1	1	1	1	1
24	Buchers Island, Bombay	1	1	1	1	1	1	1	1	1	1	1	1	1

RE MARKS.

17

(a) When an infantry battalion has one more cos on detached duty, 2 sweepers, 1 fifth cart and 1 bullock extra are allowed for a battery in divided into wings, each wing is allowed one fifth, one rubbish cart and one cook-house cart. The 1st Comdr may sanction an additional fifth rubbish cart if found absolutely necessary. For detachments authorized if the detachment cannot be served by the cart of another unit. At Ahmedabad the British infantry detachment. All other establishments authorized by the detachments must be found from the unit to which they are attached.

(b) An extra fifth cart is authorized for the British infantry battalions at Kemptee and the detachment at Hyderabad.

(c) The following special scales of cook-house carts apply to British infantry units at the mentioned stations:—Ahmednagar 4, Mhow 2 and Poona 5, each battalion.

(d) The following sweepers and fifth and rubbish cart establishment is allowed for the British Infantry Regiments at Waverley and Ghorpuri (Poona):—

Sweepers. Fifth and rubbish carts.

Waverley .. 25  
Ghorpuri .. 29

One fifth cart for the attached section.  
One additional fifth is allowed for the attached section and married quarters of the British Infantry at Ghorpuri.







[illegible]

**General Instructions applicable to all Divisions and Brigades.**

- (c) Two hand tickets are allowed in lieu of ten of each 'yellow' if the latter class is not procurable.
- (d) number of tickets in a unit is not to be reduced below the field service scale. If a company is equipped with Government transport hand tickets it will replace pass-holds, but the total of tickets in a unit is not to be reduced below the field service scale.
- (e) Habbish, fifth and cook house will be supplied by the M. W. S. or F. W. D. Where a card is issued to the company, the card is to be used and sanctioned by the O. C. the company.
- (f) The establishment required for a rest or other temporary camp is to be decided and sanctioned by the O. C. the company.
- (g) Transport segment motor vehicles are allowed the *privileges of one khaki and one camel*. Motor gunners and yard servants the *privileges of one khaki and one camel*.
- (h) In estimating the total strength at all *Post-Office* 2 children should be reckoned as 1 adult. Quartermasters' and conveyance establishments shall be regulated by the actual daily strength at the *Post-Office*, except in cases where *field parties* are authorized.

Units to which the scales are applicable.

Detail.	1	2	3	4	5	6	7	8	9	10	11	12	Infantry.										Sappers and Miners (").										15	16	17	18	19	20	21	22	23	24	Signal Companies.		1st Corps		2nd Corps		3rd Corps.		25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100	101	102	103	104	105	106	107	108	109	110	111	112	113	114	115	116	117	118	119	120	121	122	123	124	125	126	127	128	129	130	131	132	133	134	135	136	137	138	139	140	141	142	143	144	145	146	147	148	149	150	151	152	153	154	155	156	157	158	159	160	161	162	163	164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	21
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## STABILISHERS

**Table 7.—Regimental and hospital followers for Indian troops.**

[illegible]









# SECTION I ESTABLISHMENTS.

Table 7.—Regimental and hospital followers for Indian troops—*contd.*

Detail.		Artillery.		Cavalry.										Infantry.										Sappers and Miners. <sup>(v)</sup>										Units to which the scales are applicable.																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																								
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	No 16 (Burma) Co.	Railway Company.	No 23 Fortress Co.	Other Service Companies.	Signal Company.	1st Corps.	2nd Corps.	3rd Corps.	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	13th	14th	15th	16th	17th	18th	19th	20th	21st	22nd	23rd	24th	25th	26th	27th	28th	29th	30th	31st	32nd	33rd	34th	35th	36th	37th	38th	39th	40th	41st	42nd	43rd	44th	45th	46th	47th	48th	49th	50th	51st	52nd	53rd	54th	55th	56th	57th	58th	59th	60th	61st	62nd	63rd	64th	65th	66th	67th	68th	69th	70th	71st	72nd	73rd	74th	75th	76th	77th	78th	79th	80th	81st	82nd	83rd	84th	85th	86th	87th	88th	89th	90th	91st	92nd	93rd	94th	95th	96th	97th	98th	99th	100th																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																														
1	2	3	4	5	6	7	7A	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																						
21	Ward servants.	..	..	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

(i) One sweeper in addition to Corps e 1000 is allowed for the section of the company of Sappers and Miners detached for duty at Chabul. (v) Establishments for Artillery hospitals are provided as follows: 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Divisions. Detachments of not less than a half squadron or company but less than a wing are allowed one bhali and one sweeper. 4th, 5th and 6th Divisions and 7th Division—Establishments must be found from those of the unit. (ii) Bhatis are supplied from station quarters. (iii) The Indian infantry detachment at Fort is allowed a 20 bhali sweeper. A sweeper is allowed for Indian troops' hospital at Suamir Pota, Agra. (iv) One bhali only in hospital of 43rd regiment. (v) 1 bhali bhali.





**SECTION I.**  
**ESTABLISHMENTS.**

**Table 8.—Conservancy establishments authorized for Indian troops and followers at stations in the Secunderabad Division, in which cantonment funds do not exist.**

Item No.	Station and unit.		Totics.			Sweepers.	Peotahmen.	Coolies.	Cart drivers.	Carts.				Remarks.
			Male.	Female.	Gul.					Fulth.	Urns.	Rubbish.	Hand.	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	Madras	Governor's Body-guard.	1	2	1	1	..	..	..	1	..	..	..	Hired cart Rs. 5 and Rs 2-8-0 per mensem allowed for plant and disinfectants respectively. (a) 8 days per mensem
2		Indian infantry bat-talion.	11	..	..	9	3	..	3	2	..	..	..	
3		E and T. corps	2	..	..	..	..	2	..	1	..	..	1	
4		Ordnance Depart-ment.	..	..	..	..	..	..	..	..	..	..	2	
5	Perambore	Indian infantry det	2	..	..	2	2	..	..	1	..	1	..	
6	Ootacamund	Indian infantry det	..	..	..	2	(a)	..	..	..	..	2	1	
7	Cannanore	Indian infantry in garrison.	6	1	..	8	..	..	..	2	2	1	..	
8		Station hospital fol-lowers	1	..	..	..	..	..	..	..	..	..	..	
9	Trichinopoly.	E and T. followers	1	..	..	..	..	..	..	1	..	..	..	
10		Indian Infantry in garrison.	3	3	..	8	..	..	..	1	2	2	..	

**Table 9.—Quartermasters' establishments for the Indian military survey class at Moorkee.**

Item No.	Followers.	Scale.	Remarks.
1	2	3	4
1	Bhisti	1	
2	Sweepers	1	

**Table 10.—Conservancy establishments for personnel of Defence Light Sections.**

Item No.	Details.	Scale for					Remarks.
		Aden.	Colaba.	Calcutta.	Karachi.	Hangoon.	
1	2	3	4	5	6	7	8
1	Bhisti	..	1	3	3	3	Two trolley-men are allowed for Karachi Defence Light
2	Sweepers	1	3	3	3	6	

**SECTION I.**  
**ESTABLISHMENTS.**

**Table 11.—Quartermasters' establishment authorized for sanatoria, etc.**

Item No.	Establishment.	Scale for												Remarks.
		Darjeeling	Nain Tal	Landour.	Technurthi.	Standing Camp, Kailash.	Simla; Camp. Ranikhet.	Kasauli.	Mussoorie.	Dalhousie.	Wellington.	Poonamallee.	Khandala (a).	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	Chowdri . . .	1	..	1	1	..	..	..	..	..	1	..	..	(a) For 8 months only.
2	Weighman . . .	1	..	..	..	..	..	..	..	..	..	..	..	
3	Mutsuddy . . .	1	..	1	..	..	..	..	..	..	..	..	..	
4	Peon . . .	..	..	..	1	..	..	..	..	..	2	..	1	
5	Range Chowkidar . . .	..	1	2	1	1	2	1	..	..	..	..	..	
6	Shristadar . . .	..	..	..	..	..	..	..	..	..	..	..	1	
7	Lampighter . . .	..	..	..	..	..	..	..	..	..	1	1	..	
8	Tindal . . .	..	1	..	1	..	..	1	1	1	1	..	..	
9	Tent-lascars . . .	2	3	2	3	..	..	2	..	3	4	2	..	

**Table 12.—Menial servants, and conservancy establishments specially authorized for the 6th (Poona) Division.**

Item No.	Details.	Scale for					Remarks.
		BOMBAY.			(a) SATARA COMBINED SCHOOL OF MOSKERRY.		
		For preparing tea-rations in Bombay Docks.			For the period when classes are held.	During interval between the classes.	
		1 to 100.	101 to 300	301 to 500.			
1	2	3	4	5	6	7	8
1	Cooks . . . . No.	1	..	1	..	..	
2	Begarries . . . . "	1	..	3	..	..	
3	Sweepers . . . . "	..	..	..	8	4(b)	
4	Filth cart and driver . . "	..	..	..	1	1	
5	Rubbish cart and driver . . "	..	..	..	1	..	
6	Refuse cart and driver . . "	..	..	..	1	..	
7	Muccadam . . . . "	..	..	..	1	1	
8	Billars . . . . "	..	..	..	1	..	

(a) A latrine sweeper is authorised for the detachment of Indian Infantry at Satara.

(b) In addition 5 sweepers are authorized for 5 days before the commencement and for two days after the conclusion of this class.



10  
SECTION I.

ESTABLISHMENTS.

Table 11.—Quartermasters' establishment authorized for sanatoria, etc.

Item No.	Establishment.	Scale for											Remarks.	
		Darjeeling.	Naini Tal.	Landour.	Pachmarhi.	Standing Camp, Kailash.	Stanin; Camp, Rambhert.	Kasauli.	Murree.	Dalhousie.	Wellington.	Poonamallee.		Khandala (a).
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	Chowdri . . .	1	..	1	1	..	..	..	..	..	1	..	..	(a) For 8 months only.
2	Weighman . . .	1	..	2	..	..	..	..	..	..	..	..	..	
3	Mutsuddy . . .	1	..	1	..	..	..	..	..	..	..	..	..	
4	Peon . . .	..	..	..	1	..	..	..	..	..	2	..	1	
5	Range Chowkidar . . .	..	1	2	1	1	2	1	..	..	..	..	..	
6	Shristadar . . .	..	..	..	..	..	..	..	..	..	..	..	1	
7	Lampighter . . .	..	..	..	..	..	..	..	..	..	1	1	..	
8	Tindal . . .	..	1	..	1	..	..	1	1	1	1	..	..	
9	Tent liscars . . .	2	3	2	3	..	..	2	..	3	4	2	..	

Table 12.—Menial servants, and conservancy establishments specially authorized in the 6th (Poona) Division.

Item No.	Details.	Scale for					Remarks.
		BOMBAY.			(a) SATARA COMBINED SCHOOL OF MUSKETRY.		
		For preparing tea rations in Bombay Docks.			For the period when classes are held.	During interval between the classes.	
		1 to 100.	101 to 300	301 to 500.			
1	2	3	4	5	6	7	8
1	Cooks . . . . . No.	1	..	1	..	..	
2	Begarics . . . . . "	1	..	3	..	..	
3	Sweepers . . . . . "	..	..	..	8	4(b)	
4	Filth cart and driver . . .	..	..	..	1	1	
5	Rubbish cart and driver . .	..	..	..	1	..	
6	Refuse cart and driver . .	..	..	..	1	..	
7	Muccodam . . . . . "	..	..	..	1	1	
8	Biddars . . . . . "	..	..	..	1	..	

(a) A latrine sweeper is authorised for the detachment of Indian Infantry at Satara.

(b) In addition 5 sweepers are authorised for 5 days before the commencement and for two days after the conclusion of this class.







**SECTION I.**  
**ESTABLISHMENT.**

**Table 13.—Mental Establishment, Military Prisons and Detention Barracks.**

Item No.	Details	SCALE FOR										REMARKS.
		Poona	Tirunelcherry	Daghal	Lucknow.	Sikot.	Thayetmyo.	Pohawar.	Quetta.	Aden.	Hydrabad (Sind).	
1	Cooks (a) . . . . .	1	1	1	1	1	(b) 1	1	1	1	1	
2	Bhistas (a) . . . . .	1	1	1	1	1	1	1	..	..	1	
3	Sweepers (c)						..	..	..	..	..	

(a) This establishment will be entertained only where arrangements cannot be made for the work to be carried out by men under sentences

(b) A soldier cook is allowed in place of a native cook

(c) Sweepers are allowed on the following scale —

for 20 men and under . . . . . 1.

for 21 to 40 men . . . . . 2.

for 41 men and over . . . . . 3.

When two or more sweepers are not ordinarily entertained the Brigade Commander may, if found absolutely necessary, sanction the employment of an additional sweeper at Military Prisons and Detention Barracks where incarceration is carried out.

### SECTION III.

SUPPLIES INC. AND T. CORP.

Article 14.—Daily scale of rations (other than those for sea voyages) for British troops.

[illegible][illegible]

Scale of equivalence

- (1) Zingere's ration = half the ordinary complementation ration of meat and the full rations of tea and sugar.
  - (2) "Zingere's ration" = 1 lb. potatoes
  - (3) "Zingere's ration" = 1 oz. tea.
  - (4) "Zingere's ration" = 1 lb. fresh milk.
  - (5) "Zingere's ration" = 1 lb. potatoes.
  - (6) "Zingere's ration" = 1 lb. potatoes.
  - (7) Milk condensed, unseasoned by Tervase Alpe Milk Company—1 part milk plus 2 parts water equals pure cow's milk.
  - (8) Milk sterilized by The Sealab and the Anglo Swiss Milk Company—1 part milk equals 1 part pure cow's milk.
- Xorg.—Potatoes and potato meal will usually be issued in the proportion of 1 ox pickles to 1 ox potato meal.**

**NOTE**—Pickles and potato meal will usually be issued in the proportion of 1 ox. pickle to 3 of potato meal.





**SECTION III.**  
**SUPPLIES BY S. AND T. CORPS.**

**Table 13.—Daily scale of rations (other than those for sea voyages) for Indian troops.**

Item No.	Articles	Daily scale per man.						REMARKS
		On ordinary duty at stations beyond sea. (b)	Aden and outposts. (c)	Persian Gulf	Baluchistan (c)	Fort Blair and Hill stations in Upper Burma.	Tindals and Isacur, coast defences at Cross Island, Middle Ground, and Oyster Rock Batteries in Bombay Harbour	
1	2	3	4	5	6	7	8	9
1	Atta or rice (a)	1 lb.	1 lb.	1 lb.	1 lb.	1 lb.	1 lb.	(a) Indian recruit boys at Aden draw ½ rations on the scale shown in this table (b)
2	Chillies	one	one	one	one	one	one	Indian soldiers joining the reserve and sowars and privates of all branches of the Indian Army (including the Aden Troop) when discharged at a station beyond sea with or without pension are entitled to free rations on the scale in this table while awaiting a passage back to their command. (c) Leave, or compensation in lieu thereof, admissible from date of arrival at Sibi. (d) one or issued as a prophylactic with ½ oz sugar (or in lieu of ½ oz amchur) on recommendation of A. D. M. S. (e) The supply of table rice to Indian troops is prohibited
3	Curry stuff and Lokum	one	one	one	one	one	one	
4	Dhal	one	one	one	one	one	one	
5	Fish, salt	one	one	one	one	one	one	
6	Ghee	one	one	one	one	one	one	
7	Limejuice	one	one	one	one	one	one	
8	Meat, fresh	one	one	one	one	one	one	
9	Salt	one	one	one	one	one	one	
10	Sugar	one	one	one	one	one	one	
11	Tamarind	one	one	one	one	one	one	
12	Turmeric	one	one	one	one	one	one	
13	Vegetables	one	one	one	one	one	one	

# SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 16.—Daily scale of rations (other than those for sea voyages) for public followers.

Item No.	Articles.	Daily scale per follower.					REMARKS.
		On ordinary duty at stations beyond sea.	Aden and outposts. (b)	Persian Gulf.	Port Blair and hill stations in Upper Burma.	Baluchistan. (c)	
1	Atta, or rice (a)	1½ lbs.	1½	1½	1½	1½	(a) At Perim only.
2	Chillies	2 ozs.	..	..	1	..	(b) At Aden followers whose pay exceeds Rs. 15 per month do not receive free rations.
3	Curry stuff and kokum	..	1	..	..	..	
4	Dhal	3	3	3	3	3	
5	Firewood	1 bu.	(a)	3	..	..	
6	Ghee	1 oz.	1	1	1	1	
7	Limejuice	..	(d)	..	..	..	
8	Salt	1	1	1	1	1	
9	Sugar	..	(d)	..	..	..	
10	Tamarind	..	..	..	1	..	
11	Vegetables	..	7	..	..	..	

- NOTES.—1. Men specially entertained for service in Burma on special rates of pay do not receive free rations.  
2. When a free issue is unauthorised, and rations have to be issued on payment, 1½ lbs. atta or rice, 4 ozs dhal, 1 oz ghee, and ½ oz. salt will be issued daily at the rate of Rs. 2-8-0 per man per month or Re. 0-1-3½ per day.  
These issues may be made on the authority of the G. O. C. Division or Independent Brigade.  
3. Public followers serving in Assam (excepting Dacca) are supplied with rations on payment of Rs. 2-8-0 per mensem per ration. The families of S. and T. followers serving at Aden may also draw rations on payment at this rate.  
4. Pension boys and bellowsboys, also recruit boys other than those serving at Aden, if under 18 years of age, receive half rations only.  
5. When local supplies are unobtainable and the ration consequently issued is incomplete, no money compensation is paid but compensation in lieu of rations is admissible to followers serving at stations in the Persian Gulf at rates fixed annually; also at contract or price current rates to those serving in Burma, when rations cannot be issued in kind. S. and T. followers marching with troops in Burma are allowed to purchase rations from contractors at canteenment rates and in addition are allowed marching batta.  
6. The following classes of Indian followers are entitled to free rations in Burma and the Andamans unless in receipt of special rates of pay for service in those localities which specifically debar them from receiving free rations:—

Branch of Service or Department	As Indian troops Table 15, A. T. M. S.	As followers. Table 16, A. T. M. S.
British Infantry	..	Bhistas and sweepers of quartermasters'
Artillery	Lascars, store-men and tindals	..
Indian Infantry	..	..
Ordnance Department	..	..
Supply and Transport Corps	Quarter-master dafadars, kot-dafadars, malkis of mule and bullock transport and veterinary assistants in Upper Burma and the Shan States	..
Army Hospital Corps hospitals of Indian infantry regiments and station hospitals.	..	..
Army Bearer Corps	All men.	Bhistas, cooks, dholies of the A. H. Corps, sweepers ward servants and totis.
All branches of the service and departments	..	All followers serving in Upper Burma and in the Shan States and not otherwise entitled to rations.

7. The sale of any portion of the ration issued by the State is strictly prohibited.

8. Whenever rations are issued by the S. and T. Corps free or on payment, a monthly ration certificate on (T. A. T. S. 1523) will be furnished to the S. and T. Officer in the Corps or department concerned. A week or a month's supply of rations may be drawn at one time if preferred.







# SECTION III

## SUPPLIES BY S. AND T. CORPS.

Table 17.—Scales of Rations and Water.—European troops, their families, seamen and other third class passengers conveyed in Indian Marine Troop ships, hired transport and freight ships.

### SCALES OF RATIONS FOR MEN, WOMEN AND CHILDREN

Days per week to be issued	ARTICLE.		Men	Women	Over 5 and under 10	CHILDREN		NOTES
						One and under 11 years of age *		
5	Meat, fresh	lb	12	8	4	Daily scale †		The scale is to be strictly adhered to whenever practicable, but to meet cases in which fresh provisions may not be procurable, or it may be necessary to vary the tea ration, the following list of equivalents is appended — Meat, fresh = equal weight compressed corned meat Bread fresh = equal weight biscuit, rice flour 1 lb fresh vegetables or potatoes = 2 oz.
1	" " for soup	"			4			
Daily	Compressed corned beef	"	12	8	6	Milk, fresh	2 pts	
	" and mutton	"	16	12	8	Bread	4 oz	
"	Bread, fresh	"	2	2	1			
"	Vegetables, fresh	"	10	10	6	Rusky or tinned farinaceous food	1 1/2 oz.	
"	Potatoes	"	14	14	8			
"	Butter	"	1	1	1	Sugar	2 "	
"	Rice	"	1	1	1			
"	Oatmeal	"	4	4	3			
"	Flour	"	4	4	3			
"	Salt	"	1	1	1			
"	Raisins	"	1	1	1			
Daily	Tea	"	1	1	1			
"	Sugar	"	1	1	1			
"	" (extra for puddings)	"	1	1	1			
"	" (extra for rice)	"	1	1	1			
Weekly	Farm	"	1	1	1			
"	Salt	"	1	1	1			
"	Pepper	"	1	1	1			
"	Mustard	"	1	1	1			
"	Vinegar	pt	1	1	1			
"	Pickles	oz	1	1	1			
"	Milk, condensed, unsweetened	1 lb	1	1	1			
Daily	Milk, fresh	pt	1	1	1			

Boys of 10 and under 14 and girls of 10 and upwards are to receive a woman's ration.

Boys of 14 and upwards are to receive a man's ration.

† Fresh milk will be issued when procurable and the price is not prohibitive; Only full cream unsweetened condensed milk in the smallest sized tins will be issued in lieu of fresh milk.

**SECTION III.**  
**SUPPLIES BY S. AND T. CORPS.**

Table 18.—Sea Ration Scales.—Indian troops and followers.

Item No.	Articles.	Long voyages (over 10 days).		Short voyages (under 10 days).		REMARKS.
		Indian troops and followers of all castes, daily.				
		Cooking.	Non- Cooking.	Cooking.	Non- Cooking.	
1	2	3	4	5	6	7
		lb oz	lb oz.	lb oz.	lb. oz	
1	Atta or rice . . . . .	1 8	..	1 8	..	
2	Chillies . . . . .	0 ½	..	0 ½	..	
3	Dhal . . . . .	0 4	..	0 4	..	
4	Garlic . . . . .	0 ½	0 ½	0 ½	0 2 ½	
5	Ghee . . . . .	0 2	0 3	0 2	0 2 ½	
6	Ginger . . . . .	0 4	..	0 4	..	
7	Gur . . . . .	0 2	..	0 2	..	
8	Onions or other vegetables . . . . .	0 4	0 2	0 4	0 2	Half this scale if potatoes, kobanis or other dried fruits, are issued in lieu.
9	Parched gram . . . . .	..	0 12	..	0 10	
10	Potatoes . . . . .	0 6	..	0 6	..	
11	Pova (Chooria) or avel . . . . .	..	1 0	..	1 0	
12	Salt . . . . .	0 1	0 ½	0 1	0 4	
13	Sugar . . . . .	0 1	0 6	0 1	0 6	
14	Tamarind . . . . .	..	0 2	..	0 2	Kokum may be issued in lieu
15	Tea . . . . .	0 ½	..	0 ½	..	
16	Turmeric . . . . .	0 ½	..	0 ½	..	
17	Firewood . . . . .	1 8	..	1 8	..	Or ½ lb. coal.
18	Water, imperial gallons . . . . .	1 0	1 0	1 0	1 0	

## GENERAL REMARKS

1 All Indian ranks and recognised public followers are entitled to sea rations when provided with entitled passage, or when doing duty on boardship (except men of localized units at Aden proceeding on furlough or leave) Their families may draw rations on payment when provided with entitled passage.

2 The families of East Indian trumpeters, drummers, bagpipers, fiddlers and private musicians of late Madras corps, and of Europeans and East Indians serving in late Bombay corps, enrolled before 25th September 1902, will, when allowed to accompany their husbands on foreign or other service, continue to draw free rations under the regulations then in force.

3 In addition to the ordinary rations shipped for cooking men, rations on the non-cooking scale for one-fourth the voyage should also be put on board for them, as in cases of sickness or bad weather non-cooking rations may be necessary for all.

4 When pova is not procurable, 4 ozs raw gram and 12 ozs dry fruit (dates, raisins, etc) may be substituted.

5 The following articles will be shipped by the S. and T. Corps for issue on payment to Indian troops and followers on "long voyages," but on "short voyages" opium for Sikhs and Punjabis and rum for Gurkhas and others entitled thereto need only be shipped:—

Item No.	Articles.	Scale to be shipped by S. and T. Corps.	REMARKS
1	Sugar . . . . .	2 ozs. per diem for cooking men. 3 ½ ozs per diem for non-cooking men	To be issued as required, not exceeding scale.
2	Rum, 25° U. P. . . . .	1 dram per diem for half the number of men embarked.	
3	Tobacco { smoking . . . . . { eating . . . . .	1 oz. per man per diem	
4	Opium (of good Government quality) for Sikhs and Punjabis only.	20 grains per man per diem	to registered consumers in such quantities as may be required. The O. C. must give the S. and T. Corps timely notice of the number of men for whom opium is required.

6. Rum will be issued at the rate of one anna per dram, exclusive of excise duty; all other articles at cost price, and the shipping charges. S. and T. officer will determine the price of all payment issues.





### SECTION III.

#### SUPPLIES BY S. AND T. CORPS.

Table 19.—Daily standard rations for Government animals

Table 19.—Daily standard

Item No.	Detail of rations.	Horses and mules (g) camels (p)				Mounted infantry	Fishes.										Males.											
		Secunderabad Division and Belgaum.		Other Divisions			Riding and draught	PACK.										Ordnance mules	Sapper equipment mules.	PIONEER EQUIPMENT MAXIMUM GUN AND PACK TRANSPORT								
		Country breeds of British corps and all colonial camels.	Other horses and mules and camels.	Country breeds of British corps and all colonial camels.	Other horses and mules and camels.			1st class 13 2 and over.	2nd class under 13 2	1st class 13 2 and over.	2nd class under 13 2																	
1	2	3	4	5	6	7	Burma Division	Burma Division	Secunderabad Division and Belgaum	Other Divisions	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions	Burma Division	Secunderabad Division and Belgaum.	Other Divisions	Burma Division	Secunderabad Division and Belgaum	Other Divisions.	Burma Division	Secunderabad Division and Belgaum	Other Divisions.	Burma Division	Secunderabad Division and Belgaum	Other Divisions.	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions.
1	GRAIN—																											
1	Bran . lbs	2	1 1/2	2 1/2	2	..																						
2	Barley . "	..	..	5	4	..			5			5		5		5		3		5			5			5	5	
3	Dhan . "	..	..			6	6		6		5		..	..	3		6		6		6		5		..	..	..	
4	Gram . "	4	3 1/2	2 1/2	2	..			5			5		5		5		3		5			5			5	5	
5	Kulthi (a) (s) ..	4	3 1/2	..	..	..		6		6		..	5		..	6		6		(a) 6		(a) 6		..	5		..	
6	FODDER—																											
	Green (a) . lbs.	30 (g)				30	30			30		..			30		30		30		30			25				
	or																											
7	Dry . . "	20				20	20			18		13			20 (r)		20		15		18			18				
	or																											
8	Bhusa . "	{ .. .. }				20	20			15		13			20 (r)		{ .. .. }		18		18			18				
9	SALT . . ozs.	1				1	1			1		1			1		1		1 (g)		1 (g)			1 (g)				

GENERAL  
 O ■ units are at liberty to feed their animals on any recognized description of forage, and to fix the actual scale of issue but are given when the animals are in hard work. The account must be kept by the unit, and any debit balance being referred for the sanction of the exceptional hard work connected with manoeuvres, the debit balance is financial authority after careful investigation of the circumstances and on will also take over their forage account, but no unit will be required







\* aggregate value of the standard ration during the financial year is not excessive, except in unavoidable circumstances when the animals are in light work, which will admit of a more liberal and varied ration being supplied during the month, the account being finally closed on the 31st March, any credit balance on that date the debit balance of a corps be attributable to the ration scale being necessarily increased to meet extra in question. Debit balances due to other causes may only be written off by the competent authority and do not accompany a unit on its transfer to another station, the unit which takes over the animals being responsible for the same and must before leaving the station apply for its credit.

**SUPPLIES BY S.**

Table 19.—Daily standard

[illegible]





## III.

## AND T. CORPS.

rations for Government animals—concd.

Draught.			Elephants. (a),(b),(c)			Bullocks.						Donkeys.						REMARKS				
						S T or Artillery.		A T. draught		A T pack		1st class		2nd class.								
Burma Division.	Secunderabad Division and Belgaum	Other Divisions.	Large over 8' 6".	Medium.	Small under 7' 6".	Camels (d) (e).	Burma Division	Secunderabad Division and Belgaum.	Other Divisions	Burma Division.	Secunderabad Division and Belgaum	Other Divisions	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions	Burma Division.	Secunderabad Division and Belgaum.		Other Divisions.	Burma Division.	Secunderabad Division and Belgaum.	Other Divisions.
29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	
..	..	..	1			..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	(f) Barley or gram, whichever is cheaper For camels ground barley or gram if barley is n- obtainable, but departmental camels in Aden Bd receive a 2 lbs. extra allowance.
10						10																(g) Hay or chana whichever is cheaper.

## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 20.—Ration scales for animals on sea voyages.

Item No.	Animals.	Grain.	Bran.	Lusseed crushed or luseed cake.	Hay or dry fodder.	Moose.	Salt	Atta or rice.	Water.	Only to be issued if neces- sary. (a)		Description of grain to be issued.
										Vinegar.	Nitre.	
1	2	3	4	5	6	7	8	9	10	11	12	13
		lb.	lb.	lb.	lb.	lb.	oz.	lb.	gals.	gill.	oz.	
1	Horses	Oats or barley 3 or Gram . . . 2	5	Nil.	III	..	1	..	12	1	1	Oats should always be issued if possible and crushed in the crushers on board. Gram should not be issued if it can be avoided. Carrots, when available, should be placed on board and issued in the proportion and in lieu of 1 lb. bran, for sick or delicate feeders.
2	Mules and ponies.	Oats or barley 2 or Gram . . . 1	5	1		..	1	..	10	1	1	
			4	1	8	..	1	..				
3	Camels	.. 3	..	..	20	..	1	..	15	..	1	Gram. oats, barley or jowari.
4	Draught and siege train bullocks.	.. 2	1	1	..	15(b)	1	..	10	..	1	Gram. Rock salt 1 lb monthly in addition
5	Pack bullocks	.. 1 1/2	1 1/2	1 1/2	..	12(b)	1 1/2	..	10	..	1 1/2	
6	Donkeys	.. 1	1	..	10	..	2 1/2	..	5	..	1 1/2	Gram, oats or barley. Atta (coarse wheat flour) made into chapatis and baked. Rice 3rd quality Dhan (unhusked rice) double quantity.
7	Elephants { large med. small	..	..	..	170(c)	..	2 1/2	20(d)	50	..	1 1/2	
8		..	..	..	160(c)	..	2	18(d)	40	..	1	
9		..	..	..	130(c)	..	2	16(d)	30	..	1	
10	Slaughter cattle	.. 1	1	..	..	12(b)	1	..	10	..	1	Gram
11	Slaughter sheep and goats.	.. 1	..	..	2	..	1 1/2	..	1	..	..	Gram, jowari or linseed (crushed).

be given







## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water.

Item No.	Details.	Scale per diem each.
At Hill Sanitaria. (a)		
1st, 2nd, 3rd, 7th and 8th Divisions, Kohat and Bannu Brigades—		
1	British Soldiers . . . . .	7
2	Wives and adult members of soldiers' families . . . . .	7
3	Children ditto ditto . . . . .	3½
4	Lady nurses attached to military hospitals . . . . .	7
5	Two sepoy orderlies at central signalling school, Kassul (d) . . . . .	3½
6	Hospital servants (excluding store-keepers and conservancy establishments)	1
Special for Indian troops serving at Cherat—		
7	Indian soldiers . . . . .	3½
8	Followers . . . . .	1
Special for Indian troops serving at Fort Thal—(e)		
9	British officers . . . . .	10
10	Indian soldiers . . . . .	4
11	Followers . . . . .	3
12	For establs. at Forts Fulta and Chingri Khal—	(b)
For Forts at Cross Island, Middle Ground and Oyster Rock, Bombay harbour—		
13	Europeans . . . . .	} 0 (c)
14	Indians . . . . .	
For Defence Light Section Establs. at Manora—		
British—		
15	Commissioned officers . . . . .	50
16	Wives of ditto . . . . .	30
17	Children of ditto . . . . .	15
18	Warrant and N. C. Oa. and men . . . . .	20
19	Wives of ditto . . . . .	10
20	Children of ditto . . . . .	5
Indian—		
21	Rank and file . . . . .	8
22	Wives of ditto . . . . .	3
23	Children of ditto . . . . .	1½
24	Public and private followers . . . . .	5
25	Hospital Assistant . . . . .	5
26	Wife of ditto . . . . .	3
Harbour Defence Establishments at Manora—		
British—		
27	Warrant officers (master gunner and civilian mechanic) . . . . .	15
28	Wives of ditto ditto ditto . . . . .	10
29	Children of ditto ditto ditto . . . . .	5
Indian—		
30	Gunners and boatmen . . . . .	5
31	Wives of ditto . . . . .	3
32	Children of ditto . . . . .	1½
33	Public followers . . . . .	5
34	Wives of ditto . . . . .	3
35	Children of ditto . . . . .	1½
Harbour Defence Establishments at Manora—		
36	Cookes for moving stores . . . . .	1

(a) Supply should be calculated on the total number of persons (British troops and their families) at a station and is sufficient for

## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water—*contd.*

Item No.	Details.	Scale per diem each.
<b>At Hill Sanitaris—<i>continued.</i></b>		
		Gala.
	<b>Military Works Services at Manora—</b>	
37	Sub-Divisional Officer . . . . .	15
38	Wife of ditto . . . . .	10
39	Children of ditto . . . . .	5
40	Servants of ditto (up to a maximum of 3) . . . . .	5
	<b>Troops and followers at Kings Bank, Choki Point and Syriam—</b>	
41	British troops . . . . .	7
42	Indian ditto . . . . .	5
43	Followers . . . . .	5
	<b>Military, Marine and Military Works Service personnel (including public and private followers) at Monkey Point—</b>	
44	British officers . . . . .	40
45	European and Eurasian adults . . . . .	20
46	European and Eurasian Children . . . . .	12
47	Indian adults . . . . .	12
48	Indian children . . . . .	8
49	Workshops and launch boilers . . . . .	100 daily.
50	For washing barracks . . . . .	300 weekly
51	For filling cable and fire tanks . . . . .	1,000 "
52	For fire engine practice . . . . .	1,000 "





## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water—continued.

Item No.	Details.	Daily scale of water.							REMARKS.
		Steamer point.		Crater.		Perim.	Aden Troop, Khormaksar.		
		Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Condensed galls	Aqueduct, galls	
	At Aden—condensed water. (a)								
53	Officers not attached to messes . .	15	..	10	5	15	15	..	Officers when at Shakh Othman are allowed 15 gallons of condensed water each per diem.
54	Executive and Assistant Engineers	15	..	10	5	15	15	..	To pay cost of delivery at quarters.
55	Superior Mechanics . . . .	15	..	10	5	15	15	..	(See item 52.)
56	Horses of Aden Troop . . .	..	..	..	..	..	..	14	Ditto.
57	Wives and adult members of families of officers, Executive and Assistant Engineers and superior Mechanics.	10	..	5	5	10	10	..	Ditto.
58	Officer Commanding at Perim and adult members of his family.	..	..	..	..	..	..	..	Reduced to 12 gallons from October to April.
59	Post Master, Aden . . . .	..	..	..	..	..	..	..	Officers and other officials concerned to pay cost of delivery at quarters.
60	Married Clerks in Military and Postal offices, Supply and Transport Corps Agents and Hospital Store keepers (husband and wife)	4	6	4	6	10	..	..	Same as items 53 for Officer Commanding and 49 for family.
61	Horses of mounted officers (or motor cars or motor cycles maintained in lieu of horses) and of subordinates of the Military Works Services Restricted to the number of horses for which horse allowance is admissible and included in pay or drawn as a separate item.	10	..	..	10	10	..	..	Ditto.
62	Officers attached to messes . .	10	..	5	5	..	..	..	Dairy clerk comes under this item.
	Officers' mess per head . . .	5	..	5	..	..	..	..	
63	Children of officers, Executive and Assistant Engineers and superior Mechanics.	5	..	3	2	5	5	..	Officers and other officials concerned to pay cost of delivery at quarters.
64	British Warrant Officers and Non-Commissioned Officers and privates.	3	2	3	2	5	..	..	To pay cost of delivery at mess.
65	Unmarried school mistresses and wives of British Warrant Officers and Non-Commissioned Officers and privates.	3	2	3	2	5	..	..	Officers and other officials concerned to pay cost of delivery at quarters.
									Dairy Sergeants, etc., come under this item.
									Wives of Dairy Sergeants, etc.

(a) The regimental establishment of the detachment at Isthmus consumes 16,000 galls. monthly for its own use; all above these quantity is not delivered free by the S. and T. Corps.  
 Horses—Indian troops and followers, also any Sub-Assistant Surgeons, when on duty at Shakh Othman, are allowed one gal of condensed water per man per diem, women and children accompanying the detachment also receive one gallon each daily.



## SECTION III.

## SUPPLIES BY R. AND T. CORPS.

Table 21.—Daily scale of rations, water—continued.

Item No.	Details.	Daily scale of water.							REMARKS.
		Steamer Point.		Crater.		Perim.	Aden Troop, Khormakhar.		
		Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Condensed, galls.	Aqueduct, galls.	
88	At Aden—continued. Office of A. H. M. F., Aden Brigade	2	..	..	..	..	..	..	For drinking purposes and making ink
89	Office of Brigade Staff, Aden Brigade.	5	..	..	..	..	..	..	For drinking purposes and making ink.
90	Station Supply Office, Aden Brigade.	12	..	..	..	..	..	..	Ditto ditto.
91	Establishments of the Aden and Aden Camp Post Offices during office hours.	15	..	10	..	..	..	..	Cost of delivery borne by the Postal Department.
92	Station Supply Depot	..	..	8	..	..	..	..	For warrant officer and 4 non-commissioned officers.
93	For washing mail vans	..	3	..	3	..	..	..	Cost of delivery borne by the Postal Department.
94	For browning arms	..	..	..	..	..	..	..	As sanctioned by Brigade Commander
95	Cleaning rifles	15	..	15	..	..	..	..	Per Infantry Regiment per diem during annual course of musketry.
96	Cleaning and washing buckets, casks and other vessels for the storage of drinking water of Aden garrison.	500 gallons condensed water weekly.							200 gallons of condensed water are allowed quarterly for washing tanks at Perim. Monthly; used exclusively for sweet water carts and tanks
97	For washing carts and tanks	..	..	..	..	65†	..	..	† For cleaning water barrels.
98	For cleaning water carts and tanks at Steamer Point and Crater.	3,000 gallons condensed water monthly.							
99	For washing bedding of British troops.	..	..	..	..	..	..	..	90 gallons condensed per 100 sets
100	For cleaning out quarters occupied by men of Army Bearer Corps.	..	..	..	..	..	..	..	100 gallons, aqueduct, monthly.
	Station Hospital at Steamer point*	50	100	..	..	..	..	..	From 15th April to 15th October.
101									* The Matron of the Station Family Hospital, Aden (if not the wife of a soldier), is allowed 3 gallons condensed and 11 gallons aqueduct water daily for herself and for each of her children.
	Ditto ditto ditto	40	60	..	..	..	..	..	From 16th October to 14th April
102	Section Hospital, Crater	..	..	20	60	..	..	..	From 15th April to 15th October.



## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 21.—Daily scale of rations, water—continued.

Item No.	Details.	Daily scale of water.							REMARKS.
		Steamer Point		Crater.		Perim	Aden Troop, Khormaksar.		
		Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Aqueduct, galls.	Condensed, galls.	Condensed, galls.	Aqueduct, galls.	
102A	At Aden—continued. Section Hospital, Crater . . .	..	..	20	30	..	..	..	From 18th October to 14th April. Per 100 pieces of clothing to be washed.
103	Station Hospital, Steamer Point, and Section Hospital, Crater.	60	..	60	..	..	..	..	
104	Soldiers and Sailors' Institute . .	30	..	10	10	..	..	..	
105	For tanks connected with defence works	..	..	..	..	..	..	..	As required.
106	For tanks connected with defence works	..	..	..	..	..	..	..	
107	For drinking purposes during hot season	200	..	..	..	..	..	..	100 gallons condensed when required Per month.
108	For recharging the 6" and 10" H. P. cylinders for working guns.	..	..	..	..	..	..	..	
109	Officer Commanding R. A. for cleaning guns of defences at Steamer Point, Ras Morbat and Ras Tarshyne	484	..	..	..	..	..	..	Condensed water as required.
110	Royal Indian Marine vessels H. M. water boat "Sakka" and H. M. steam launch "Despatch."	..	..	..	..	..	..	..	
111	Light House at Perim	..	..	..	..	20	..	..	Monthly.
112	Signalling guns, Light House at Perim.	..	..	..	..	..	..	..	Ditto.
113	Position finding station at Amen-khel for use of specialists.	40	..	..	..	..	..	..	Ditto.
114	Ordnance Department for general purposes	..	..	93	186	..	..	..	Ditto.
115	Ordnance Department for the preservation of the telegraphic wire.	..	..	60	..	..	..	..	Ditto
116	Families of all attested followers (except those of Aden Troop)— Women . . . . . Children . . . . .	2 1	1 1	..	..	..	..	..	Water is issued on payment as required to the Harbour Police.
117	Families of the Aden Troop— Women . . . . . Children . . . . .	.. ..	.. ..	..	..	..	1 1	1 1	
118	4 European constables each . .	10	..	..	..	..	..	..	
119	3 Havildars each . . . . .	2	..	..	..	..	..	..	
120	4 Naicks each . . . . .	1 1/2	..	..	..	..	..	..	
121	46 Constables each . . . . .	1 1/2	..	..	..	..	..	..	
122	2 Police stations each . . . . .	7	..	..	..	..	..	..	
123	Aden Municipality . . . . . each	..	..	..	..	..	..	..	
124	Jail and Civil Hospital . . . .	..	..	..	..	..	..	..	
125	The Royal Navy . . . . .	..	..	..	..	..	..	..	
126	Fishermen and Petty Traders at Perim.	..	..	..	..	..	..	..	
127	For cleaning butter and milk pots, etc.	3	..	2	..	..	..	..	Daily.
128	For washing floor of issue room .	..	5	..	..	..	..	..	Every Saturday [cost being debited to Dairy accounts].



## SECTION III.

## SUPPLIES BY THE S. AND T. CORPS.

Table 22.—Scale of bedding (other than the personal bedding of the British soldier for which see A. R. I., Vol. II).

Item No.	Detail.	Mattress case. (a) (b) (c).	Pillow case. (a) (b) (c).	Leather straps with buckles. (a) (b).	Coltr. (b) (c).	Straw. (c).	Blankets.	REMARKS.
		No.	No.	No.	lbs.	lbs.	No.	
1	In main guard rooms for officers on guard or with men and women in barracks, military pupils, and military prisons	2	2	1	..	..	..	} Per cot in use.
2	For British soldiers temporarily employed in Government Military Farms.	2	2	..	..	..	..	
3	To N. C. Os and men on the U. L. together with their wives, who are living in Government quarters and are entitled to barrack furniture	2	2	..	..	..	..	
4	To the children of the N. C. Os. and men mentioned at items 1, 2 and 3 (see Table 43, item 7)	1	1	..	..	..	..	
5	To British Infantry, Fort St George (d)	70	70	70	1,505	..	..	
6	For rest barracks and camps	2	2	2	..	..	..	Per officer and man (e)
7	For stuffing, per set of one mattress and pillow case in use, first issue	..	..	..	21½	..	..	19½ lbs. per mattress and 2 lbs. per pillow case.
8	To replace loss in re-teasing per set of one mattress and pillow case in use	..	..	..	1	..	..	Quarterly (f)
9	For British troops— For tents on line of march when marching	..	..	..	..	{ 0 3	..	Per man or woman. (g) Per child not in arms. (h) } per diem.
10	For tents when encamped in cantonments, and for tents in rest camps, when barrack furniture is not available	..	..	..	..	{ 0 3	..	Per man or woman. Per child not in arms. } (h)
11	When in camp for artillery practice, musketry instruction, etc., or sanitary reasons (other than epidemic outbreaks) and cots are not used	..	..	..	..	0	..	Per man (i)
12	In camps for cholera or other epidemic outbreak when cots or charpoys are not supplied	..	..	..	..	{ 0 3	..	Per man or woman Per child not in arms. } (i)
	For Indian troops and followers—							
13	On line of march when In damp and inclement weather when deemed absolutely necessary by Officer Commanding on the spot and on the recommendation of a medical officer, if present.	..	..	..	..	5	..	Per man per day (l).
14	In camps	..	..	..	..	5	..	Per man per week (k)
15	For use of men, whose regiments belong to outstations, confined in main guard, Fort William.	..	..	..	..	..	10	





## SECTION III.

## SUPPLIES BY THE S. AND T. CORPS.

Table 22.—Scale of bedding (other than the personal bedding of the British soldier for which see A. R. I., Vol. II).

Item No.	Detail	Mattress cases (a) (b) (i)	Pillow cases (a) (b) (i)	Leather straps with buckles (a) (b)	Cover. (b) (i)	Straw, (c).	Blankets.	REMARKS.
16	Drum, fife and bugler majors, drummers, fifers and buglers of European extraction serving in Indian regiments of the 1st, 2nd, 3rd, 7th and 8th Divisions and who were enrolled before the 15th September 1902	..	..	..	..	..	1	Annually.
17	Trumpet, drum, fife and bugler majors, fanner majors, trumpeters, drummers, fifers, buglers, fanners and veterinary pupils, whether of European or Indian extraction, serving with Indian corps of the old Madras Army, and who were enrolled before the 15th September 1902.	..	..	..	..	..	1	Biennially
18	Carnatic ordnance artificers	..	..	..	..	..	..	..
19	To replace loss in re-tensing per set of one mattress and pillow case in use in Hospitals of Indian troops.	..	..	..	1	..	..	Quarterly.

(a) Period of duration of issue. (b) Damaged and damaged and replaced and replaced in the case of units and not recovered on continental hills.

## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 23.—Scale of cooking utensils for British Troops.

Item No.	Articles	Per mess of eight men (a).	Per eighteen men in mess.	Per cook-house (b).	REMARKS
1	Bags, flannel, for coffee, to last six months.	1	..	..	(a) The number of messes is calculated on the strength of each squadron, battery, company, depot and sanitarium; bandmen, trumpeters and drummers of cavalry and infantry messing separately may also be calculated for separately; an additional set is allowed for each group of men in excess of an exact multiple of eight.
2	Baskets, ration . . . .	1 (c)	..	..	
3	Bowls, hand, gal iron, 9½" dia by 3½" deep, with short wooden handles	..	..	2	
4	Choppers, to last two years . . .	1 (g)	..	..	
5	Buckets, gal iron, 3 gns with lids	..	..	2	(b) These items are allowed for cook-houses fitted with ranges and also for cook-houses in which cooking is done by British soldier cooks; two sets are allowed when a cook-house is used for more than one squadron, battery, company or band.
6	Colanders, 14" diameter . . . .	..	..	1	
7	Bowls, pudding, mixing . . . .	..	..	2	
8	Dredgers, flour . . . . .	..	..	1	
9	Forks, flesh . . . . .	..	..	2	(c) Supplied on payment to regimental institutes and sergeants' messes.
10	Irons, grid—to last two years . .	1 (g)	..	..	(d) Not taken on the line of march but returned to the Supply and Transport Corps.
11	Kettles, camp, oval, with covers—to last two years.	1 (c)	..	..	
12	Kettles, tea, wrought-iron—to last five years.	1 (d)	..	..	(e) Cost debitable to fixed allotments of units having an allotment.
13	Knives, butcher's . . . . .	1 (g)	..	..	(f) For carriage of cooking utensils; 17 per British infantry battalion, 10 per British cavalry regiment, 4 per Royal Horse Artillery and Royal Field Artillery battery, 3 per British Mountain battery, 2 per Heavy Battery and Royal Field Artillery Ammunition Column and 1 per Royal Horse Artillery Ammunition Column.
14	Ladles—to last two years . . . .	1	..	..	
15	Machines, weighing (with oblong tin pan) with weights 14 lbs. to ½ oz	..	..	1	
16	Pins, rolling . . . . .	..	..	2	
17	Steel . . . . .	..	..	2	(g) Per 11 camp kettles.
18	Straainers, tea . . . . .	..	..	1	
19	Sullectahs (f) . . . . .	..	..	..	
20	Trays, iron . . . . .	..	1	..	







**SITTING IN S. AND T. CORN.**

Table 24.—Scale of lamps, lanterns (a), oil (b) and wick.

[illegible]

Item No.	Place or service.	Number and description of lamps.	Scale of oil.	Item No.	Place or service.	Number and description of lamps.	Scale of oil.
1	Dormitories and dining rooms occupied by single British rank and file. Rooms occupied by signallers in the Telegraph Department at stations not occupied by British troops (c) . . . .	(c)	A and B or C and D	13	Quarter and other regimental guards (except liquor bar quarters) and barrack detention rooms, British troops (d)	(c)	A and B.
2	Staircases . . . .	(c)		14	Station, Main and fort gate guards when mounted by Indian troops . . . each	1	A and B.
3	Passages . . . .	(c)		15	Quarter guards and places of arms detached from quarter guards of non-sallahar cavalry . . . .	1	A and B.
4	Latrines . . . .	(c)		16	Quarter guards of Indian Infantry regiments and detachments, and of corps and detached companies of sappers and miners . . . .	1	..
5	Urinals . . . .	(c)		17	Rear guards of Indian Infantry detachments at Jamrud, Shabkadar and Abazai . . . .	1	A and B.
6	Special washing compartment . . .	(c)	As fixed by the standing Barrack Committee A and B.	18	Guards of Indian mountain batteries . .	1	A and B.
7	Matron's quarters . . . .			19	Warrant and non-commissioned officers on gate duty at arsenals . . . .	1	A and B.
8	H. S. K.'s store-rooms . . . .						
9	Kitchens . . . .	each					
10	Each hospital ward and surgery, Indian troops and followers . . . .	(a) + 1	All night F. and G.				
1	Tents of British troops when not marching (c) . . . .	1	"Duplex lamp for ward.				
	Jarrison guards and officers' rooms of the same . . . .	1	A and B.				

## SECTION III.

## SUPPLIES IV S. AND T. CORPS.

Table 24.—Scale of lamps, lanterns (a), oil (b), and wick—contd.

Item No.	Place or service.	Number and description of lamps.	Scale of oil.	Item No.	Place or service.	Number and description of lamps.	Scale of oil.
21	Military prisons and detention barracks .	(f)	C and D	37	Corridors of building occupied by military students of the Grant Medical College, Bombay .	■	A and B.
22	Tunnels at Aden . . . .	(f)	Double B				
23	Approach to Arsenal Guard, Poona . . each	2	C and A	38	Lanes of Indian troops { Every 25 rank and file or less	1	A and B.
24	Prayer rooms (f) . . . .	(f)	when rooms are used	39	and Indian trans- port personnel, { Every Indian officer .	1	(c c)
25	Main guard, Fort St. George . . . extra	1		40	Burma Division. { Every 3 havildars or less in a separate room .	1	C and D.(c c)
26	Main entrance, British infantry lines, Bangalore . . . . . No	1		41			
27	Garrison guard, Secunderabad . . . .	3	A and B.	42	For first class forts and defences— Attock Fort—Inner Lahori gate { (g) (h) Inner Mori " " Outer Mori " "	30	
28	Military treasure room, Mhow . . . .	1		43	Chingri Khal—Entrance gate . . . .	1	A and B.
29	Harness and Saddlery Factory Guard, Cawnpore (including living rooms, latrine and urinal) . . . .	5	A and B	44	Falta—Entrance gate . . . .	1	
30	Neemuch Treasury Chest Guard . . . .	■	A and B.	45	Madras (g) (f) . . . .	18	
31	Dress Treasury Chest Guard . . . .	1	A and B	46	Rangoon.—Main gate, Syrian main battery. Main gate, Syrian mine fields battery. Main gate, Chowki Point Main gate, King's bank main battery. Main gate, King's bank mine fields battery. Point Main gate, Monkey Point battery. Two enclosures gates and 3 street corners and 1 near the S. A. A. store Monkey Point battery.	12	A and B.
32	Mori gate Guard, Attock . . . . extra	2	C and D.				
33	Entrances (archways) to Fort St. George . . . .	(f)	A and B				
34	Environments of barracks, Kasauli . . .	18 (r)	A and B.				
35	War game building, Poona . . . .	12	D when used D and A when used.				
36	Military medical pupils when accommodated in hired buildings owing to accommodation in college not being sufficient . . . .	As required.	C and D.				





47	Aden.—Main gate, Fort Tarshyno . . .	1			A and B.
48	" " Morbut . . extra . . .	1			D and A.
49	Sulkur (g) (t) . . . . .	9			
50	Bombay—Co'ba North, Command gate . . .	1			
51	" " outer gate (near main road) . . . . .	1			
52	Colaba South, entrance gate . . .	1	Lamps, acreage, hanging or wall		A and B.
53	Oyster Rock, entrance gate . . .	1			
54	Middle Ground, entrance gate . . .	1			
55	Mahaduxmi, entrance gate . . .	1			
56	Malabar North, entrance gate . . .	1			
57	" " South, two entrance gates . . .	2			
58	Korachi—Manora, 2 entrance gates } Beach Fort, south east gate } (g) (t) Marsh Fort, entrance gate }	5			Lanterns, hurricane
59	Quetta—Nuri Fort, entrance gate (t) (g) . . .	12			C and D.
60	Sisabudi Fort, for men working in the tunnel . . .	1			A and B.
61	For lighting Fort Chitral . . . . .	6			C and D.
62	Cavalry regiment and infantry battalions . . . . .	One per group of 100 troops			
63	For latrines of Indian troops. Heavy and mountain batteries, ammunition columns, frontier garrison artillery, sepper and minor companies or detachments of these units . . . . .	2			C and D.
64	Latrines of 10000 of Indian troops and departmental forces; 1 latrine per hospital . . . . .	1			A and B.

## SECTION III.

## SUPPLIES BY E. AND T. CORPS.

Table 24.—Scale of lamps, lanterns (a), oil (b), and wick—cont'd

Item No.	Place in service.	Number and description of lamps.	Scale of oil.	Item No.	Place or service.	Number and description of lamps.	Scale of oil.
78	Wards and reading rooms of hospitals, British troops . . . . .	(i) Lamps, duplex, 1	{ All night F and G for one lamp Till tattoo, F and G for other lamp.	89	British troops, when tent lanterns are used, each tent . . . . .	1 (n)	E and A. E and B.
79	Surgeons, hospitals of British troops . each	1	{ Lamps, duplex, with globe, chimney and punkah protector	90	For use in Khojak tunnel in case of emergency . . . . .	10 (g) (n) 1 { Lamps, duplex, wall. 1 {	All night F and G for one lamp. Till tattoo, F and G for the other.
80	Recreation room, hospital, British troops.	1	Till tattoo F and G	92	Duty room of lady nurses . . . . .	1	Lamp, duplex, table, with punkah protector.
81	For covered gymnasia . . . . .	(k)	(k)	93	General sitting and dining rooms of lady nurses, each . . . . .	1	Lamp, duplex, wall.
82	For night classes, British Army schools, per 12 scholars or less . . . . .	(g)	(l)	94	Quarters occupied by a family, widow, warder not on Unattached List, and non-commissioned officers of or above the rank of sergeant (except those in class I for pension), British troops except departmental (o) (p) . . . . .	1	Till tattoo, F and G.
83	Guards at powder factory and magazine at Kilaee . . . . .	1	A and B, D	95	Quarters occupied by a warrant officer, school mistress, non-commissioned officers in class I for pension, British troops, except departmental (q) . . . . .	..	C and D. (u)
84	For the use of the enquiry over certain outlying magazines, at Fort St. George . . . . .	1	A and B.	96	Warrant or non-commissioned officers in charge of a rest-camp (r) . . . . .	..	{ A and B.
85	Each rest camp during trooping season only . . . . .	1	A and B, D	97	Sergeants' messes, British troops. For half the number of lamps considered necessary by the Standing Barrack Committee . . . . .	..	C and D.
86	Quetta Fort . . . . .	2	D and A.	98	Upper Pagoda guard, Rangoon, British troops . . . . .	1 (g)	A and B.
87	Fort Shahbadr . . . . .	4	A and B.				
88	for lighting the landing places at— Elephanta causeway, Bombay Butcher Island Pier, Bombay. Pilot Bunder, Colaba, Bombay . . . . .	2 2 1	A and B.				









## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 25.—Scale (d) of well gear and bullocks for use in lines of British troops, Non-Silladar Cavalry Regiments, etc.

Item No.	Detail.	Chains, Iron, or ropes (c) (e).	Motors, leather with iron frame, (a)	Pulleys, (a)	Bullocks with drivers.	Yokes per pair of bullocks, (a)	Threshing Coolsies.	Remarks.
1	For drawing water from wells for watering horses, for filling plunge baths, for filling reservoirs for tatties and for lavatories attached to barracks and hospitals; and for watering regimental and company gardens per well	1	1	1	(b)	..	(e)	Note.—Where Persian wheels are used, earthen chatties and <i>mal</i> ropes will be supplied under the conditions in note (a) below.
2	For drawing water from the well inside the Bareilly Fort	1	1	1	..	1	..	
3	For drawing water for the mules of Mountain Batteries per well	1	1	1	..	..	..	
4	For use in the following forts — Jamrud Durgai Chitral	1 1 1	1 1 1	1 1 1	.. .. ..	.. .. ..	.. .. ..	
5	For carrying water to the Musketry Camp at Hebbal (Bangalore)	..	..	..	(b)	..	..	

Table 26.—Equipment for sanitarium

Item No.	Articles.	Where required and for what purpose.	Authorised proportion.
1	Basins, washing, steel (a)	For barracks, British troops, at all stations	1 Per man.
2	" washing, steel, fixed	For quarter guards and cells	.. As required, to be fixed by M. W. S.
3	Brooms	For cleaning barracks, etc.	.. As required. Cost to be met from fixed allotment.
4	Brushes		.. Ditto
5	" scrubbing, coir		..
6	" washing.	For cleaning mattress and pillow cases	..
7	Buckets, G. I., with lds and lps, 3 gals.	For distributing water from filter tanks to barracks, cook-houses, etc	1 Per 20 men of strength of sanitarium.
8	Buckets, G. I., 3 gals.	For storage of water for fires and for filling metal tanks used for carriage of water.	..
9	Clocks.	For schools	..
10	Jars, water, or chatties	For drinking water	..
11	Measures, Imperial (b)	For liquor bars	1 Per sanitarium.
12	Pans, privy, earthen	For privies	..
13	" privy, iron (c)	For privies where earthen pans are not used.	..
14	Scales, copper, with weights.	For weighing groceries, etc.	1
15	" wooden, with weights.		1
16	Scissors, country	For trimming lamps	..
17	Trays, earthen	For urinals	..
18	" iron	For iron urinals where used	..
19	Tanks, metal	For carriage of water	..
20	Tubs, G. I., with and without lds	vide Table 34	..
21	Urinals, earthen	For urinals	1
22	" iron	Where earthen urinals are not used	..

(a) Period of duration = 4 years, and to be fixed twice a year (b) Each set consisting of following measures 1 gal., 1 gal., 1 quart, 1 pint, 1 half pint, 1 dram and 1 half dram (c) At stations where issued a reserve of 20% will be maintained.





## SECTION III.

## SUPPLIES BY R. AND T. CORPS.

## 27.—Stores authorised for Remount Depôts.

Item No.	Articles.	Sabharwal.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Item No.	Articles.	Sabharwal.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.		
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16		
1	Barrel, washing, steel	No	4	4	6	3	3	3	14	Pan, copper, dog hole	No	20	20	30	2	10	..
2	Boiler, copper, grain	..	2	2	3	2	2	2	13	.. iron	..	20	20	40	..	10	..
3	.. .. water	..	2	2	4	1	1	1	18	.. privy, iron	..	70	80	100	40	11	24
4	.. .. iron, grain	..	5	5	4	2	3	3	17	Pillows, coconut fibre	..	29	20	40	11	12	..
5	Cart, dead horse	..	1	1	1	..	1	1	14	Pruners, tree	.. per	4	4	4	..	4	2
6	Clocks	..	6	6	6	2	3	3	19	Pumps, Chinese	.. No	..	..	..	..	1	..
7	Choppers	..	10	10	20	..	..	..	20	.. for lifting water	..	..	..	..	1	..	
8	Fittings, E. W. for wash hand stands	sets	2	2	4	1	1	2	..	..	..	..	..	..	..	..	
9	Lamps, office	No	6	6	6	6	2	4	21	Rollers, iron or stone, small	..	3	3	4	..	1	1
10	Lanterns, hurricane	..	30	30	40	30	10	15	22	.. .. large	..	1	1	2	..	1	1
11	Mats, cot	..	As required						23	.. wooden	..	6	6	6	1	2	..
12	.. rubber	..	3	3	3	3	3	3	..	..	..	..	..	..	..	..	
13	Mattresses, coconut fibre	..	25	20	40	6	12	..	24	.. hand, 1 os to 12 lbs	..	1	1	1	1	1	1
									25	Scissors, country	.. per	16	18	16	2	10	12
									26	Traps, rat	.. No	30	60	60	5	20	10
									27	Urinals, earthen	..	30	30	60	11	11	11

Table 29.—Signalling Equipment allowed for Units, etc.

Item No.	Articles.	British Troops.								Indian Troops				Sanitaria (except Mouree and Valol Tal) and standing camps at Chakrota, Dalhousie and Kaniabari.	Fort Armaments.					
		Signal Company.	Instructional Class.	Mountain Battery.	Company E. & A.	Cavalry Regiment.	Infantry Battalion.	Signo Troop, Lark, Barker.	Cavalry Regiment.	Acta Troop.	Infantry Battalion.	Detached half battalion, British or Indian (b).	Bombay and Fort William.		Euxa Fort.	Chital Fort.	Other Forts.	Detached Brigade.	Abasal (b).	Fort Blair (c).
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
1	Chagnis, Canvas, Field hospital pattern.	15	12	2		2	2		2		2									
2	Funnels, oil	20	12		2	4	4	4	4	12	4			4			2		1	2
3	Pakhals, metal, sets	2	2																	
4	Scissors, pairs	20	12		2	4	4	4	4	12	4		2	4			2	6	1	1
5	Signes																			

(a) Also allowed for British Infantry detachment, Mirkee, as station stores

(b) Station stores, on charge of the Guides Cavalry, for communication between patrols, and for use in the case of troops moving out

(c) Allowed as Station Stores.

**SUPPLIES BY E. AND T. CORFS.**

**Table 29.—Equipment for 1st class Gymnasia.**

Item No.	Articles.	Scale per Gymnasium #1				Remarks.
		Ambala.	Lucknow.	Secunderabad.	Punna.	
1	Basins, washing steel	No.	2	2	2	
2	Brooms, with long bamboo handles	"	2	2	2	
3	"	"	5	5	5	
4	Brushes, with long handles	"	6	6	6	
5	Buckets, G. I., 3 gals	"	11	6	6	
6	Coir, loose fibre (a)	"	"	"	"	
7	Cocconut fibre mats	"	2	2	2	
8	Jars, water, or chatties	"	6	6	6	
9	Lamps	"				
10	Mops	"	6	6	6	
11	Pans, privy, glazed earthenware	"	12(b)	6	6	
12	Scrubbers	"	6	6	6	
13	Squeeges	"	2	2	2	
14	Trays, glazed, earthenware	"	2	2	2	
15	Urinals, glazed	"	5	5	3	

Vide Table 24.

(a) For unboarded floors of gymnasiums, excluding schools of arms, at 52 lbs. per 10 superficial feet of area as a first issue. For regimental gymnasiums coir, straw or grass is allowed for stuffing mattresses at the scale of 7½ lbs. of coir or one maund of straw or grass.

(b) Six for the Indian troops latrine attached to the gymnasium.

**Table 30.—Equipment for School of Cookery, Poona.**

Item No.	Articles.	Scale.	Item No.	Articles.	Scale.
1	Aldershot oven (for field instruction) . . . No.	1	11	Meat choppers . . . . No.	2
2	Benches (for cutting up) . . . "	2	12	Mess tins (infantry) . . . "	20
3	Brooms, bass . . . "	2	13	Bowls, pudding, mixing . . . "	2
4	Brushes, hand, scrubbing . . . "	2	14	Pails, 1. G . . . . "	2
5	Canip kettles . . . . "	15	16	Rolling, pins . . . . "	2
6	Colanders, 14" diameter . . . "	1	16	Soup ladles . . . . "	2
7	Forks, flesh . . . . "	2	17	Steel . . . . . "	1
8	Flour dredger . . . . "	1	18	Ten strainers . . . . "	2
9	Bowls, hand, gal iron, 8 1/2" dia by 3 1/2" deep, with short wooden handles . . . . "	2	19	Pails, gal iron, 3 gns. . . . "	2
10	Meat blocks . . . . . "	2	20	Machines, weighing (with oblong tin pan) with weights 14 lbs. to 1/2 oz. . . . . "	1

NOTE —Cost of renewals or repairs should be met from the accessories grant.

**Table 31.—Equipment for Cavalry School, Sauger.**

Item No.	Articles.	For what purpose.	Authorised proportion.
1	Chopping blocks, small	Cook-rooms	1 per cook-room.
2	Durries	Quarters of British officers other than students.	4 per quarter.
		Quarters of British officer students	2 per quarter.
		Commandant's office	3
3	Fans, commode	Quarters of British officers other than students.	2 per quarter.
		Quarters of British officer students	1 per quarter.
		Commandant's office	1
4	Toliet sets	Quarters of British officers other than students.	2 per quarter.
		Quarters of British officer students	1 per quarter.
5	Tube, bath	Quarters of British officers other than students.	2 per quarter.
		Quarters of British officer students	1 per quarter.







## SECTION III.

## SUPPLIES BY R. AND T. CORPS.

Table 32.—Equipment (a) for rest barracks and camps.

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
1	Basins, washing, steel . . .	. . . . . No.	1 Per officer. For men as required.
2	Brooms	} For cleaning barracks, etc. . . . .	.. As required.
3	" with long bamboo handles		
4	Brushes, with long handles		
5	" scrubbing, coarse	For scrubbing barrack furniture . . . .	} Ditto.
6	" washing	For cleaning mattress and pillow cases . .	
7	Buckets, G. L., with lids and lips, 3 gals.	For rest barracks at Khandwa . . . . No.	1 Per 20 men. .
		For others . . . . .	.. Vide general scale in table 34.
8	Buckets, G. L., 3 gals.	For storing water for fires, and for filling metal tanks used for carriage of water.	.. Vide table 34.
9	Chopping blocks, small . . .	...	.. As required.
10	Cooking utensils	Vide table 23	
11	Durries (carpets)	For officers' rooms and tents . . . . No.	1 Per room or tent.
12	Fittings, E. W., for wash hand stands . . . sets	...	1 Per washhand stand authorized by Table 68.
13	Jars, water, or chhattee . . .	For drinking water . . . . .	.. As required.
14	Lamps	Vide tables 24 and 42	
15	Pans, privy, earthen . . .	For privies	} .. As required.
16	" " iron . . .	For privies where earthen pans are not used . . . . .	
17	Scissors, country . . .	For trimming lamps . . . . .	1 Per building.
18	Strawls . . .	For drinking water . . . . .	} As required.
19	Tubs, earthen . . .	For urinals . . . . .	
20	" iron . . .	For iron urinals where used . . . . No.	1 Per urinal.
21	Tanks, metal . . .	For carriage of water . . . . .	.. Vide table 34.
22	Tubs, G. L., with lids . . .	For lavatories and cockhouses when not provided with iron tanks or reservoirs . .	2 Per lavatory.
23	" G. L., without lids . . .	For bathing purposes . . . . . No	1 Per officers' bath room.
24	Urinals, earthen . . .	For urinals . . . . .	} { For men as required.
25	" iron . . .	Where earthen urinals are not used . . .	

(a) Equipment in rest barracks and camps will be returned into store when camps are closed.

TABLE 33.—Equipment for ladies' waiting rooms and officers' mess in the Sassoon Dock, Bombay.

Item No.	Articles.	Scale.	REMARKS.
1	Chicks, door . . . . . No.	2	Vide Table CXV.
2	Fittings, E. W., for washhand stands . . . . . sets	1	
3	Glasses, dressing, large . . . . . No	1	
4	Matting, coir . . . . . "	(a)	
5	" coloured, China . . . . . pieces	4 (b)	
6	Tubs, bath, zinc . . . . . No.	2	
7	Vases, flower, blue . . . . . "	4	

(a) For one room

(b) For floor of one small room.

## SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services.

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	
1	Basins, washing, steel (a)	For British troops in barracks, etc., at all stations . . . No For military signallers of the Telegraph Department not accommodated in barracks, 1st, 2nd, 3rd 7th and 8th Divns . . . No For officers' mess and families, Sassoon Dock, Colaba, during trooping season . . . No	1	Per man.
2	Basins, washing, steel, fixed	For quarter guards and detention barrack rooms . . . . .	28	Per 4 men.
3	Basins, iron, enamelled	For offices of Commandant and Engineer, Indian Central Flying School, Sitapur .	1	As required. To be fixed by M. W. E.
4	Bath, galvanised iron	For the Orderly Officer's quarters in Fort Feretepore . . . . .	1	Per office.
5	Boilers	For boiling kultha for transport animals at Belgaum and in the Secunderabad Division . . . No.	1	Per III animals.
6	Boxes, tin	For Divisional, Brigade, Station Staff and Supply and Transport Offices, for holding confidential papers and stationery for courts martial . . . . .	1	As required. Number to be fixed by Divl. or Bde. Comdr.
7	Brooms	For barracks with boarded, stone or brick floors—British troops . . . . .	1	As required. Cost to be met from fixed allotment.
8	" Goa	For use in Sassoon Dock, Bombay, during trooping season . . . No	12	
9	Brushes, with long handles	For barracks with boarded, stone or brick floors . . . . .	12	As required. Cost to be met from fixed allotment.
10	" scrubbing coir	For scrubbing barrack furniture . . . . .	1	
11	" washing	For cleaning mattress and pillow cases . . . . .	40	Per two utensils, etc.
12	" tar	For applying tar to urinals and necessary utensils, Secunderabad Division . . . No.	10	Per regt. or battn. of Brit. cavy. and infy.
		For distributing water from filter tanks to barracks, cook-houses, etc. . . . .	7	Per batt. of horse or field artillery.
		For filling metal tanks authorized for British corps for carriage of drinking water . . . . .	4	Per heavy or mounted batt. or coy., R.G.A.
			2	Per R. F. A. Ammunition Column.
			2	Per R. H. A. Ammunition Column.
			3	Per R. H. A., R. F. A. and mountain batt. and coy., R. G. A.
			2	Per heavy battery.
			16	Per regt. of Brit. cavy. or battn. of infy.
13	Buckets, C. I., with lids and lips, 3 gallons	For filling metal tanks used for carriage of water at— Bara Gali, Chakrata, Changla Gali, Chaututta, Cherat, Ghora Dakka, Jutogh, Kalabegh, Kasauli, Khyra Gali, Ranikhet and Taragarh Arkonam, Deolali, Guntakul, Mount Abu, Pachmarhi, Poonamallee, Purandhar, Ramandroog, and Wadi For storage and carriage of drinking water in Indian Infantry lines at Crater, Aden .	1	Per 20 animals or less
			1	Per pakhall.
			32	

(a) Period of duration 4 years, to be renewed twice a year.





## SECTION III.

## SUPPLIES BY B. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	
		For latrines of the "Horbury" pattern where in use	As required. 1	
		For cess pools, Secunderabad and Burma Divisions.		
		For use in Sassoon Dock, Colaba, during trooping season	2	
		For station hospital laundry at Doolah	6	
		For	20	
		For	4	
		For	4	
		tanks for holding water have been constructed and buckets have superseded ghurrahs and kerosene oil tins	As required. Scale to be fixed by Asst. C. R. E.	
14	Buckets, G I., 3 gals.	For storage of water for fires at S and T. Store Depôts at— Kamptee . . . . . No Doolah . . . . . Maymyo . . . . . For storage of water for fires at the 7 Defence Forts, Bombay For storage of water for fires at Sabathu and Dogshai For lines of Khyber Rifles and the Khyber defences . . . . . No. For use with fire-engines at— Dalhousie . . . . . Terozapore . . . . . Jullunder . . . . . No. Multan . . . . . Bannu (station engine) . . . . . Jhansi . . . . . Bombay (Butcher Island) . . . . . Manora . . . . . Jacobabad (station engine) . . . . . Rurkee Fort . . . . . For regimental institutes and family quarters of British units at stations where fire-engines have been withdrawn . . . . . For storage of water for fires at Baran . . . . . For all barracks and buildings which have neither thatched nor wooden roofs but have wooden walls, at stations in the hills or plains where there are no fire engines, stand pipes or hose . . . . .	224 12 12 21 50 160 16 48 70 10 100 { 25 } { 12 } 50 8 42 12 120 { 50 } { 25 } 60 60 --	Per fort. Ranikhet barracks. S. & T. buildings. M. W. buildings. Farm buildings. For buildings in Fort. R. F. A., British Infantry. Heavy battery. Indian Infantry. Brit Infantry. Defence Light Section. Defence Light Section. Indian Cavalry. Per regt. of cavalry or Batta. of infantry. Per Royal Artillery unit. As required.
15	Carts, water, with draught animals.	For conveyance of drinking water from the "Dilwara" well at Nasirabad to the lines of British troops quartered at that station . . . . . No.	See Table 6.	
16	Casks, half . . . . .	For cook-houses of Indian troops in Burma and the Andamans for reception of refuse . . . . . No.	4 Per cook house.	

(a) For family quarters, W. O's and B. S. quarters and other regimental buildings to which this scale cannot be applied, the number of buckets required will be fixed by the A. C. R. E.

**SECTION III.**  
**SUPPLIES BY S. AND T. CORPS.**

Table 24.—Equipment for special and miscellaneous services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
17	Casks, with covers . . .	Issued to the troops at Aden—(i) for the storage of aqueduct water for British troops, (ii) for the storage of both condensed and aqueduct water for Indian troops . . . No.	<div style="display: flex; align-items: center;"> <div style="margin-right: 10px;"> 8 8 8 34 74 64 27 16 </div> <div> Per company, R. Q. A. For coast defence barracks. For R. G. A. staff. Per battalion, Brit. Infy. Per battalion, Indian Infy. For Aden troop. Per coy. of S. and M. For Aden defences. </div> </div>
18	" with lids . . .	For barracks of Indian troops at Port Blair . . .	2 Per barrack.
19	Chamber utensils, E. W..	For barrack detention rooms . . .	3 " "
20	Chamber pots . . .	For married quarters of warrant officers (non-departmental), schoolmasters, schoolmistresses, n. c. o.'s and privates . . .	1 " room.
21	Charpoys . . .	For use in sanitary camps when straw is not used . . . No. For cleaning bhocoas in mounted units . . .	1 " quarter. 1 " man. 1 " squadron or battery. (a)
22	Chicks . . .	At Quetta for married quarters and end rooms of single men's barracks, British Infantry lines, and R. A. barracks. For British Infantry hut barracks at Subathu . . .	.. As required. 1 Per door and window.
23	Chicks, coarse, for verandahs . . .	For regimental school of British Infantry battalion at Secunderabad . . . No. For Military buildings in Fort St George; Supply Reserve Depot Office, Madras; and Military Staff Offices, St. Thomas' Mount and Poona Mallico . . .	27
24	Chopping blocks, small . . .	For barracks, married and detached quarters, sergeants' messes, and quarters of warrant officers (non-departmental) and . . .	.. As required
25	Churns, leather . . .	Per pakhal water mules and bullocks . . .	1 Per animal.
26	Clocks . . .	For schools of adults and grown up children, and infant schools, British troops No. For guard rooms (other than regimental guard rooms)— (i) where the guard is furnished by more than one unit; (ii) where the guard is furnished by a unit in addition to the regimental guard . . .	1 Per school where absolutely necessary. 1 Per guard room.
27	Coltr, fibre, loose . . .	For 1st class and regimental gymnasia at Fort William, Barrackpore, Dum-Dum, . . .	62 Per ten superficial feet of area (excluding schools of arms) so as to allow of an uniform depth of 6 inches.

(a) Renewals at 10 per cent. per annum.







**SECTION III.**  
**SUPPLIES BY S. AND T. CORPS.**

**Table 34.—Equipment for special and miscellaneous services—contd.**

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
28	Cooking places . . . .	For boats carrying troops in Burma . .	As required.
29	Cots, string (a) . . . .	For British troops in standing camps at Ambali, Meerut, Bareilly and Sitapur .	1 Per man, woman and two children.
30	Dish, soap, iron, enamelled . .	For offices of Commandant and Engineer, Indian Central Flying School, Sitapur . For married quarters of warrant officers (non-departmental), schoolmasters, school-	1 Per office.
31	Durries, 16' x 13' . . . .		1 Per quarter.
32	Durries . . . . .		1 Per quarter.
33	Extinguishers, Minimax, fire . .	Ferozepore . . . . .	3
34	Fittings, E. W., for washhand stands.	For S. and T. Store Depot, Aden . . No For washhand stands authorized by Tables 4, 47, 53, 55, 58, 63, 71, 75, 78 and 87 . . . . . sets	10 1 Per washhand stand
35	Flare lights, Wells (b) . . . .	For the orderly officer's quarters in Fort Ferozepore . . . . .	1
36	Flare lights, Wells (b) . . . .	For Fort Lockhart when occupied by regular troops . . . . . No For store rooms of British troops, 4th, 5th and 6th Divns. and Aden Bde. . . . . No.	3 1
37	Funnels, tin . . . . .		1 For each separate corps, detachment or sanitarium.
38	Gear, well, viz., chain, iron . . . .	For use with condensed water at Aden . .	As required
39	Gear, well, viz., bucket, leather; chain, iron; and pulley . . . .	For veterinary hospital at Ahmedabad . No	1 Renewed when required.
40	Gear, well, viz., rope and leather bucket . . . . .	For Artillery lance lines at Aden . . set	1 Renewed when required.
		For all public buildings having thatched or wooden roofs at stations in the plains where there are no fire engines, tanks and buckets . . . . .	1 Per Indian unit Hospital at Nowshera.
		For fire protection in the 16th Mule Cadre lines, Peshawar . . . . .	100 In Burma the ghurras or tins will be kept filled with sand or earth under regimental arrangements
40	Ghurras, or kerosine oil tins with handles, (c) . . . .	For Indian corps (except Indian Infy. battn. at Allahabad) . . . . . No.	100 Per half squadron of Cavry. and company of Infy.
		For storage of water for fires at S. and T. Store Depôts at— Ferozepore . . . . . No. Kalka . . . . . Jutogh . . . . . Dunapore . . . . . Jhansi . . . . . Nowgong . . . . . Jubbulpore . . . . .	250 For 160 n t a in Battery lines at Nowshera. 180 Per detached company of Sappers and Miners.
		For fire protection in the Army Bearer Corps lines, Mhow . . . . .	200
41	Ghurras, with covers . . . . .	For use in Sassoon Dock, Colaba, during trooping season . . . . . No.	80
42	Glass, toilet, with stand . . . .	For Poona signalling school . . . . .	100
		For the orderly officer's quarters in Fort Ferozepore . . . . .	290
			12
			60
			3
			1

(a) To be renewed annually, if necessary. (b) Scale of oil, vide Table 42, Item 55, cleaning materials and wicks and renewals of component parts as required.

(c) Kerosine oil tins, with handles, will be substituted for ghurras as the latter become unserviceable, and they will in turn be replaced by tanks and buckets, 6 1/2 gals., as funds are available. See Item 14 of this table. At Quetta oil tins can be issued in lieu of ghurras at the rate of five half tins to 25 ghurras.



## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorised proportion.
53	Mosquito curtains (a)— <i>concd</i>	For R. G. A. detachments in Malabar and Mahaluxmi Forts . . . No For British or Indian guards at the Mint and at the Jafferpoore and Lucknow Ranges . . . " For British Infantry detachment at Bhamo . . . " For Coast Defence Gunners stationed at the River Forts, Rangoon . . . " For men on garrison guard at Butcher Island, Bombay . . . " For men on the Bombay Arsenal guard . . . " For Indian N. C. O.'s and men of Rangoon Section, Q. V. O. Sappers and Miners, Rangoon . . . " For public followers employed at the river forts, Rangoon . . . " For the warrant or non-commissioned officer performing night duty in the Rangoon arsenal . . . " For the non-commissioned officer on detached duty at Duddinsore magazine . . . "	1 Per man. 1 Per man. 1 Per man. 1 Per man. 1 Per man. 1 Per man. 1 Per man. 1 Per man. 1 Per man. 1 Per man. 1 Per man.
56	Muzzles for mules . . .	For British garrison at Agra Fort . . . " Issued as station stores for the use of the Indian Mountain battery sending a section to Droah . . . "	1 Per man. 1
57	Pans, commode . . .	For commodes authorized in Section IV . . . "	1 Per commode.
58	" privy, iron . . .	For use in Bassein Dock, Colaba, during troopig season . . . " For privies of corps, detachments and batteries and companies of artillery in barracks . . . " For privies of British soldiers serving with R. A. Staff, S. and M. and Defence Light Section . . . " For privies in compounds of churches attended by troops . . . " For British garrison and other guards . . . " For Indian units not provided for by cantonment authorities . . . "	.. As required. .. As required. Cost to be met from fixed allotment. 1 Per opening in seat. 1 Per opening in seat. .. As required. .. As required. Cost to be met from fixed allotment if in receipt of the same. .. As required. (b)
59	" " earthen . . .	For signalling and veterinary schools . . . " For latrines of Indian Infy. detachment at Anandale, Simla . . . " For latrines of servants of departmental warrant and N. C. O.'s . . . " For servants' privies attached to officers' quarters and mess-houses, the property of Government (c) . . . " For British troops undergoing musketry course at Pallavaram . . . "	20 2 9 1 Per opening in each privy seat. .. As required. .. As required. .. As required. Cost to be met from fixed allotment.
		Indian Military General Hospital at Aden . . . " Indian Infantry Hospital at Poona . . . "	1 1

(a) Renewed as required through fair wear and tear.

(b) Scale to be fixed by Standing Barrack Committee.

(c) Not applicable to units in receipt of fixed allotment.







## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorised porportion
75	Tanks, metal— <i>concl'd.</i>	For carriage of water for British troops at—	7 Per Divisional signal company.
		Bare Gali prs.	1 Per pakhalī authorised at Mount Abu, Pachmarhi, Poonamallee, Purandhar and Ramandroog sanitarium.
		Changla Gali "	50 For use on the Samana posts.
		Cherat "	18
		Ghora Dakha "	12
		Kalabegh "	770
		Kasauli "	80
		Khyra Gali "	18
		Jutogh "	222
		Chakrata "	18
		Landour "	18
		Chaubuttia "	99
		Ranikhet "	444
		Taragarh "	103
		Arkonam "	303
		Guntakel "	12
		Wadi "	1
		For carriage of water for the Indian battalion stationed at Malakand . . .	12
76	Trays, earthen or iron . . .	For urinals—	To be maintained as station stores
		(i) For units, etc., having a fixed allotment . . .	As required. Cost to be met from fixed allotment.
		(ii) Others . . . No	1 Per urinal in use
77	" tooth brush, enamelled . . .	For married quarters of warrant officers (non-departmental), schoolmasters, . . .	1 Per quarter
78	Tubs, bath . . . . .	" No	1 Per quarter
79	" G. L. with lids . . .	" "	8
		" "	2
80	" " with hinged lids . . .	For cook-houses of British troops not provided with iron tanks . . . No.	Per lavatory not provided with tanks or reservoirs for the purpose
		" No.	1 Per cook-house.
		For stables of British Mounted Corps, and gun sheds etc., of Artillery units, . . .	12 Per squadron British Cavalry and per Heavy battery having bullock draught.
		" "	13 Per Horse, Field Mountain, and partly Horsed Heavy Battery.
		" "	8 Per Horse Artillery Ammunition Column.
		" "	25 Per Field Artillery Ammunition Column.
81	" " without lids (c)	For British soldiers temporarily employed in Government Military Farms . . . No	1 Per single or married man.
		For Military signallers of the Telegraph Department not accommodated in barracks . . . No.	1 Per man.
		For Telegraph training school at Trumulgerry . . . No.	1

(c) Tubs issued to stables and gun sheds of British troops will have two tin pots attached to each with chains. A reserve of per cent. tin pots will also be supplied.



## SECTION. III.

## SUPPLIES BY S. AND T. CORPS.

Table 34.—Equipment for special and miscellaneous services—*concd.*

Item No.	Articles.	Where required and for what purpose.	Authorised proportion.
81	Tubs, G. I., without lids— <i>concd.</i>	For private ablution rooms of lavatories	1 Per ablution or bath room. 4 Per lavatory.
82	Tubs, half cask	For storage of water for fires at S. and T. Store Depot at Purandhar	4 Per 25 men.
83	Urinals, iron	For use in Sassoon Dock, Colaba, during the trooping season	8 9
		For use in Sassoon Dock, Colaba, during trooping season	18
		For urinaries of upper storeys of barracks in 4th, 5th and 6th Divns., and Aden Bde for night use only.	2 Per urinary.
		For use at night in barracks of British Infy regts., Quetta, from 1st December to 31st March	40 Per regiment
		For urinaries in compounds of churches	1 As required 1 Per guard. 1 As required (a)
84	" with trays, zinc, or iron. (b) (c)	For Indian Infy. battn at Aden and Perim	1 As required. (a)
		Detachment of Royal Garrison Artillery at Manora	13 As required Cost to be met from special allotment
		For workshops, staff sergeants and single men's quarters and sergeants' mess of	1 As required (a) 1 As required (a)
		For barracks of British troops	1 Per privy. As required. Cost to be met from fixed allotment.

(a) Scale to be fixed by Standing Barrack Committee (b) Where earthen urinals are not procurable iron ones will be supplied.  
(c) Iron urinals are supplied to British troops at all stations in Burma

Table 35.—Equipment for the Staff College, Quetta.

Item No.	Articles.	Scale.	Remarks.
1	Clocks	No	24 (a)
2	Clocks, hanging	"	8
3	Clocks	"	1 (b)
4	Curtains	Pairs	4 (b)
5	Durries	Sq. Yds.	410 (a)
6		"	34 (b)
7	Fittings, E. W., for washhand stands	set	1
8	Lamps, table, with fittings	No.	4 (a)
9	" wall, with brackets and fittings	"	12 (a)
10	Mats, door	"	8 (a)
11	Pans, commode	"	4
12	Stoves, slow combustion	"	2
13	" oil	"	1 (a)

(a) For general library (b) For library for directing staff

NOTE.—Such articles as are not included in the above table will be bought under the authority of the Commandant and paid for from the contingent grant of the College







## SECTION III.

## SUPPLIES BY S. AND T. COMPS.

Table 36.—Scale of fuel for warming and drying—*contd.*

Seri- no. Va.	Stations.	Service for which re- quired.	British or Indian.	For warming per diem.				For drying.							REMARKS.
				PERIOD.		Drying baskets or frames	Grates with tripods and ash-pans.	PERIOD.		From	To				
				From	To			From	To						
				Large fireplace.	Small fireplace.			Per diem.	Per mensem.						
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
				..	..	..	..	100(f)	..	100	..	..	Monsoon	months.	..
2	Abu— <i>contd.</i>	Regimental libraries, reading rooms and schools. Hospital stores- keeper's stores. Store rooms.	British " "	..	..	..	..	100	..	..	..	1	Do.	Do.	(a) Per fireplace, (b) Per five men or patients, (c) Per annum.
3	Agra	Hospital (Indian troops) Station family hospit- als.	Indian British	80 80	40 40	1st Dec. 15th Dec.	End of Feb. 31st Jan.	..	..	..	..	..	..	..	(d) Per Regimental fami- ly quarters, (e) Per 450—superficial feet. (f) Per grate. (g) Per man.
4	Allahabad	Ditto	"	80	40	Do.	Do.	..	..	..	..	..	..	..	(i) On strength annual- ly.
5	Ambala	Regimental married quarters. Hospital (troops) Hospital (troops and followers).	" " Indian	80 80 80	40 40 40	Do. Do. Do.	15th Feb. Do. Do.	..	..	..	..	..	..	..	(j) For each of the two wood-burning stores sanctioned for special wards.
6	Andamans	Barracks (troops)	"	..	..	..	..	..	12 1/2 (h)	10% (e)	10% (e)	..	1st May	31st Oct.	..
7	Bannu	Hospital (troops and followers) Quarters of Park Sergeant.	" British	160 ..	80 40	1st Dec. Do.	16th Mar. Do.	..	..	..	..	..	..	..	..





8 Bareilly .	Regimental married quarters.	"	40	15th Dec.	15th Feb.	..	..	..	..	..	..	(1) For one store in each regimental hospital.
	Hospitals (troops)	"	80 (g)	1st Dec	31st Jan.	..	..	..	..	..	..	(f) Per man at Maymyo.
	Ditto	Indian	80 (l)	Do.	Do.	..	..	..	..	..	..	(m) Per fort for drying stores and telephone rooms. Fire-panels and drying baskets will be replaced biennially.
9 Dehra Dun .	Station family hospital	"	40	15th Dec	Do.	..	..	..	..	..	..	
	Barracks and guard-rooms.	British	..	..	..	..	1 (b) (c)	..	..	..	..	
	Hospitals (troops)	"	..	..	..	..	..	..	..	..	..	
10 Bhamo .	Regimental married quarters.	"	..	..	..	..	..	..	..	..	..	
	Barracks (troops)	"	..	..	..	..	..	..	..	..	..	
	Barracks (troops)	Indian	..	..	..	..	..	..	..	..	..	
11 Bombay .	Barracks and Guard rooms.	British	..	..	..	..	..	..	..	..	..	
	Hospitals (troops)	"	..	..	..	..	..	..	..	..	..	
	Regimental married quarters.	"	..	..	..	..	..	..	..	..	..	
12 Burma (Lower) and also at Maymyo in Upper Burma.	Regimental libraries, reading rooms, and schools.	"	..	..	..	..	..	..	..	..	..	
	Fort in the Bombay Defence.	"	..	..	..	..	..	..	..	..	..	
	Barracks (troops)	Indian	..	..	..	..	..	..	..	..	..	
13 Barr .	Hospitals (troops and followers).	"	80 (e)	16th Mar.	14th Oct.	..	..	..	..	..	..	
	Hospitals (troops and followers).	"	80	1st Dec.	15th Feb.	..	..	..	..	..	..	
	Regimental married quarters.	British	..	15th Dec	Do.	..	..	..	..	..	..	
14 Delhi .	Hospitals (troops)	"	40	1st Dec.	Do.	..	..	..	..	..	..	
	Hospitals (troops and followers).	Indian	80	15th Dec.	Do.	..	..	..	..	..	..	
	Hospitals (troops and followers).	"	120	1st Dec	15th Mar.	..	..	..	..	..	..	



## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 35.—Scale of fuel for warming and drying—*contd.*

Item No.	Stations.	Service for which required.	British or Indian.	For warming per diem.				For drying.						Remarks.	
				Firewood.		Period.		Charcoal.		Five pane.	Drying baskets or frames.	Grates with tripods and ashpans.	Period.		
				Large fireplace.	Small fireplace.	From.	To.	Per diem.	Per mensum.				From.		To.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
17	Dibrugarh	Hospitals (troops and followers).	Indian	80	40	1st Nov.	End of Feb.	..	..	..	..	..	..	..	† 40 lbs. per diem in winter and 50 lbs. per diem in summer.
17A	Drosh	N. C. O.'s of the S. & T. Corps and N. C. O.'s of the S. & M. companies. Agents, store-keepers and hospital store-keepers. Clerks. Followers.	British Indian " " British	.. .. .. .. ..	80(h) 80(h) 80(h) 6(h) †	Nov. Do. Do. Do. ..	Feb. Do. Do. Do. 16th Mar.	..	..	..	..	..	..	(a) Except <i>Darbelling</i> where allowed from 15th October to 15th March 224 lbs per large and 112 lbs. per small fireplace, and from 16th March to 14th October 80 lbs per large and 40 lbs. per small fireplace; and <i>Sololet</i> and <i>Subetla</i> allowed from 1st December to end of February 80 lbs. per large fireplace and from 10th June to 10th September 60 lbs. per large and 30 lbs. per small fireplace.	
18	Himalayan III Stations; and also at Chertai (a)	Quarters of Assistant Surgeons. Barracks and hospitals (troops) Dagabai Detachment barracks.	" " "	160 80 160	80 40 80	16th Oct. 16th Mar. 15th Oct.	16th Mar. 14th Oct. 16th Mar.	..	..	..	..	..	..	..	(b) Except Simla where a daily issue of
19	Himalayan III Stations, excluding Abbottabad (b) also at Chertai and Kohima.	Hospitals (troops and followers).	Indian	80	40	16th Mar.	14th Oct.	..	..	..	..	..	..	..	





20	Samsa	Barracks (troops)	"	5 (c)	15th Nov.	15th Dec.	25	10%	10%	1 (A)	1st May	1st Oct.	2 mds. is allowed from 1st November to 1st March to the Indian Infantry detachment employed at the saluting battery, and the same allowance to the Indian troops and followers left at Jutogh.
21	Jandala	Followers	"	10 (c)	16th Mar.	31st Mar.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(c) At Shillong from April to September an additional annual allowance of 16,800 lbs. of coal is authorized.
22	Drainda	Barracks (troops)	"	5 (c)	16th Dec.	15th Dec.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(d) As required, but cost not to exceed Rs. 16 per annum for the hospital of the regiment of cav. alry.
23	Malakand	Followers	"	5 (c)	1st Nov.	15th Mar.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(e) Per man.
24	Shillong (c)	Hospital (troops and followers)	"	50	16th Mar.	14th Oct.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(f) On strength annually.
25	Jacobabad	Hospitals (troops)	"	160	15th Oct.	15th Mar.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(g) Per 5 men or patients.
26	Kamptee	Barracks	British	..	..	Do.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(h) Per 10 men or patients per annum.
27	Kohat	Hospitals (troops)	Indian	..	1st Dec.	Do.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(i) Per man per diem.
28	3rd (Labore) Divn. (plain stations) except Ambala.	Hospitals (troops and followers)	Indian	..	Do.	Do.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(j) Includes 10 lbs. per diem for the armament office.
29	Hanipur	Hospitals (troops and followers)	British	..	1st Nov.	End of Feb.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(k) Per company barrack room.
30	Maymye	Hospital (troops)	"	100	1st Dec.	Do.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(l) Per Regimental married quarter.
		Drying rooms in barracks.	"	60	1st Oct.	31st Mar.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	(m) For guard room and Quartermaster's stores (3 rooms).
		Do.	"	..	1st Apr.	30th Sep.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	
		Do.	"	..	..	..	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	
		Regimental followers' hospital.	Indian	100	1st Oct.	31st Mar.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	
				25	1st Apr.	30th Sep.	5 (g)	10%	10%	1 (A)	1st May	1st Oct.	

## SECTION III.

## SUPPLIES NW S. AND T. CORPS.

Table 36.—Scale of fuel for warming and drying—contd.

Item No.	Stations.	Service for which required.	British or Indian.	For warming per diem.				For drying.						Remarks.	
				FIREWOOD.		PERIOD.		CHARCOAL.		Drying baskets or frames.	Grates with tripods and ashpans.	PERIOD.			
				Large fireplace.	Small fireplace.	From.	To.	Per diem.	Per month.			From.	To.		
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
31	Meerut .	Regimental married quarters. Hospitals (troops) . Hospitals (troops and followers).	British . " . Indian .	80 80 80	40 40 40	16th Dec. Do . Do .	16th Feb. Do . Do .	.. .. ..	.. .. ..	.. .. ..	.. .. ..	.. .. ..	.. .. ..	.. .. ..	(a) For each of the two stores sanctioned for special wards.
32	Mittra .	Station family hospital.	British .	100	40	Do .	31st Jan.	..	..	..	..	..	..	..	1
33	Lucknow	Hospital (troops) .	"	80 (a)		1st Dec.	Do .	..	..	..	..	..	..	..	
34	Lucknow	Station family hospitals.	"	100	10	16th Dec.	Do .	..	..	..	..	..	..	..	
35	Cawnpore		"	100	10	16th Dec.	Do .	..	..	..	..	..	..	..	
36	Fyzabad .		"	100	10	16th Dec.	Do .	..	..	..	..	..	..	..	
37	Sitapur .	Barracks and hospitals (troops).	"	100	40	1st Dec	End of Feb	..	..	..	..	..	..	..	
			"	60	10	10th	10th Sep.	..	..	..	..	..	..	..	
38	Pachmarhl	Quarters of Assistant Surgeon	"	40	30	1st Dec	End of Feb	..	..	..	..	..	..	..	
			"	40	30	10th	10th Sep.	..	..	..	..	..	..	..	





[illegible]



## SECTION III.

## SUPPLIES BY M AND T. CORPS.

Table III.—Scale of fuel for warming and drying—*contd.*

Item No.	Stations.	Service for which required.	British or Indian.	For warming per diem.				Per drying.							Remarks.	
				Firewood.		Period.		Charcoal.		Drying baskets or frames.	Grates with tripods and ash pans.	Period.				
				Large fireplace.	Small fireplace.	From.	To.	Per diem.	Per mensum.			From.	To.			
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	
41	Baluchistan and Zhob— <i>contd.</i>	Roman Catholic Church.	..	160 (A)	80 (A)	15th Oct.	15th Mar.	..	..	..	..	..	..	..	(a) Per man.	
		Divisional and Brigade Staff Offices.	..	40 (A)	40 (A)	16th Mar.	31st Mar.	..	..	..	..	..	..	..	(b) On strength annually.	
			..	20 (A)	20 (A)	1st Oct.	14th Oct.	..	..	..	..	..	..	..	(c) Per river fort.	
			..	40 (A)	40 (A)	16th Mar.	31st Mar.	..	..	..	..	..	..	..	(d) Except Sialkot where the scale is from 1st December to 15th February.	
			..	210	210	1st Oct.	14th Oct.	..	..	..	..	..	..	..	(e) Except Sialkot where the scale is 30 lbs. per large and 40 lbs. per small fireplace respectively.	
		Ditto British Infantry (Quetta).	"	800	300	15th Oct.	15th Mar.	..	..	..	..	..	..	..	..	(f) Together with 1,804 lbs. of coke for the whole winter, subject to a maximum charge of Rs. 44 per annum for fuel and coolies.
			..	300	300	1st Oct.	14th Oct.	..	..	..	..	..	..	..	..	..
			..	..	..	..	..	..	..	..	..	..	..	..	..	..
			..	..	..	..	..	..	..	..	..	..	..	..	..	..
		42	Rangoon	Barracks.	"	..	..	..	..	..	25 (a)	10% (b)	10% (b)	..	1st May	31st Oct.
River forts.	"			..	..	..	..	..	3 (c)	1 (c)	..	..	..	Whole year.	..	..
43	Rangoon	Drying rooms in barracks.	British.	..	..	..	..	..	8 (d)	..	..	..	1st May	31st Oct.	..	





	Barracks and hospitals (troops).	Salkot Military Prison.	Hospitals (troops and followers)	Cantonment Church (Civil charges) Rawalpindi.	Divisional Staff officers (4 discharges). Rawalpindi.	Quarters of the British subordinate sites of the Supply and Transport Corps and of the Brigade Office clerks, Jhelum.	Regimental married quarters	Soldier students, Thomason College,	Hospitals (troops).	Hospitals (troops and followers)	Hospitals (troops and followers).	Station Family Hospitals.	Quarters of Assistant Surgeons.	Barracks .	Sergeant Instructors of Volunteers. {}
"	"	"	Indian	"	"	British	"	"	"	Indian	"	British	"	Indian	British
	80 (c)	40 (e)	160 (e) 800 (f)	Do. (d) Winter months. 1st Dec.	Do. (g)	Do. (h)	40 (f)	40 (g)	40	40	40	40	+ "	"	"
	16th Mar. (d)	15th Feb.	16th Mar. (d)	months.	15th Mar.	End of Feb.	16th Feb.	Do.	Do.	Do.	Do.	End of Feb.	31st Jan.	"	End of Feb.
(9) Per student.	"	"	"	"	"	"	"	"	"	"	"	"	"	"	"
(10) Twice weekly.	"	"	"	"	"	"	"	"	"	"	"	"	"	"	"
(11) Per fireplace on working days.	"	"	"	"	"	"	"	"	"	"	"	"	"	"	"
(12) Not applicable if Instructor is in receipt of consolidated rates of pay sanctioned in A. D. No. II B, dated 3rd January 1910.	"	"	"	"	"	"	"	"	"	"	"	"	"	"	"
(13) Per Regimental married quarter.	"	"	"	"	"	"	"	"	"	"	"	"	"	"	"
(14) Per man per diem.	"	"	"	"	"	"	"	"	"	"	"	"	"	"	"
+ 40 lbs. per diem in winter and 20 lbs. per diem in summer.	"	"	"	"	"	"	"	"	"	"	"	"	"	"	"

# 2nd (Rawalpindi) Divn. except Abbottabad Brigade (plane stations).

44 Roorkhee

45 Ferozpur

46 Shahjahanpur

47 Ootacamund



Oct.

Page 47, Table 32 is reconstructed as follows:—  
 (a) for rest barracks and camps

Page 48—

Table 34—

Item 13—Delete "Arkonam", "Guntakul", and "Wadi" in column 3.

Oct. Appx.

I. A. O.—1919.

Q. M. G. 17385

Q. 18-A.

Table 34.—Pages 52 and 53.

Item 55 (as amended by Oct. Appx. I. A. O.—1917) is reconstructed as follows:—

Oct. Appx.

I. A. O.—1919.

Q. M. G. 33749.

55 Mosquito curtains.  
(b).

For all regimental ranks of regular British units serving at plains stations and in the hills in India (including Burma) but excluding the following stations:—

All hill stations in the 2nd (Rawalpindi) Division, Dalhousie, Jutogh, Mussoorie, Naini Tal, Roorkee, Landour, Chakrata, Darjeeling, Lebong. (c)

1 per man.

For the wives and children of all regimental ranks of regular British units at plains stations and in the hills in India (including Burma) but excluding the following stations:—

All hill stations in the 2nd (Rawalpindi) Division, Dalhousie, Jutogh, Mussoorie, Naini Tal, Roorkee, Landour, Chakrata, Darjeeling, Lebong. (c)

1 per cot.

For officers' guard rooms

1 per officer on guard.

For the departmental warrant or non-commissioned officer performing night duty in the Bangalore Arsenal

2

For the departmental non-commissioned officer on detached duty at Duckinsore Magazine

1

For Indian troops at stations where malaria is rife. (d).

1 per man.

For public followers employed at the River Forts, Rangoon

1 per man.

1

per man.

(b) Renewed as required through fair wear and tear.

(c) In the case of men, wives and children proceeding to other hill stations, they will take with them the mosquito curtain in their possession.



Oct. Appx.

Page 46, m.

as follows:—

Oct. Appx.

I. A. O.—1919.

Q. M. G. 9579-

(16-B.)

Page 46, Table 31 is reconstructed as follows:—

Table 31.—Equipment for the Cavalry School, Saugor.

Oct. Appx.

I. A. O.—1919.

Q. M. G. 9579-

(16-B)

Item No	Articles.	For what purp.s.	Authorized proportion.
1	Section 11. Blocks, chopping, small	cook rooms	1 per cook room.
	Section 12 Stools, close, F. A.—	quarters of Br. officers other than students	2 per quarter.
2	Pans . . . . .	Commandant's office.	1 per quarter
		quarters of Br. officer students.	2 per quarter.
3	Tubs, ablution . . . . .	quarters of Br. officers other than students.	1 per quarter.
4	Wash-hand, stands— Basins . . . . .	quarters of Br. officer students.	1 per quarter.
	Dishes, soap—		
5	covers . . . . .	quarters of Br. officers other than students.	2 per quarter.
6	dishes . . . . .	quarters of Br. officers students.	1 per quarter.
7	drainers . . . . .		
8	Ewers . . . . .		
9	Trays, brush Section 13-C.	quarters of Br. officers other than students.	4 per quarter.
10	Durries (a) . . . . .	quarters of Br. officers students.	2 per quarter.
		Commandant's office	3

(a) Sizes required to be stated in demands.

19	Implements, butchers—	1
20	Stools . . . . .	2
21	Jacks, roasting . . . . .	1
22	Ladles, cooks, barrack.	1
23	Machines, mowing, small . . . . .	2
24	Machines, weighing, 14 lbs. (with weights 1 to 4 lb. or ) . . . . .	6
25	Mill, coffee (or spice) . . . . .	1
	Moulds . . . . .	1
		6

quired to be stated in demands.

(f) For cartons.

Cavalry regt. 4 per E. B. A. Ammu—

Heavy battery and E. F. A. Ammu—

(g) Per 2 camp kettles.













**SECTION III.**  
**SUPPLIES BY S. AND T. CORPS.**

Table 38.—Equipment and stores authorized for military prisons and detention barracks.

Note.—Renewed as required, except where otherwise stated.

Item No.	Articles.	Scale of Issue.
1	Bags, grocery . . . . . No.	1 For every eight cells or fraction of that number.
2	Bambs, washband, steel . . . . . "	As required; fixed by Military Work Services.
3	Baskets, small . . . . . "	As required.
4	Baskets, ration, large . . . . . "	Per two cells.
5	Brooms, hair, long handled . . . . . "	Per cell.
6	Brushes, hand, scrubbing . . . . . "	Per two cells [except at Hyderabad (Sind)]
7	Brushes, long-handled . . . . . "	1 For every eight cells or fraction of that number.
8	Buckets, G. L., with lids and lugs . . . . . "	As required.
9	Bamboos . . . . . "	Per cook-house.
10	Bricks, bath . . . . . "	Per cell.
11	Cans, milk . . . . . "	As required, where recommended by the medical authorities.
12	Chamber utensils, E. W. . . . . "	Per prison or detention barrack (except Aden)
13	Chicks . . . . . "	Per prison or detention barrack. Renewable every 10 years, if necessary.
14	Chopping blocks, small . . . . . "	1 For every eight cells or fraction of that number.
15	Clocks . . . . . "	As required.
16	Cooking utensils (a) . . . . . sets.	1 For Lucknow detention barrack only.
17	Camphor . . . . . lbs.	As required.
18	Clay, pipe . . . . . "	As required.
19	Churns, leather . . . . . No.	2 For Lucknow detention barrack only.
20	Frames, iron, for churns . . . . . "	As required.
21	Cline . . . . . lbs.	As required.
22	Jharas, cooks . . . . . No.	As required.
23	Hemp, country . . . . . lbs.	As required.
24	Knives, kitchen . . . . . No.	1 Per cook.
25	Lime, unslaked . . . . . lbs.	As required.
26	Measures, milk . . . . . No.	1 Per cook-house.
27	Hops, long handles . . . . . "	1 Per two cells (except at Thayetmyn)
28	Oil, coconut . . . . . gals.	As required.
29	Pans, privy, earthen . . . . . No.	1 Per privy seat.
30	Plates, dinner . . . . . "	1 Per cell.
31	Pokers, fire . . . . . "	7 For Quetta detention barrack only.
32	Purdahs . . . . . "	As required, when recommended by the medical authorities.
33	Paper, latrine . . . . . pkts.	As required.
34	Sheets, ration . . . . . No.	2 Per prison or detention barrack.
35	Shovels, fire . . . . . "	7 For Quetta detention barrack only.
36	Surahs, or chatties, water . . . . . "	1 Per cell.
37	Soap, country . . . . . oza.	As required.
38	Soda, washing . . . . . lbs.	As required.
39	Scissors, country . . . . . pr.	1 Per prison or detention barrack.
40	String . . . . . "	As required.
41	Trays, urinal, earthen . . . . . No.	As required.
42	Trays, ration . . . . . "	1 For every eight cells or fraction of that number. Renewable annually.
43	Tubs, G. L., without lids . . . . . "	As required; only when no bath is provided.
44	Urinals, earthen . . . . . "	As required.
45	Wicks, coconut oil . . . . . "	As required.
46	Wax, bees . . . . . lbs.	As required.
47	Ropes, well, 110 feet, for churns . . . . . No.	2 For Lucknow detention barrack.

(a) Each set consisting of 1 oval camp

2 girdles, 1 chopper and 1 ladle.

## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 39.—Showing the dandies, etc., authorized for units, etc., in cantonments.

NOTE.—The S and T. Corps will be responsible only for the supply of dandies and bearers where the Army Bearer Corps cannot find them.

Item No.	Units, etc.	Dandies with covers. (d)	Thampans.	Bearers. (e)	Remarks.
British Troops.					
1	Battery or company of R. A.	1	..	4	(a) One in use and one in reserve with the corps, or in use with its wing if detached, in which case 4 additional bearers are allowed
2	Regiment of cavalry or battalion of infantry	12 (a)	..	4	
3	Detached wing of cavalry or infantry	1	..	4	(c) Except Secunderabad and Burma Divisions. (d) To be supplied to units to which carriages, ambulance stretcher, I. P., are not issued (see Section II Table XI, item 67 A). The number of bearers to be supplied to unit in possession of carriage, ambulance stretcher, I. P., is left to the discretion of the Divisional Commander
4	Sanitaria }	1	1 (c)	4	
5	Indian Troops				
6	Battery of mountain artillery	1	..	4	(d) To be supplied to units to which carriages, ambulance stretcher, I. P., are not issued (see Section II Table XI, item 67 A). The number of bearers to be supplied to unit in possession of carriage, ambulance stretcher, I. P., is left to the discretion of the Divisional Commander
7	Regiment of cavalry or battalion of infantry	2 (a)	..	4	
8	Detached wing of cavalry or infantry	1	..	4	

Table 40.—Stores supplied annually to Remount Depôts.

Item No.	Articles.	Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.
1	2	3	4	5	6	7	8
1	Alum . . . . . lbs.	30	32	60	4	16	16
2	Ammonia, muriate . . . . .	120	123	240	10	64	64
3	Avesalferida . . . . .	30	32	60	10	16	16
4	Blankets, country . . . . . No.	400	400	600	10	100	100
5	" " for fomentations . . . . .	60	64	120	5	32	32
6	Borax . . . . . lbs.	16	16	60	2	8	8
7	Burners, lamp or lantern . . . . . No.	3	3	4	2	2	2
8	Chalk, white . . . . . lbs.	50	100	80	20	50	50
9	Coal tar . . . . .	5,000	5,560	6,560	200	1,000	1,000
10	Cocumtel . . . . .	..	..	..	..	8	8
11	Coir, fibre . . . . .	164	164	216	82	82	82
12	Cotton, cleaned . . . . .	30	30	30	10	15	15
13	Deccamell . . . . .	..	..	..	..	16	16
14	Dubbling . . . . .	300	300	400	50	200	200
15	Fat, or lard mutton . . . . .	120	123	240	20	40	40
16	Gauze . . . . . yds.	160	160	300	20	80	80
17	Ginger, dry . . . . . lbs.	60	64	120	10	32	32
18	Gum, Arabia . . . . . oz.	60	64	120	10	10	10
19	Jaggery (gur) . . . . . lbs.	40	40	80	20	10	10
20	Linseed meal . . . . .	150	160	300	80	80	80
21	Lead, ordinary, tea . . . . .	0	75	85	10	40	10
22	" red . . . . .	20	20	30	5	10	10
23	Mustard, Europe . . . . .	90	96	180	10	48	48
24	Nail, fly . . . . . No.	10	10	20	3	3	3
25	Nitre, country . . . . . lbs.	150	160	300	10	80	80
26	Nuts, soap . . . . .	60	64	120	10	32	32







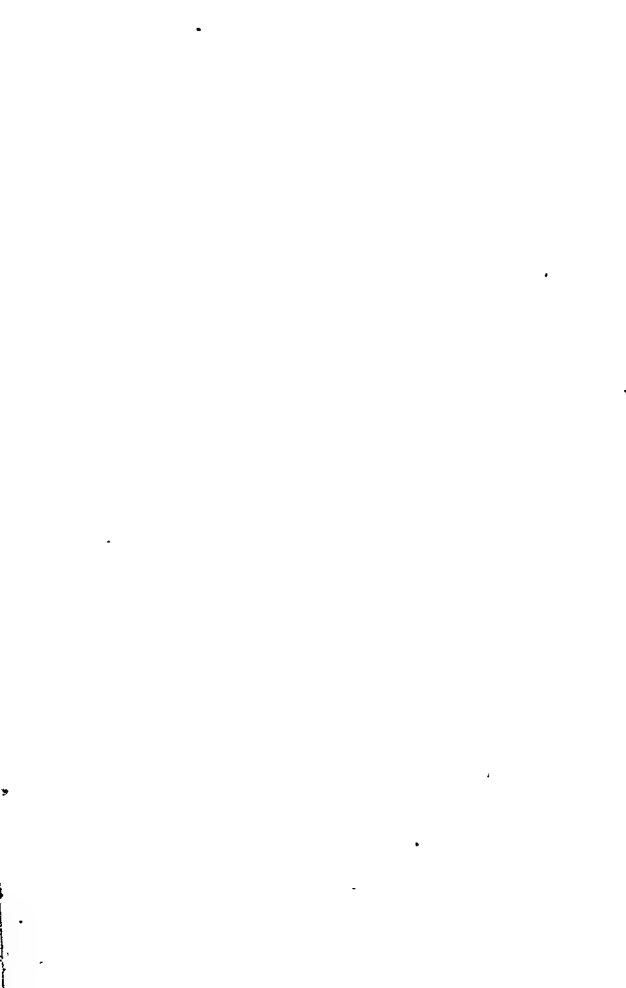
## SECTION III.

## SUPPLIES BY R. AND T. CORPS.

Table 40.—Stores supplied annually to Remount Depôts—*concl'd.*

Item No	Articles	Saharanpur	Hapur.	Mona and Sargodha	Calcutta	Hosur.	Ahmednagar.
1	2	3	4	5	6	7	8
27	Oils—						
27	Castor . . . . gals.	212	212	318	51	127	127
28	Cocanut . . . . "	11	13	22	21	81	81
29	Kerosine . . . . tuns.	180	192	360	50	98	98
30	Linseed, boiled . . gals.	22	22	33	61	11	11
31	" raw . . . . "	33	33	50	11	11	17
32	Mustard . . . . "	219	219	548	61	22	22
33	Neats foot . . . . botts	310	330	360	20	36	36
34	Neem . . . . s. ozs	206	103	103	69	69	69
35	Paint, black . . . lbs	20	20	40	5	10	10
36	Phenyle . . . . gals	25	20	30	3	24	24
37	Powder, carbolic, McDougall's lbs.	240	240	320	640	160	160
38	Resin . . . . "	50	50	50	5	25	25
39	Rum . . . . botts.	12	12	16	4	6	..
40	Scrapers, grass . . No.			As required.			
41	Skins, sheep, with wool . . "	60	60	160	4	20	20
42	Soap, carbolic, country . . lbs.	6	6	12	6	3	3
43	Soap, carbolic, Europe . . "	12	12	24	6	6	6
44	Soap, saddle, country . . tuns	70	70	90	11	60	60
45	" soft . . . . lbs.	250	250	250	50	200	200
46	" yellow . . . . bars	45	48	90	10	24	24
47	" country . . . . lbs.	60	64	120	5	32	32
48	Solder . . . . "	100	100	100	5	25	25
49	Suet, mutton . . . . "	20	20	20	10	10	10
50	Sulphate of copper . . . . "	32	20	30	2	5	5
51	Sulphur . . . . "	32	90	50	5	10	10
52	Tape, brass, measure 9 ft. . No.	1	2	3	2	2	2
53	" cotton, girth . . . yds.	150	70	100	20	50	50
54	" narrow . . . . "	150	200	200	..	80	80
55	" newar . . . . lbs	200	200	400	..	150	150
56	" woollen . . . . yds.	90	90	100	..	50	50
57	" broad . . . . lbs.	10	10	12	..	5	5
58	Thread, country . . . . "	54	60	82	10	40	40
59	" khaki . . . . "	24	24	24	10	10	10
60	" plain . . . . reels.	15	15	20	10	10	10
61	Treatle . . . . lbs.	30	32	82	10	18	18
62	Turpentine, spirits of . . . "	30	30	30	10	20	20
63	Vinegar . . . . "	30	32	60	10	16	16
64	Wax, bees . . . . "	100	100	100	5	50	50
65	Wick, lamp . . . . yds.			As required.			







## SECTION III.

## SUPPLIES BY E. AND T. CORPS.

Table 42.—Periodical and petty supplies.

em No.	Articles.	Where required and for what purpose.		Authorized proportion.
1	Alkali . . .	For painting gun carriages and mounted slides . . . . . lbs.	3	Per annum per gun carriage and mounted slide
		For R. M. L. 2.5" camel battery . . . lbs	20	Annually.
		For the care and preservation of 40-pr. R. M. L. guns on charge with heavy batteries, R. G. A. . . . . lbs.	26	Per 3 guns, carriages and limbers Annually.
		For precipitating sedimentary matter in turbid water before boiling To be supplied on recommendation of medical authorities under whose direction the alum will be used . . . . . lbs.	42	Per horse or field battery.
			37	" company, R. G. A.
			29	" mountain battery.
			26	" heavy battery.
			158	" regiment, British Cavalry
			263	" battalion, British Infantry.
2	Alum . . .	For the above purpose for rest camps and barracks— (i) for details proceeding to and from Bombay . . . . . grains (ii) for British corps and detachments marching . . . . .	13	Per diem for each British soldier halted. (b)
			..	To be met regimentally from annual allowance.
3	Bamboos . . .	For carrying urinals of British troops, Fort St. George . . . . . No. For military prisons and detention barracks . . . . .	8	Per mensem.
			..	As required.
4	Baskets, bamboo . . .	troops); and Detention Barracks, Thayetmyo . . . . . No. For Royal Artillery and Army Schools, St. Thomas' Mount. . . . . No. For conservancy establishments of British troops, Secunderabad and Burma Divisions . . . . .	2	To each sweeper per mensem.
			111	Quarterly.
			..	As required. Cost to be met from fixed allotment.
5	Baskets, cane, small.	For Aden camel battery . . . . .	..	Ditto.
		For sets of cooking utensils for British troops in use with— (i) Units, etc., having a fixed allotment (ii) Others . . . . . No.	1	Ditto.
6	Baskets, ration . . .	For military prisons or detention barracks . . . . .	..	Per 35 men quarterly.
		For time gun or instructional guns at Sanitaris . . . . .	..	As required.
		Cleaning materials, B.-L. 5" temporary heavy batteries . . . . .	108	Per B.-L. gun } Monthly. Per R. M. L. gun }
7	Bath bricks . . .	For R. M. L. 2.5" camel battery . . . . . For saluting batteries . . . . . For the care and preservation of 40-pr R. M. L. guns on charge with heavy batteries, R. G. A. . . . .	13	Annually per battery.
			1	Ditto.
			1	Per 4 guns annually.
8	Bone dust . . .	For browning arms, British and Indian troops, all services . . . . . lbs	13	Per 3 guns, carriages and limbers Annually.
			1	Biennially per 100 stand of arms.
9	Borax, refined . . .	Per set of armourer's tools issued free . . . ozs. Cavalry School, Saugor . . . . . ozs.	10	Replaced as necessary. Annually.

(a) For British N. G. Co.

(b) On indent of officer in charge of rest camp.

## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
10	Brooms	For conservancy establishments of British troops For cleaning barracks of Indian troops in Bangalore and Mysore in Lucknow in Allahabad in Lucknow	No. 2 To each sweeper per mensem. No. 24 Quarterly. As required. Cost to be met from fixed allotment. As required.
11	" bass	For kitchens of British troops where Indian cooks have been dispensed with	As required. Cost to be met from fixed allotment.
12	" with long bamboo handles.	(British troops) For barracks of British troops For 1st class gymnasia at Secunderabad, Lucknow, Poona and Ambala	No. 2 Per mensem As required. Cost to be met from fixed allotment As required.
13	Brushes, cocoanut fibre	For Aden Camel battery	As required. Cost to be met from fixed allotment.
14	Brushes, with long handles	For 1st class gymnasia at Secunderabad, Lucknow, Poona and Ambala	As required.
15	" scrubbing coir	For scrubbing barrack furniture For scrubbing barrack furniture of garrison guards (British and Indian), Aurangabad, Belgaum, Secunderabad and Burma Divisions	As required. Cost to be met from fixed allotment. No. 2 Per guard per annum.
16	" tar	For applying tar to necessary utensils, urinals, etc., Aurangabad, Belgaum, Secunderabad and Burma Divisions	No. 1 Per two utensils, etc
17	" washing	For cleaning mattresses and pillow cases— (a) Units, etc., having a fixed allotment (u) Others	As required. Cost to be met from fixed allotment. No. 20 Per 100 sets of mattress and pillow cases. (a)
18	Burners	For kerosene and vegetable oil lamps, using burners, authorized in table 24 for all services	As required. (b)
19	Byssakes, or props	For supporting tatties	1 Per tattie in use.
20	Candles	For magazine lamps in fort armaments	lb. 1 Per lamp annually.
21	Camphor	For military prisons and detention barracks	As required.
22	Carbolic acid	For preserving sponge heads of time guns and instructional guns at sanitariums For saluting batteries	oz. 1 Annually per sponge head. oz. 1 Per sponge head annually.

(a) Annually or longer if brushes remain serviceable.

(b) On the certificate of the O. C. the unit that the renewal is necessitated by fair wear and tear.







### SECTION III

**SUPPLIES BY S. AND T. CORPS.**

Table 42.—Periodical and petty supplies—contd.

[illegible]

(a) See Army Tables, Medical

(b) Competent financial authority may, when necessary, increase this scale up to 3 lbs. per square per diem.

(c) Condemned hospital clothing or bedding will be supplied in lieu when available.

(d) Or ☐ more economical empty meat tin or tin locally procurable.

## SECTION III.

## SUPPLIES BY B. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
34	Doosootie, old	For the care and preservation of 40-pr R. M. L. guns on charge with heavy batteries, R. G. A. . . . .	1b <sup>a</sup> 16
		For sanitaria for cleaning arms . . . . .	lbs 6
		For cleaning time guns or instructional guns at sanitaria . . . . .	ozs. 2
		For R. M. L. 2.5" camel battery . . . . .	lbs. 28
		Cleaning materials for 5" B. L. temporary heavy batteries . . . . .	lbs 10
		For cleaning maxim guns, harness, etc	lbs 8
		For cleaning arms, British and Indian troops, all services . . . . .	lbs. 5
		For saluting batteries . . . . .	lb 1
		For chursas (b) . . . . .	..
		" R. M. L. 2.5" camel battery . . . . .	lbs. 312
35	Dubbing . . . . .	" each 5" B. L. temporary heavy battery . . . . .	lbs 50
		" each maxim gun with tripod mounting and harness . . . . .	lbs 12
		" each machine gun at schools of musketry . . . . .	lbs. 6
		" each time gun or instructional gun [at sanitaria mounted on a travelling carriage . . . . .	lb 1
		" M. I. Saddlery and line gear at D. I. Khan, Danna, Abbotabad, Kohat, Samana and in Burma . . . . .	..
		For cleaning materials for 5" B. L. temporary heavy batteries . . . . .	yds (a) 320
		For R. M. L. 2.5" camel battery . . . . .	yds 28
		" time guns and instructional guns at sanitaria . . . . .	yds { 20
			{ 10
		For the care and preservation of 40-pr. R. M. L. guns on charge with heavy batteries, R. G. A. . . . .	yds. 64
37	Flannel . . . . .	For cleaning machine guns, harness, etc.	yds. 1
38	Gear, well, viz., bucket, leather, and rope.	For each Indian unit hospital at Nowshera . . . . .	No 1
39	Ghurrahs . . . . .	For 1st class gymnasium at Poona . . . . .	..
40	Globes, hurricane lantern.	" Sassoon Dock, Bombay . . . . .	ozs 20
		" holding water for fire purposes . . . . .	ozs 25
41	Globes, for sunlight lamp . . . . .	For hurricane lanterns authorized in Table 24 . . . . .	ozs 25
42	Glue . . . . .	For sunlight lamps used in covered gymnasia . . . . .	ozs 60
		For sanitaria for musketry instruction . . . . .	lbs. 9
		" schools of musketry . . . . .	lbs 51
43	Grates, tripod, ash-pans complete	" military prisons and detention barracks . . . . .	..
44	Grease, hot or cold weather . . . . .	" each set of armourers' tools issued free . . . . .	lb. 1
		Cavalry School, Saugor . . . . .	No. 4
		For schools of musketry . . . . .	lbs. 3

(a) Or 210 lbs. recommended clothing

(b) Castor oil may be drawn in lieu of dubbing where the chrome leather chursah is in use.





## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd*

Item No.	Articles.	Where required and for what purpose.		Authorized proportion.
45	Jars, water, or chat-tics.	For 1st class Gymnasia at Lucknow and Ambala In Secunderabad and Burma Divisions for— British and Indian guards; station staff offices; and military students, Civil Engineering College, Madras . . . . . No	3	As required. Per mensem for each service.
46	Jharans . . . . .	For detached places of arms for Indian troops, Bellary . . . . . "	1	Ditto
47	Kerosine oil tins . . . . .	For cook-house of British troops where Indian cooks have been dispensed with	..	As required Cost to be met from fixed allotment.
48	Latrines paper, pkts . . . . .	For holding water for fire purposes . . . . .	..	To be replaced when worn out by fair wear and tear, but renewals of tins that have been in use for less than eighteen month will be made only under the sanction of the competent financial authority.
49	Lime, unslaked . . . . .	For military prisons and detention barracks . . . . .	..	As required.
50	Mops . . . . .	For military prisons and detention barracks . . . . . For 1st class gymnasia at Secunderabad, Lucknow, Poona and Ambala . . . . . For barracks where authorized, and all cook-houses of British troops where Indian cooks have been dispensed with— (i) of units, etc., having a fixed allotment . . . . .	..	As required. As required. As required
51	Naphthalene . . . . .	(u) other services . . . . . For preservation of silk cartridges of time guns, also instructional guns at sanitaria . . . . . lbs	15	As required. Cost to be met from fixed allotment, Renewed when worn out.
52	Naunds . . . . .	For the preservation of the kits of Indian Army and Transport reservists . lbs- For the preservation of serge lined pack saddle pannels in store :— British cavalry regiments and Indian non-silladar cavalry regiments, . lbs British and Indian infantry battalion in possession of mobilization equipment . . . . . "	10 3	Annually per 100 cartridges, Annually per 100 kits on charge, Annually per regiment
53	Oil, common . . . . .	When supplied in lieu of tube for water-mg tatters . . . . . % For greasing punkah pulleys and friction rollers— (i) of units, etc., having a fixed allotment . . . . .	2 10	Annually per battalion Monthly on number in use.
54	" coconut . . . . .	(ii) for others . . . . . fl ozs. For thermantidotes . . . . . For lubricating well machinery in Fort Jamrud . . . . . gals. For cleaning materials for 5" R. L. temporary heavy battery . . . . . " For R. M. L. 25" camel battery . . . . . " " military prisons and detention barracks . . . . . " time guns and instructional guns at sanitaria . . . . . gals. For saluting batteries . . . . . " For the care and preservation of 40-pr. R M L guns on charge with heavy batteries, R O A . . . . . gns	2 2½ 5 1½ .. .. 3 1 2½	As required. Cost to be met from fixed allotment. Per month for each pulley and friction roller when in use. As required. From fixed allotment for unit having such allotment. Quarterly. Per battery annually. Ditto. As required Per B. L. gun per annum. Per gun annually Per 3 guns, carriages, and limbers. Annually.

## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorized proportion.
55	Oil, kerosine, ordinary.	For cleaning machine guns, harness, etc. pta.	2	Annually per gun ( $\frac{1}{2}$ pt. at schools of musketry).
		" Wells' flare lights for Fort Lockhart, gals.	48	Per annum.
		" Rappingille's dinner stoves authorised by Table LXXVII . . . pint	1	Per stove per day.
		" time guns and instructional guns at sanitaria . . . gals.	1	Per gun annually.
56	" Kerosine, 150° F. fire test.	For working the engine in the Central Workshops, Aden . . .	..	As required.
		For painting gun carriages and mounted slides . . . fl. ozs.	3}	Annually per gun carriage and mounted slides.
57	" linseed, country, boiled.	For the care and preservation of 40 pr R M L guns on charge with heavy batteries, R G A . . .	8	Per 2 guns, carriages and limbers, Annually.
		" . . . pint	$\frac{1}{2}$	Annually.
		" . . . L tem. qts.	3	Per annum.
58	" . . . raw.	For the care and preservation of 40 pr R M L guns on charge with heavy batteries, R G A . . . pints.	24	Per battery annually.
		" . . . pints.	2	Per 2 guns, carriages and limbers, Annually.
59	" heavy, minerals	For oiling earthenware troughs in the muzzles of British troops . . .	$\frac{1}{2}$	Per mensem for double compartment urinary. Cost to be met from fixed allotment.
		" . . .	1	Per mensem for single compartment urinary. Cost to be met from fixed allotment.
60	" lubricating (mineral, thin; and tallow, country).	For fire engines of— (i) Units, etc., having a fixed allotment . . .	..	As required. Cost to be met from fixed allotment.
		(ii) Others { Mineral, thin . . . gals.	$\frac{1}{2}$	Annual supply for fire-engine.
		{ Tallow, country . . . lbs.	7	
61	" seats foot	For preservation of boots and shoes in regimental stores . . .	..	As required. Cost to be met from fixed allotment.
62	" sweet	" . . . fl ozs	141	Monthly when pump is in use.
63	" vegetable.	" . . .	..	As required. Cost to be met from fixed allotment.
		Indian " for artillery practice at night. } fl ozs	2	Per night for 11 lamps all the year round
64	Paint, dry, black, lamp	For sanitaria for musketry instruction . . . lbs.	5	Annually per sanitarium.
		" schools of musketry . . .	40	" " school
		" . . .	..	Renewed as worn out.
		" . . . %	25	Monthly on number in use.
		For lines of the escort of the Resident, Hyderabad, at Secunderabad.		







## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.
66	Fans, privy, earthen—(concl'd.)	For servants' privies attached to officers' quarters and mess houses, the property of Government.	%	25 Monthly on number in use.
		For British troops undergoing musketry course at Pallaveram.		.. As required. (a)
		For privies of all other services.		
		= 1st class gymnasia at Lucknow and Ambala and latrines of Indian troops attached to the latter	%	8 Monthly on number in use.
67	Pepper, black	For preservation of silk cartridges of time guns, and instructional guns at sanitariums	lbs.	6½ Annually per 100 cartridges.
68	Pipe, clay	For cleaning materials for 5" B. L. temporary heavy battery	lbs.	24 Per battery annually.
		For military prisons and detention barracks		.. As required.
69	Quicklime	For cleaning surface drains and night urinals of British troops at Mandalay	lbs	300 Per mensem.
		For filth pits	ozs	20 Per pit daily. (b)
		= stables of the Viceroy's Body-guard while at Ballygunge or Dehra Dun	mds.	4 Per mensem.
70	Rags	For washing compartments		.. As required Cost to be met from fixed allotment.
71	Reservoirs	For kerosine and vegetable oil lamps authorised in Table 24 for all services.		.. As required. (c)
72	Resin, black	For armourers' tools issued to British units	lbs	1 Per set.
73	Scrubbers	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona		.. As required.
74	Sheeting, oil (d)	For browning arms, British and Indian troops, all services	lbs.	24 Biennially per 100 stand of arms
		For cleaning rifles	ozs	2½ Per soldier annually.
75	Soap, country	For washing mattresses and pillow cases— (i) Units, etc., having a fixed allotment		.. As required Cost to be met from fixed allotment.
		(ii) Others	ozs.	4 Quarterly, per set of mattresses and pillow cases.
		For military prisons and detention barracks		.. As required.
76	Soda, washing	For military prisons and detention barracks		.. As required
		For cook houses of British troops where Indian cooks have been dispensed with		.. As required. Cost to be met from fixed allotment.
77	Squeegees	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona	No.	2 Per annum for each place.
78	String	For military prisons and detention barracks		.. As required
79	Stuffing, coir, straw or grass.	For mattresses in use in gymnasia	mds	1 Per mattress if straw or grass is used (e) or 7½ lbs. of coir.
		For cooling and distributing drinking water		.. As required. Cost to be met from fixed allotment.
		.. military prisons or detention barracks at Sialkot, Agra, Lucknow and Aden	%	10 Monthly on the number in use.
80	Surahis	For garrison school, Fort St. George		4
		For Royal Artillery and Army schools at St Thomas' Mount	No	8 Quarterly.

(c) Cost debitable to fixed allotment in case of units, etc., having such allotment

## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorised proportion.
		For servants' privies attached to officers' quarters and mess houses, the property of Government. . . . . %	25 Monthly on number in use.
66	Fans, privy, earthen—(contd.)	.. .. . %	.. As required. (a)
		.. .. . %	8 Monthly on number in use.
67	Pepper, black	For preservation of silk cartridges of time guns, and instructional guns at sanitariums . . . . . lbs.	6½ Annually per 100 cartridges.
68	Pipe, clay	For cleaning materials for 5" B. L. temporary heavy battery . . . . . lbs.	24 Per battery annually.
		For military prisons and detention barracks . . . . .	.. As required.
69	Quicklime	For cleaning surface drains and night urns of British troops at Mandalay . . . . . lbs.	300 Per mensem.
		For fifth pits . . . . . ozs.	20 Per pit daily. (b)
		" stables of the Viceroy's Body-guard while at Ballygunge or Dehra Dun . . . mds.	4 Per mensem.
70	Rags	For washing compartments . . . . .	.. As required. Cost to be met from fixed allotment.
71	Reservoirs	For kerosine and vegetable oil lamps authorised in Table 24 for all services . . . . .	.. As required. (c)
72	Resin, black	For armourers' tools issued to British units . . . . . lbs.	½ Per set.
73	Scrubbers	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona . . . . .	.. As required.
74	Sheeting, old (d)	For brownings arms, British and Indian troops, all services . . . . . lbs.	24 Biennially per 100 stand of arms.
		For cleaning rifles . . . . . ozs.	2½ Per soldier annually.
75	Soap, country	For washing mattress and pillow cases— (i) Units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) Others . . . . . ozs.	4 Quarterly, per set of mattress and pillow cases.
		For military prisons and detention barracks . . . . .	.. As required.
76	Soda, washing	For military prisons and detention barracks . . . . .	.. As required.
77	Squeezes	.. .. .	.. As required. Cost to be met from fixed allotment.
78	String	Lucknow, Ambala and Poona . . . . . No	2 Per annum for each place.
		For military prisons and detention barracks . . . . .	.. As required.
79	Stuffing, coir, straw or grass.	For mattresses in use in gymnasia . . . mds.	1 Per mattress if straw or grass is used (e) or 71½ lbs. of coir.
		For cooling and distributing drinking water . . . . .	.. As required. Cost to be met from fixed allotment.
		" military prisons or detention barracks at Sialkot, Agra, Lucknow and Aden . . . . . %	10 Monthly on the number in use.
80	Surahis	For parson school, Fort St. George . . . . .	4 } Quarterly.
		For Royal Artillery and Army schools at St. Thomas' Mount . . . . . No	6 }

(a) Cost debitable in fixed allotment in case of units, etc., having such allotment.

(b) Not authorised where night-soil is buried under trench system.

(c) On the certificate of the S. &amp; T. C. the unit that the renewal is necessitated by fair wear and tear.

(d) When sheeting is not available domestic or other suitable material will be given in lieu, 25 yards being considered the equivalent to 24 lbs. of sheeting.

(e) To be returned to S. and T. Corps when replaced by fresh supply.



## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.		Authorised proportion.
		For servants' privies attached to officers' quarters and mess houses, the property of Government.	%	25 Monthly on number in use.
66	Fans, privy, earthen—(concl'd.)		..	As required. (a)
			%	8 Monthly on number in use.
67	Pepper, black	For preservation of silk cartridges of time guns, and instructional guns at sanitariums	lbs.	61 Annually per 100 cartridges.
68	Pipe, clay	For cleaning materials for 5" N. L. temporary heavy battery	lbs.	24 Per battery annually.
		For military prisons and detention barracks	..	As required.
69	Quicklime	For cleaning surface drains and night urns of British troops at Mandalay	lbs.	300 Per mensem.
		For fifth pits	ozs.	20 Per pit daily. (b)
		For stables of the Viceroy's Body-guard while at Ballygunge or Dehra Dun	mds.	4 Per mensem.
70	Rags	For washing compartments	..	As required. Cost to be met from fixed allotment
71	Reservoirs	For kerosine and vegetable oil lamps authorised in Table 24 for all services	..	As required. (c)
72	Resin, black	For armourers' tools issued to British units	lbs.	1 Per set.
73	Scrubbers	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona	..	As required
74	Sheeting, oil (d)	For brownings arms, British and Indian troops, all services	lbs.	24 Biennially per 100 stand of arms
		For cleaning rifles	ozs.	2½ Per soldier annually.
75	Soap, country	For washing mattress and pillow cases—(i) Units, etc., having a fixed allotment	..	As required. Cost to be met from fixed allotment.
		(ii) Others	ozs.	4 Quarterly, per set of mattress and pillow cases.
		For military prisons and detention barracks	..	As required.
76	Soda, washing	For military prisons and detention barracks	..	As required.
		For cook-houses of British troops where Indian cooks have been dispensed with	..	As required. Cost to be met from fixed allotment.
77	Squeezes	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona	No.	2 Per annum for each place
78	String	For military prisons and detention barracks	..	As required.
79	Stuffing, coir, straw or grass.	For mattresses in use in gymnasia	mds.	1 Per mattress if straw or grass is used (e) or 71½ lbs. of coir.
80	Surahis	For cooling and distributing drinking water	..	As required. Cost to be met from fixed allotment.
		For military prisons or detention barracks at Sialkot, Agra, Lucknow and Aden	%	10 Monthly on the number in use.
		For parson school, Fort St. George	No.	4 Quarterly.
		For Royal Artillery and Army schools at St. Thomas' Mount	..	6

(a) Cost debitable to fixed allotment in case of units, etc., having such allotment.

(b) Not authorised where night-soil is buried under trench system.

(c) On the certificate of the O. O. the unit that the renewal is necessitated by fair wear and tear.

(d) When sheeting is not available doosoots or other suitable material will be given in lieu, 25 yards being considered the equivalent to 24 lbs. of sheeting.

(e) To be returned to S. and T. Corps when replaced by fresh supply.



## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
		(For servants' privies attached to officers' ) % 25	Monthly on number in use.
66	Pans, privy, earth- en—(concid.)	attached to the latter. % 8	As required. (a) Monthly on number in use.
67	Pepper, black	For preservation of silk cartridges of time guns, and instructional guns at sani- taries lbs. 61	Annually per 100 cartridges.
68	Pipe, clay	For cleaning materials for 5" B. L. tem- porary heavy battery lbs. 24	Per battery annually.
		For military prisons and detention barracks ..	As required.
69	Quicklime	For cleaning surface drains and night urnals of British troops at Mandalay lbs 300	Per mensem.
		For filth pits ozs. 20	Per pit daily. (b)
		" stables of the Viceroy's Body-guard while at Ballygunge or Dehra Dun mds. 4	Per mensem.
70	Rags	For washing compartments ..	As required. Cost to be met
71	Reservoirs	For kerosine and vegetable oil lamps authorised in Table 24 for all services ..	from fixed allotment.
72	Resin, black	For armourers' tools issued to British units lbs 1	As required (c) Per set.
73	Scrubbers	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona ..	As required.
74	Sheeting, old (d)	For brownng arms, British and Indian troops, all services lbs. 24	Biennially per 100 stand of arms.
		For cleaning rifles ozs. 2½	Per soldier annually.
75	Soap, country	For washing mattress and pillow cases— (i) Units, etc., having a fixed allotment ..	As required. Cost to be met from fixed allotment.
		(ii) Others ozs. 4	Quarterly, per set of mattress and pillow cases.
		For military prisons and detention barracks ..	As required.
76	Soda, washing	For military prisons and detention barracks ..	As required
77	Squeegees	For cook-houses of British troops where Indian cooks have been dispensed with ..	As required. Cost to be met from fixed allotment.
78	Siring	For 1st class gymnasia at Secunderabad, Lucknow, Ambala and Poona No. 2	Per annum for each place.
79	Stuffing coir, straw or grass.	For military prisons and detention barracks ..	As required.
		For mattresses in use in gymnasia mds. 1	Per mattress if straw or grass is used (e) or 71½ lbs. of coir.
80	Surahis	For cooling and distributing drinking water ..	As required. Cost to be met from fixed allotment.
		" military prisons and detention barracks at Sialkot, Agra, Lucknow and Aden % 10	Monthly on the number in use.
		For garrison school, Fort St. George No. 4	Quarterly.
		For Royal Artillery and Army schools at St. Thomas' Mount .. 6	

(a) Cost debitable to fixed allotment in case of units, etc., having such allotment.

(b) Not authorised where night-soil is buried under trench system.

(c) On the certificate of the O. C. the unit that the renewal is necessitated by fair wear and tear.

(d) When sheeting is not available doosodie or other suitable material will be given in lieu, 25 yards being considered the equivalent to 24 lbs. of sheeting.

(e) To be returned to S. and T. Corps when replaced by fresh supply.

## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
81	Tar (c).	For coating privy utensils in use— (i) For units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) For all other services where utensils are supplied by the State. . . . .	6 Per mensem for each earthen utensil.
		For special pattern urinals used in lines of British troops at Quetta . . . . . lbs.	8 Per mensem for each iron utensil.
		For coating exterior of Crowley, Bradley and other pattern filth carts— (i) For units, etc., having a fixed allotment . . . . .	10 Per mensem for each wooden utensil.
82	Tatties . . . . .	(ii) For others . . . . . lbs.	2 Per urinal per mensem.
		For barracks, etc., and for thermantidotes . . . . .	.. As required. Cost to be met from fixed allotment.
		For places of public worship for which tatties were authorized prior to December 1870 . . . . .	4 Quarterly per cart.
		.. . . .	.. As may be fixed by Standing Barrack Committee.
83	Tin pots (1 pint) . . . . .	For garrison school at Fort St. George No. . . . .	4 } Quarterly.
		„ R. A. and Army schools, St. Thomas' Mount . . . . .	4 }
84	Trays, earthen . . . . .	For 1st class gymnasia at Lucknow and Ambala . . . . . %	8 Monthly on number in use.
		For urinals— (i) Of units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) Other services . . . . . %	8 Monthly on number in use. For single urinals as required.
85	„ iron . . . . .	For iron urinals where used . . . . .	.. Renewed as worn out. Cost to be met from fixed allotment if in receipt of such allotment.
86	Tube, G. I., without lids, naunds or half casks.	For holding water for watering tatties. . No.	1 Per 2 tatties if close together, otherwise 1 per tattie.
87	Unguent (c) (grease 2 parts, tar 1 part).	For conservancy carts (old pattern) and water carts of— (i) Units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) Others . . . . . ozs.	8 Monthly per pair of wheels of conservancy carts.
		For Crowley, Bradley and other pattern filth and rubbish carts of— (i) Units, etc., having a fixed allotment . . . . .	8 Monthly per water cart.
88	Unguent (a) (b) (c).	(ii) Others . . . . .	.. As required. Cost to be met from fixed allotment.
		(i) Units, etc., having a fixed allotment . . . . .	7 Quarterly per cart for coating interior.
		(ii) Others . . . . .	1 Monthly per cart.

(a) For interior of filth carts in proportion of pitch 5 lbs. and tar 2 lbs.

(b) For wheels in proportion of soap 18 ozs. and tar 4 ozs.

(c) Heavy mineral oil may, if desired, be drawn in lieu of tar or unguent; 15½ gals. ozs. of heavy mineral oil being reckoned as the equivalent of 1 lb. of tar or 1 lb. of unguent.





## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
81	Tar (c).	For coating privy utensils in use— (i) For units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) For all other services where utensils are supplied by the State. . . . .	6 Per mensem for each earthen utensil.
			8 Per mensem for each iron utensil.
			10 Per mensem for each wooden utensil.
82	Tatties . . . . .	For special pattern urinals used in lines of British troops at Quetta . . . . . lbs.	3 Per urinal per mensem.
		For coating exterior of Crowley, Bradley and other pattern filth carts— (i) For units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) For others . . . . . lbs.	4 Quarterly per cart.
		For barracks, etc., and for thermantidotes For places of public worship for which tatties were authorised prior to December 1870 . . . . .	.. As may be fixed by Standing Barrack Committee.
83	Tin pots (1 pint) . . . . .	For garrison school at Fort St. George . . . . . No.	4 } Quarterly.
		„ R. A. and Army schools, St. Thomas' Mount . . . . . „	4 }
		For 1st class gymnasias at Lucknow and Ambala . . . . . %	3 Monthly on number in use.
		For urinals— (i) Of units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
84	Trays, earthen . . . . .	(ii) Other services . . . . . %	3 Monthly on number in use.
			For single urinals as required.
85	„ iron . . . . .	For iron urinals where used . . . . .	.. Renewed as worn out. Cost to be met from fixed allotment if in receipt of such allotment.
86	Tubs, G. I., without lids, naunds or half casks.	For holding water for watering tatties. . . . . Nos.	1 Per 2 tatties if close together, otherwise 1 per tattia.
87	Unguent (c) (grease 2 parts, tar 1 part).	For conservancy carts (old pattern) and water carts of— (i) Units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) Others . . . . . ozs.	3 Monthly per pair of wheels of conservancy carts.
			3 Monthly per water cart.
88	Unguent (a) (b) (c).	For Crowley, Bradley and other pattern filth and rubbish carts of— (i) Units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) Others . . . . . lbs (a)	7 Quarterly per cart for coating interior.
			1 Monthly per cart.

(a) For interior of filth carts in proportion 111 pitch 5 lbs. and tar 2 lbs.

(b) For wheels in proportion of soap 12 ozs. and tar 4 ozs.

(c) Heavy mineral oil may, if desired, be drawn in lieu of tar or unguent; 15½ gals. ozs. of heavy mineral oil being reckoned as the equivalent of 1 lb. of tar or 1 lb. of unguent.



**SECTION III.**  
**SUPPLIES BY S. AND T. CORPS.**

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorised proportion.
81	Tar (c).	For coating privy utensils in use— (i) For units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) For all other services where utensils are supplied by the State. . . . .	6 Per mensem for each earthen utensil.
			8 Per mensem for each iron utensil.
			10 Per mensem for each wooden utensil.
82	Tatties . . . . .	For special pattern urinals used in lines of British troops at Quetta . . . lbs.	2 Per urinal per mensem.
		For coating exterior of Crowley, Bradley and other pattern filth carts— (i) For units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) For others . . . . . lbs.	4 Quarterly per cart.
			.. As may be fixed by Standing Barrack Committee.
83	Tin pots (1 pint) . . . . .	For barracks, etc., and for thermantidotes . . . . .	.. Ditto.
		For places of public worship for which tatties were authorised prior to December 1870 . . . . .	..
		For garrison school at Fort St. George . No.	4 } Quarterly.
		„ R. A. and Army schools, St. Thomas' Mount . . . . . „	4 }
84	Trays, earthen . . . . .	For 1st class gymnasia at Lucknow and Ambala . . . . . %	8 Monthly on number in use.
		For urinals— (i) Of units, etc., having a fixed allotment . . . . .	.. As required. Cost to be met from fixed allotment.
		(ii) Other services . . . . . %	8 Monthly on number in use.
			For single urinals as required.
85	„ iron . . . . .	For iron urinals where used . . . . .	.. Renewed as worn to be met from fixed allotment.
86	Tubs, G. I., without lids, naunds or half casks.	For holding water for watering tatties. . No.	1 Per 3 tatties & otherwise.
87	Unguent (c) (grease 2 parts, tar 1 part).	For conservancy carts (old pattern) and water carts of— (i) Units, etc., having a fixed allotment . . . . .	
		(ii) Others . . . . .	
88	Unguent (a) (b) (c).	For Crowley, Bradley and other filth and rubbish carts of— (i) Units, etc., having a . . . . .	
		(ii) Others . . . . .	

(a) For interior of filth carts in proportion of  
(b) For wheels in proportion of soap 15 cwt.  
(c) Heavy mineral oil may, if desired, be counted  
equivalent of 1 lb. of tar or 1 lb. of unguent.





## SECTION III.

## SUPPLIES BY S. AND T. CORPS.

Table 42.—Periodical and petty supplies—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	
89	Unguent	For ambulances in regimental charge of— (i) Units, etc., having a fixed allotment . . . . . (ii) Others . . . . . ozs.	..	As required. Cost to be met from fixed allotment.
90	Urinals, iron . . . . .	For all services where authorized . . . . .	8	Per vehicle monthly.
			..	As required. Cost to be met from fixed allotment if such received.
			20	Monthly on number in use.
91	Urinals, earthen	For barracks and buildings of— (i) Units, etc., having a fixed allotment . . . . . (ii) For 1st class gymnasia at Ambala and Lucknow . . . . . (iii) Others . . . . . %	..	As required. Cost to be met from fixed allotment.
			8	Monthly on number in use. For single urinals as required.
92	Wash-hand basins, earthen.	For R. A. and army schools, St. Thomas' Mount . . . . . No.	6	Quarterly.
93	Wax, bees . . . . .	For schools of musketry . . . . . lbs. For military prisons and detention barracks . . . . .	1	Annually per machine gun in use.
			..	As required.
94	Whiting, country . . . . .	For sanitarium for musketry instruction . . . . . lbs. " schools of musketry . . . . . lbs.	50 402	Annually per sanitarium. " school (804 lbs. at Satara).
95	Wicks, 8" long . . . . .	For Rippingule's dinner stoves, authorized by Table 31 . . . . .	1	Per stove quarterly. Cost to be met from allotment.
96	" cotton	For the bulls'-eye lanterns in use with— guards of British units . . . . . and with— British mountain batteries . . . . . Indian " . . . . . for artillery practice at night . . . . . ozs.	..	As required. Cost to be met from fixed allotment.
			3	Monthly.
97	" for solar lamps.	For lamps in use in Grant Medical College, Bombay . . . . . No.	1	Per lamp, every fourth night if necessary.

(a) Heavy mineral oil may, if desired, be drawn in lieu of tar or unguent; 16 fluid ozs. of heavy mineral oil being reckoned as the equivalent of 1 lb. of tar or 1 lb. of unguent.

**SECTION IV.**  
**SUPPLIES BY M. W. S. or P. W. D.**

**Table 12.—Equipment for barracks—general scale.**

*Note 1.—The scale is for British troops unless otherwise stated.*

*II.—The scale for staff sergeants of British units is also applicable to staff sergeants with volunteer units, in departmental employ and station butchers occupying government quarters.*

*III.—In the Southern Army furniture is allowed for the Lieutenant General's escort and guard on the scale for other Indian guards. Soldier musicians of the band of His Excellency the Governor of Bombay on the scale allowed for British troops.*

Item No.	Articles.	Scale.
1	Boards, inventory, notice and order . . . . .	According to requirements.
1.1	Boards, black 4' x 3' and easels (d) . . . . .	1 Per sanitarium for mnaketry instruction.
2	Boxes, lit . . . . .	1 per unmarried warrant officer (non-departmental), schoolmaster, schoolmistress, N. C. O. and private.
3	Carts, water . . . . .	2 per married warrant officer (non-departmental), schoolmaster, N. C. O. and private.
4	Chairs, barrack . . . . .	As required, if water supply fails.
5	Chairs, cane bottomed . . . . .	2 per single warrant officer (non-departmental), sergeant, schoolmaster, schoolmistress.
6	Chairs, easy . . . . .	3 per married warrant officer (non-departmental), schoolmaster, schoolmistress, N. C. O. and private.
7	Cots, iron, trestle . . . . .	1
8	Forms without backs, 5' (lecture-room) . . . . .	1 an odd number.
9	" " 10' . . . . .	2 per 5 men or less attending lectures at one time.
10	Gratings, 2' x 2' . . . . .	2 per plunge bath.
11	Gratings . . . . .	1 per ablution room.
12	Harness-racks (artillery harness) . . . . .	As required for temporary harness rooms.
13	Jumps with 2 poles each (temporary barrack buildings) . . . . .	As required.
14	Ladders, bamboo . . . . .	8 per fire engine for other than thatched barracks.
15	" " fire 14", G. I. wire rope, with bamboo . . . . .	15 " " for thatched barracks.
16	" " treads . . . . .	For thatched roofs at 1 per 30 running feet of roof.
17	" " lamp . . . . .	Extra bamboo ladders as required.
18	Padlocks and keys for lit boxes (a) . . . . .	1 per barrack.
19	Padlocks, with duplicate keys . . . . .	1 per unmarried warrant officer (non-departmental), schoolmaster, schoolmistress, N. C. O. and private.
20	Punkah fringes, 18" deep, ropes and canes (b) . . . . .	2 per married warrant officer (non-departmental), schoolmaster, N. C. O. and private.
21	Racks with drawers (quartermaster's stores) . . . . .	1 set per lit box for holding pouch ammunition of British and Indian troops.
22	" " without drawers . . . . .	As required in all public quarters except liquor bars.
23	Racks, wooden for laundries— For dirty clothing room . . . . .	7 per regt. of cav., or battn. of infy.
24	For making-up room . . . . .	5 per head quarters wing of cav. and infy.
25	Skittles (pins and balls) (c) . . . . .	3 per sanitarium.
26	Stools, 2' high . . . . .	2 per detached wing of cav. and infy.
27	Tables, 1' x 2' 10", B. F. No. 1 . . . . .	1 per battery or coy. of artillery.
28	Tables for laundries— For dirty clothing room . . . . .	For units for whom laundries are provided. (For details, see Type plan, No. 74 B. 1. series.)
29	For making-up room . . . . .	1 set per skittle alley.
		1 per private ablution room.
		1 per British artificer employed in saddler's shop.
		1 per warrant officer (non-departmental), schoolmaster, schoolmistress, sergeant and married man.
		For cavalry and infantry regiment for whom laundries are provided.
		1 per unit, for other units for whom laundries are provided.
		For all units for whom laundries are provided. (For details, see Type plan No. 74 B. 1. series.)

(a) A padlock and key will be issued to each unmarried soldier on arrival or enlistment in India, and will thereafter be maintained at his own expense.

A married soldier on arrival in India will receive two padlocks and keys and similarly maintain them.

A single soldier on marriage in India will receive an additional padlock and key and similarly maintain them.

(b) Washed at the expense of the unit if required.

(c) Maintained at expense of and after first issue.

(d) Three black boards and easels are allowed to the M. W. S. A. Company at Katojgar for instructional purposes.







**SECTION IV.**  
**SUPPLIES BY M. W. N. or P. W. D.**

Table 43.—Equipment for barracks—general scale—*contd.*

Item No.	Articles.	Scale.
27	Thermantidotes . . . . .	...
28	Trestles, iron (store rooms of British and Indian troops)	As determined by Standing Barrack Committee.
29	Tubs, H. I., with lugged covers, padlocks and keys, and wooden stands . . . . .	As required.
30	Tubs, G. I., with lids . . . . .	1 per building in the lines of British corps, except at Aden, in which a supply for drinking water is required, but where a pipe supply is laid on to barracks these tubs are authorised only when it is necessary to sterilise the drinking water before use.
31	Wash-stand . . . . .	4 per company R. G. A. and 18 per batt'n, British Infy, at Aden for the storage of the daily ration of condensed water.
32	Wrenches . . . . .	1 per married warrant officer (non departmental), schoolmaster, n. c. o., and private.
		2 per battery or coy. R. A., or coy. of infy.
		4 per squadron of cavy.
		1 per 50 men at sanitarium.
	<i>For armourers' shops, British and Indian troops at all stations and sanitarium</i>	
33	Almirah, with padlock and key . . . . .	1
34	Arm-racks, for 80 or 100 stand of arms . . . . .	1
35	Bench, 22" high, 3' wide, with fittings for 2 vices and lathe . . . . .	1
36	Blocks, wood, anvil . . . . .	1
37	Frames, bellows . . . . .	1
38	Racks for tools, above bench . . . . .	1
39	Shelf for tools, above racks . . . . .	1
	<i>For temperance rooms for units in barracks, excluding sanitarium</i>	
40	Almirahs . . . . .	1
41	Cupboards . . . . .	1
42	Forms, with backs, 5' . . . . .	8
43	Tables, iron trestle, 5' x 2' 6", B. F., No. 6. . . . .	28(a)
		14(a)
	<i>For writing and other purposes in barrack rooms where combined dining halls and cookhouses are provided in the lines.</i>	
44	Forms, without backs, W' . . . . .	2
45	Tables, iron trestle, 5' x 2' 6", B. F., No. 6 . . . . .	4
		1
		2
	<i>For temperance rooms at sanitarium.</i>	
46	Almirahs . . . . .	1
47	Cupboards . . . . .	1
48	Forms with backs, 5' . . . . .	14
49	Tables, iron trestle, 5' x 2' 6", B. F., No. 6 . . . . .	7
	<i>For workshops.</i>	
50	Benches . . . . .	...
51	" with vices affixed . . . . .	1
52	Blocks, anvil 2½ cwt. (or 2½ cwt) . . . . .	1
53	Boards, cutting . . . . .	1
54	Composing frames . . . . .	...
55	Frames, bellows . . . . .	1
56	Imposing table, with slab . . . . .	...
57	Tables . . . . .	...

(a) When regiments are divided a proportion of furniture to be given to each wing.

## SECTION IV.

## SUPPLIES BY M. W. B. or P. W. D.

Table 41.—Equipment for orderly, reading, and court-martial rooms, libraries, and sergeants' messes.

NOTE.—The scale is for British troops unless otherwise stated.

SCALE PER															
ORDERLY ROOM.															
Item No.	Articles.	3 or more batteries or companies, R. A.	2 or more batteries or companies, R. A.	Battery or company, R. A.	Regiment of British Cavalry	Battalion of British Infantry.	Detached wing of British Cavalry or Infantry.	Detachment of British Cavalry or Infantry under a wing.	Sanitaria of less than 200 men.	Sanitaria of over 200 men.	Library.	Reading-room.	Sergeants' mess.	Court-martial room.	REMARKS.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
1	Boards, inventory . No.	..	..	..	..	..	..	..	..	..	..	..	..	..	As required.
2	Bookcases, library " patt.	..	..	..	..	..	..	..	..	..	(a)	..	..	..	..
3	Chairs, barrack ..	..	..	..	..	..	..	..	..	..	..	..	(b)	..	..
4	.. cane bottomed ..	3	3	3	3	3	3	3	3	3	..	..	..	8(c)	..
5	Cupboards ..	..	..	..	..	..	..	..	..	..	..	..	..	1	..
6	Forms, with backs, 5' ..	8	4	2	8	8	4	2	2	4	(d)	(d)	..	..	If no fixed cupboards in walls of building.
7	Ladders, lamp ..	..	..	..	..	..	..	..	..	..	..	..	..	..	One per building
8	Punkah fringes, 18" deep ropes and canvas (g).	..	..	..	..	..	..	..	..	..	..	..	..	..	As required.
9	Receptacles, large, for wet refuse (for plains stations).	..	..	..	..	..	..	..	..	..	..	..	2(e)	..	..
10	Receptacles, 6th, large (for plains stations).	..	..	..	..	..	..	..	..	..	..	..	1	..	..
11	Receptacles, small, for wet refuse (for hill stations).	..	..	..	..	..	..	..	..	..	..	..	2(f)	..	..
12	Receptacles, small, for dry refuse (for plains and hill stations).	..	..	..	..	..	..	..	..	..	..	..	1	..	Per cookhouse.
13	Receptacles, small (Bradley pattern, for hill stations).	..	..	..	..	..	..	..	..	..	..	..	1	..	..
14	Tables, iron trestle, 5' x 2' 6", B. F. No. 6.	4	2	2	4	4	2	2	2	2	(e)	(e)	(f)	2(c)	..
15	Tables, 5' x 2' 10", B. F. No. 1	..	..	..	..	..	..	..	..	..	..	..	..	1(c)	..
16	Tables, cook-house, 3' x 2', B. F. No. 3 (A).	..	..	..	..	..	..	..	..	..	..	..	1	..	..

(a) One per battery or company, R. A., wing of British cavalry or infantry and sanitarium, 2 per regiment, British cavalry or infantry (b) One per number of men. (c) When located in buildings constructed for the purpose. (d) Two superficial feet per man. Number of men to be calculated at rate of 15 superficial feet of space per man. (e) Three superficial feet per man for whom there is space, calculated at 15 superficial feet of space per man. (f) One running foot per number of men. (g) Washed at the expense of the unit if required. (A) Tables of smaller dimensions will be provided for use in those cases in which Tables, 5' x 2', cannot be conveniently issued. (i) Per cookhouse sink.





#### SECTION IV.

SUPPLIES BY H. W. S or P. W. D.

**Table 45.—Equipment for cookhouses and messes, rank and file.**

NOTE.—The scale is for British troops unless otherwise noted.

Item No.	Articles.		Scale
1	Boards, inventory . . . . .	...	As required.
2	Cupboards . . . . .	{ 1	per mess, rank and file } Unless cupboards are fixed in walls.
3	Forms, without backs, 5'	{ 3	per cookhouse.
4	Receptacles, large, for dry refuse (for plains stations)	{ 3	per 6 men or less.
■	Receptacles, small, for dry refuse (for plains stations).	{ 1	per cookhouse or kitchen for 65 to 128 men
■	Receptacles, small, for dry refuse (for hill stations)	{ 2	per cookhouse or kitchen for 129 to 248 men
7	Receptacles, small, for dry refuse (for plains and hill stations).	{ 1	per cookhouse or kitchen for 249 men or less.
8	Receptacles, large, for wet refuse (for plains stations).	{ 1	per cookhouse or kitchen for 64 men or less.
9	Receptacles, small, for wet refuse (for plains and hill stations)	{ 2	per cookhouse or kitchen for 65 to 128 men.
10	Receptacles, small, for wet refuse (for hill stations)	{ 4	per cookhouse or kitchen for 208 to 248 men.
11	Slop-pails (special pattern) . . . . .	1	per cookhouse for regimental warrant officers, staff sergeants, and officers' quarters and mess houses when Government property
12	Stools, 2' high . . . . .	{ 2	per sink for cookhouses of single men and officers' messes if Government property.
13	Tables, iron, trestle, 5' x 2' 6", H F No. 6 . . . . .	{ 1	per 3 families for cookhouses of married sergeants and rank and file.
14	" 3' x 2' B. F., No. 3 (a) . . . . .	1	" " " " " " " " " " " "
		2	" " " " " " " " " " " "
		3	" " " " " " " " " " " "
		4	" " " " " " " " " " " "
		5	" " " " " " " " " " " "
		6	" " " " " " " " " " " "
		7	" " " " " " " " " " " "
		8	" " " " " " " " " " " "
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		13	" " " " " " " " " " " "
		14	" " " " " " " " " " " "
		15	" " " " " " " " " " " "
		16	" " " " " " " " " " " "
		17	" " " " " " " " " " " "
		18	" " " " " " " " " " " "
		19	" " " " " " " " " " " "
		20	" " " " " " " " " " " "
		21	" " " " " " " " " " " "
		22	" " " " " " " " " " " "
		23	" " " " " " " " " " " "
		24	" " " " " " " " " " " "
		25	" " " " " " " " " " " "
		26	" " " " " " " " " " " "
		27	" " " " " " " " " " " "
		28	" " " " " " " " " " " "
		29	" " " " " " " " " " " "
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		34	" " " " " " " " " " " "
		35	" " " " " " " " " " " "
		36	" " " " " " " " " " " "
		37	" " " " " " " " " " " "
		38	" " " " " " " " " " " "
		39	" " " " " " " " " " " "
		40	" " " " " " " " " " " "
		41	" " " " " " " " " " " "
		42	" " " " " " " " " " " "
		43	" " " " " " " " " " " "
		44	" " " " " " " " " " " "
		45	" " " " " " " " " " " "
		46	" " " " " " " " " " " "
		47	" " " " " " " " " " " "
		48	" " " " " " " " " " " "
		49	" " " " " " " " " " " "
		50	" " " " " " " " " " " "
		51	" " " " " " " " " " " "
		52	" " " " " " " " " " " "
		53	" " " " " " " " " " " "
		54	" " " " " " " " " " " "
		55	" " " " " " " " " " " "
		56	" " " " " " " " " " " "
		57	" " " " " " " " " " " "
		58	" " " " " " " " " " " "
		59	" " " " " " " " " " " "
		60	" " " " " " " " " " " "
		61	" " " " " " " " " " " "
		62	" " " " " " " " " " " "
		63	" " " " " " " " " " " "
		64	" " " " " " " " " " " "
		65	" " " " " " " " " " " "
		66	" " " " " " " " " " " "
		67	" " " " " " " " " " " "
		68	" " " " " " " " " " " "
		69	" " " " " " " " " " " "
		70	" " " " " " " " " " " "
		71	" " " " " " " " " " " "
		72	" " " " " " " " " " " "
		73	" " " " " " " " " " " "
		74	" " " " " " " " " " " "
		75	" " " " " " " " " " " "
		76	" " " " " " " " " " " "
		77	" " " " " " " " " " " "
		78	" " " " " " " " " " " "
		79	" " " " " " " " " " " "
		80	" " " " " " " " " " " "
		81	" " " " " " " " " " " "
		82	" " " " " " " " " " " "
		83	" " " " " " " " " " " "
		84	" " " " " " " " " " " "
		85	" " " " " " " " " " " "
		86	" " " " " " " " " " " "
		87	" " " " " " " " " " " "
		88	" " " " " " " " " " " "
		89	" " " " " " " " " " " "
		90	" " " " " " " " " " " "
		91	" " " " " " " " " " " "
		92	" " " " " " " " " " " "

(a) See footnote (A) to Table 41.

## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D

Table 16.—Equipment for quarters of provost sergeant and assistant warder at Aden, (including naval cells and guard detention rooms) military prisons and detention barracks, guard and barrack detention rooms.

NOTE.—The scale is for British troops unless otherwise stated.

Item Number	Articles	Guard room	Provost's Guard room.	MILITARY PRISONS AND DETENTION BARRACKS												Quarters of provost sergeant and assistant warder at Aden.	REMARKS.
				Set of detention rooms.													
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
1	Almirah, large . . . .			1	1	1	1	1	1	1	1	1	1	1	1		
2	Almirahs, small for books			1	1	1	1	1	1	1	1	1	1	1	1		
3	Apparatus, hot water				1	1			1								
4	Benches, workshop, 14' x 4'																
5	" " " 14' x 4'																
6	Bins, rubbish																
7	Blackboards and easels .			1	1	1	1	1	1	1	1	1	1	1	1		
8	Boards, inventory, notice, order, etc	(a)	(1)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a) As required.
9	Boxes, coal, small																
10	" " " " "			1	1	1	1	1	1	1	1	1	1	1	1	1	
11	Carts, water																
12	" " " " " (Crowley, Bradley or other suitable pattern)																
13	Carts, rubbish																
14	Carts, cookhouse water																
15	Chains, padlocks and keys	(c)	1														(b) Also for use in provost sergeant's quarters
16	Chairs, barrack	(d)															(c) Each guard room of British and Indian corps in which regimental treasure chest is kept.
17	" " cane bottomed		6														(d) One allowed for each Indian officer in garrison guard rooms.
18	Charpoy	(e)															(e) One allowed for each Indian officer on garrison guard and for Indian troops in Fort Alibabad
19	Commodore		1														
20	Cots, trellis, complete	(f)															(f) Allowed for guard rooms of British corps in proportion of one for each man on guard and for Indian troops furnishing guards at the following stations:—
21	Cots, newar (with mosquito poles and frames)		1														1st, 2nd and 3rd Divisions—Fort Govindgarh; the Fort and Government House at Lahore; Murree; the mobilization godowns at Peshawar and the Commandant-in-Chief's residence at Simla.
22	Couches																
23	Cupboards			3	2	2	3	1	2	3	1	1	1	6			7th and 8th Divisions—Agra Fort, Cawnpore; Dacca; Dum Dum, Gun Carriage Factory, Jabalpur, Fort Fata; Lahore, Nos III and IV Redoubts, Lucknow.
24	Dressers, small																
25	Forms, without backs, E'	(g)		12	6	8	11	6	8	12	4	2	30	(j) 12			

(b) Also for use in provost sergeant's quarters  
 (c) Each guard room of British and Indian corps in which regimental treasure chest is kept.  
 (d) One allowed for each Indian officer in garrison guard rooms.  
 (e) One allowed for each Indian officer on garrison guard and for Indian troops in Fort Alibabad

(f) Allowed for guard rooms of British corps in proportion of one for each man on guard and for Indian troops furnishing guards at the following stations:—  
 1st, 2nd and 3rd Divisions—Fort Gorindgarh; the Fort and Government House at Lahore; Murree; the notification godowns at Peshawar and the Command-in-Chief's residence at Simla

5th and 8th Divisions—Agra Fort, Cassipore; Daulatpore; Dum Dum, Gun Carriage Factory, Jabalpur, Fort Fatah, Lahore, Nos III and IV Redoubts, Lucknow.







**SECTION IV.**  
**SUPPLIES BY N. W. S. or P. W. D.**

**Table 16.—Equipment for quarters of provost sergeant and assistant warder at Aden, (including naval cells and guard detention rooms) military prisons and detention barracks, guard and barrack detention rooms.**

Item Number	Articles.	Guard room.	Officers' Guard room.	MILITARY PRISONS AND DETENTION BARRACKS.												Aden, including naval cells and guard detention room.	Quarters of Provost sergeant and assistant warder at Aden.	REMARKS
				Set of detention rooms														
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	
26	Padlocks and keys . . . .					69	50	109	23		65	24		203	(1)21	...	8th Division and Aden Bde—Aden and Balthasha Island, Bombay	
27	Poles for mosquito curtains sets (r) (r)1															...	(g) For guardroom, provost sergeant and assistant warder's quarters.	
28	Pantah fringes, 8" deep. No. (b) ropes and cables.															...	(a) Provost sergeant's quarters.	
29	Reading desks . . . .													1			(i) Two running feet per man on guard, British and Indian.	
30	Receptacles, large, for cook-houses						2	6	2		2	2		10	(m)5		(j) Detention barracks, detention rooms, warder's quarters	
31	Receptacles, 6lb, large for privies (for plains stations)	(n)	(n)			2	2	8			2	2		7	1	...	(k) For guardrooms as required. Washed at expense of unit.	
32	Receptacles, 6lb, large, for urinals (for plains stations)	(o)					2						1	11			(l) For detention barracks, store rooms, cook houses and almirahs	
33	Receptacles, 6lb, small, for privies (Bradley pattern) for hill stations	(n)	(n)			2											(m) For detention barracks, provost sergeant and assistant warder's quarters.	
34	Receptacles, 6lb, small, for urinals (Bradley pattern) for hill stations.	(o)															(n) One per latrine to garrison or regimental guard and detention rooms.	
35	Stands for tubs, galvanised iron									1				6			(o) One for each urinary	
36	Stools, prison . . . .														2			
37	Sentry boxes . . . .	(p)															(p) One per building not having a verandah on which a British sentry is regularly posted, and one per British squadron or battery when homes' lives are in the open. Indian troops will only be supplied with sentry boxes in special cases under the sanction of the Divisional Commander.	
38	Stools, prison . . . .					1	...	1	1	1	1	1	1	1	...	...	(q) One running foot per man.	
39	Tables, iron trestle, 6' x 2 1/2', B F. No. 6.	(g)	2	2	6	3	4	12	2	4	10	1	1	15	2	...		
40	Tables, 6' x 2'—10", B F. No. 1															1		
41	" camps, B. F. No. 41															1	(r) 1 set of 4 poles per curtain, other than bell shaped authorised for guard rooms and (where) guard rooms by Table 34.	
42	" office, with drawers, B. F. No. 34.					1	1	1	1	1	1	1	1	2				
43	" cookhouses 3' x 2'					1	1	1	1	1	1	1	1	1				
44	Thermantidotes . . . .		(s)														(s) As determined by Standing Barrack Committee.	
45	Tubs, galvanised iron . . . .						2				1							
46	Wood, teaks planks . . . .													24				

## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 47.—Equipment for Army Schools and Inspectors.

NOTE.—The scale is for British troops unless otherwise stated.

## SCALE FOR ADULT SCHOOLS.

Item No.	Articles.	SCALE FOR ADULT SCHOOLS.																	
		series or		series or		series or		series or		series or		series or		series or		series or		series or	
		100	200	300	400	500	600	700	800	900	1000	1100	1200	1300	1400	1500	1600	1700	1800
1	Almirahs, large	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
2	Blackboards, and easels (g).	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
3	Boards, inventory	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
4	Bookcases, library pattern (a) (g).	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
5	Bookshelves	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
6	Boxes lit, with padlocks and keys (d)	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
7	Chairs, barrack (g)	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
8	Canes, cane-bottomed (g).	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
9	Desks, long	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
10	Do, 0' long, 21" high in front	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
11	Do, 3' long, with desks B. F. No. 32	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
12	Do, lecturing	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
13	Forms, with backs, 7½' high, without	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
14	Do, 2' high and 9' long.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
15	Do, middling, without backs, 1' 9" high, 9' long	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
16	Do, low, 1' 6" high, 9' long	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
17	Do, with backs, 6' long, 15" high	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
18	Map stands	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
19	Map racks, with 10 hooks.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
20	Pointers, long	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
21	Do, short	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
22	Punkah fringes 18" deep ropes and canes (f).	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
23	Tables 5' x 2' 10" B. F. No. 1.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
24	Do, office with drawers B. F. No. 34.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
25	Trunks, camel, with padlocks, keys and box for industrial materials.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
26	Washhand stands	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18







## SECTION IV.

SUPPLIES BY M. W. S. or P. W. D.

Table 48—Equipment for gymnasia.

Item No.	Articles.	SCALE OF APPARATUS FOR				REMARKS.
		1ST CLASS GYMNASIA.		REGIMENTAL OR 2ND CLASS GYMNASIA.		
		Fixed	Move-able.	Fixed	Move-able.	
1	Mirrors, large	1 (a)	..	..	..	(a) For Ambala.
2	Arm racks	1	..	..	..	
3	Bars, horizontal	1	..	1	..	
4	Bars, parallel	..	1	..	1	
5	Bars, wall	1 set of 20 stalls	..	1 set of 10 stalls	..	
6	Beams, double double	1 (b)	..	..	..	(b) One upright to be fixed to the wall.
7	Beams, single double	..	..	1 (b)	..	
8	Benches, 4' long x 3½' high x 1½' wide (c)	..	1	..	1	(c) Made of stout wood, with very stout legs, to give weight and make it firm for working on.
9	Boards, spring (g)	..	2	..	1	(g) For vaulting horse.
10	Boxes, lit, with padlocks and keys	..	4	..	2	
11	Chairs, cane bottomed	..	8	..	..	
12	Forms, without backs, 5'	..	24	..	..	
13	Jumping standards	..	1	..	1	
14	Padlocks, iron, 3"	..	(d)	..	(d)	(d) Two for Ambala and one each for Poona and other gymnasia.
15	Do. do 2"	..	(e)	..	(e)	(e) Three for Ambala and one each for Poona and other gymnasia.
16	Padlocks, and keys, iron, with labels and split rings	..	5	..	..	(f) As required.
17	Ropes, vertical	..	6	..	2	
18	Shelves	1	..	1	..	
19	Tables, iron trestl., 6' x 2' 6" (B F No. 6)	..	4	..	2	
20	Vaulting horses	..	2	..	1	

Table 49—Equipment for authorised prayer rooms.

Item No.	Articles.	Authorized proportion.	REMARKS.
1	Bookshelves, or bookcases	2 per regt. of cavy, wing of infy. or sanitarium. 2 per battn. of infy. 3 per two battns. of infy. 1 additional for every two battns. of companies, R. A. sanitarium.	
2	Chairs, cane-bottomed	..	
3	Forms, with backs, 6'	.. per battn. of infy. 16 per two battns. of infy. 1 additional for each batty. or coy., R. A.	
4	Pankah fringes 15" deep with ropes and canes (a).	As required.	(a) Washed at the expense of the unit using the prayer room.
5	Tables, 6' x 3' 6" B. F. No. 37.	4 per regt. of cavy, wing of infy 5 per battn. of infy. 8 per two battns. of infy. .. for each batty. or c.	







## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 50.—Conservancy equipment other than carts

Note 1.—The scale is for British troops unless otherwise stated.

(d). The authorised scales of filth and rubbish carts are laid down in Tables 4, 5, 6, 7, 8, 12, 46, 53 and 68.

Item No	Articles	Scale
1	Boards, inventory . . . . .	As required.
2	Buckets, G. L. (urine) . . . . .	As required for hospitals of native troops equipped with portable
3	Commodos . . . . .	
4	Privy pans, G. L. (filth) . . . . .	Latrines
5	Receptacles, filth, large (For privies in plains stations.) (a)	
6	Receptacles, filth, large (For urinaries in plains stations.)	
7	Receptacles, filth, small (Bradley pattern for privies in hill stations.) (a)	men. 2 per latrine in barracks for single men accommodating under 50 men. 4 per barracks for married men with 20 sets of quarters or less. 6 per barracks for married men with more than 20 sets of quarters. 1 per latrine to warrant officers (non departmental) and staff sergeants' quarters. 1 per set of 6 officers' quarters or their equivalent.
8	Receptacles, filth, small (Bradley pattern for urinaries in stations.)	
9	Seats, necessary for latrines without fixed seats	
10	Stools, privy . . . . .	
11	Tripods, iron 1' high (For urinaries not on the trough system.)	3 per horse or field battery, and squadron of cavalry. 6 per mountain battery, company of artillery, and company of infantry.

(a) Are also allowed according to requirements for servants' privies attached to officers' quarters and Government mess houses, For lines of British troops at Steamer Point, Aden, receptacles, filth, small, are supplied.

SECTION IV.  
SUPPLIES BY M. W. S. or P. W. D.

Table 51.—Equipment for Standing Camps for British Troops at Ambala, Meerut, Chingri Khal and Bareilly

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
1	Almirahs . . . . .	For temperance rooms .	
2	Arm racks — . . . . .	Guards, etc . . . . .	1 per 8 men (not authorized for Chingri Khal). 1 " quarter guard. 1 " rear guard.
3	Boxes, kit (a) . . . . .	" . . . . .	2 per company for ammunition.
4	Chairs, cane bottomed . . . . .	Orderly rooms . . . . .	1 " man or woman (not authorized for Chingri Khal). 4 per orderly room.
5	" easy . . . . .	For married quarters . . . . .	1 per married warrant officer (non-departmental), schoolmaster, and schoolmistress, N. C. O., and private.
6	Cots, iron truss . . . . .	Guard, N. C. O.'s and men . . . . .	24 for the B. G. A. guard at Chingri Khal, if available from stock.
7	Cupboards . . . . .	For temperance rooms . . . . .	1 per wing of British infantry or cavalry detachment aggregating in strength to half a battalion and per batty. or coy. of B. A. (or 2 batteries or companies, if encamped together).
8	Forms, with backs . . . . .	Orderly-rooms . . . . .	2 per orderly room.
9	" with backs 5' . . . . .	Quartermaster's stores . . . . .	2 quartermaster's stores.
10	" without backs . . . . .	For temperance rooms (b) . . . . .	16 per wing of British infantry or cavalry detachment aggregating in strength half a battalion.
11	Receptacles, large (to be painted white) . . . . .	Guards and sergeants' mess . . . . .	8 per batty. or coy. B. A. (or 2 batteries or companies, if encamped together).
12	Tables, 3' x 2', B. F., No. 3(c) . . . . .	Cook-houses . . . . .	2 per cookhouse.
13	" iron trestle, 5' x 2'6", B. F., No. 6 . . . . .	Do. . . . .	1 " do.
14	" 5' x 2' 10", B. F., No. 1 . . . . .	Orderly-rooms . . . . .	2 " orderly room.
15	Tables, iron trestle 5' x 2½', B. F., No. 6 . . . . .	Quartermaster's stores . . . . .	1 " quartermaster's stores.
16	Trestles, iron . . . . .	Men's mess . . . . .	1 " 6 men or less, if available from stock.
17	Tube, G. I. (with stands) . . . . .	Guards . . . . .	1 " quarter guard, if available from stock.
18	Wash-stand . . . . .	Do. . . . .	1 " rear guard, if available from stock.
		Sergeants' mess . . . . .	1 " 4 sergeants, if available from stock.
		Married quarters . . . . .	1 " married quarters
		For temperance rooms (b) . . . . .	7 " wing of British infantry or cavalry detachment aggregating in strength to half a battalion.
			4 per batty. or coy. B. A. (or 2 batteries or companies, if encamped together).
			6 per battalion of infantry.
			1 " battery of artillery.
			1 " company of infantry or battery of artillery.
			1 for whole of married quarters in each battalion or battery
			1 per married warrant officer (non-departmental), schoolmaster, schoolmistress, N. C. O., and private.

latrine furniture and





**SECTION IV.**  
**SUPPLIES BY M. W. S. or P. W. D.**

**Table 52.—"Equipment for British troops in camps at Camp Barian, Cherat, Dalhousie, Ghora Dhakka, Kallana, Chakrata, Khau Spur, Kasauli, Ranikhet and Upper and Lower Topa."**

Item No.	Articles	Where required and for what purpose.	Authorized proportion.
1	Almirahs . . . . .	Temperance rooms . . .	1 per wing of British infantry or cavalry detachments, aggregating in strength half a battalion, and per battery, or coy. B. A., (or 2 batteries or companies if unaccompanied together).
2	Arm-racks, with padlocks, keys, brass or copper, and metal labels	Guards, etc. . . . .	1 per tent. 1 per quarter-guard. 1 per rear-guard. 1 per camp.
3	Black boards and easels . . . . .	Schools . . . . .	1 per camp at Dalhousie, Kallana and Ranikhet.
3A	Boards, black, 4' x 3' and easels . . . . .	For musketry instruction	1 per married man and N.-C. O.
4	Boxes, kit . . . . .	Orderly rooms, etc. . . .	1 per single man. 2 per orderly room. 3 per battery or company.
5	Boxes, kit, with padlocks, keys, brass or copper, and metal labels.	For holding ammunition	2 per orderly room.
6	Chairs, barrack . . . . .	Orderly rooms . . . . .	2 Duties
7	" cane-bottomed . . . . .	Orderly rooms . . . . .	2 per married warrant officer (non-departmental), schoolmaster, schoolmistress, N.C.O., and private.
8	Chairs, easy . . . . .	Married quarters . . . .	1 per family
9	Commodore . . . . .	Quarters . . . . .	2 per married man.
10	Cots, iron trestle, with iron planks . . . . .	Do . . . . .	1 for each child over 10. 1 for every 2 children under 10
11	Cupboards . . . . .	Temperance rooms . . . .	1 per cookhouse. 1 per sergeants' mess.
12	Forms, with back <sup>3</sup> , 5' . . . . .	Libraries, etc. . . . . Sergeants' mess . . . . . Temperance rooms (a) . .	2 per 2 batteries or companies if unaccompanied together). 1 per 6 men or less. 1 per quarter-guard. 1 per rear-guard. 3 per camp.
13	" without back 6' . . . . .	Messes . . . . .	2 per 6 men or less.
14	" high, without backs, 2' high, 3' long . . . . .	Guards . . . . .	1 per quarter-guard.
15	" middling, without backs, 1' 6' high, 3' long . . . . .	Schools . . . . .	1 per rear-guard.
16	" low, without backs, 1' 6' high, 3' long . . . . .	Do . . . . .	3 per camp.
17	Receptacles, small . . . . .	Do . . . . .	2 Do.
18	" filth, small . . . . .	Cookhouses . . . . . Privies . . . . . Urinals . . . . . Quarters . . . . . Messes . . . . . Libraries . . . . . Orderly room . . . . . Sergeants' mess . . . . . Temperance room (a) . .	1 per cookhouse. 1 per privy, if under 8 seats. 2 per privy, if over 8 seats. 1 per urinal. 1 per married man and N. C. O. 1 per 6 men or less. 4 per camp. 3 per orderly room. 1 per sergeants' mess.
19	Tables, iron trestle, 5' x 2' 6", B. P., No. 6.	Libraries . . . . . Orderly room . . . . . Sergeants' mess . . . . . Temperance room (a) . .	7 per wing of British infantry or cavalry detachment aggregating in strength half a battalion, and battery, or coy. B. A., (or per 2 batteries or companies if unaccompanied together).
20	" 3' x 2', B. P., No. 3 (b) . . . . .	Cookhouses . . . . .	1 per cookhouse.
21	Trestles, iron . . . . .	Store rooms . . . . .	3 per camp.
22	Tubs, G. I., with wooden stands . . . . .	For drinking water . . . .	1 per battery or company.
23	Wash-stand . . . . .	Married quarters . . . . .	1 per married warrant officer (non-departmental), schoolmaster, schoolmistress, N.C.O., and private.

(a) For each complete regiment or battalion the numbers of forms and tables will be proportionately increased.  
(b) See footnote (b) Tab 54.

## SECTION IV.

## SUPPLIES BY M. W. S. or F. W. D.

Table 53.—Equipment for British soldiers temporarily employed on Government Military Farms.

Item No.	Articles.	Authorized proportion.
1	Boxes, kit . . . . .	{ 1 per single man. 2 per married man.
2	Chairs, barrack . . . . .	{ 1 per single man accommodated in permanent quarters. 3 per married man accommodated in permanent quarters or tent.
3	Chairs, cane bottomed . . . . .	1 per married man.
4	Chairs, easy . . . . .	1 per single or married man
5	Commodore . . . . .	1 per single man. 2 per married man.
6	Cots, iron trestle . . . . .	{ 1 per single man. 1 for each child over 10 years and 1 per two children under 10 years.
7	Cupboards, mess . . . . .	1 per cookhouse.
8	Forms, without backs, 5' . . . . .	1 per 3 single men, or less, accommodated in tents.
9	Receptacles, filth . . . . .	1 per tent or separate quarter.
10	Tables, cookhouse, 3' x 2', B. F., No. 3 (a)	1 per cookhouse. 1 per single or married man accommodated in permanent quarters
11	Tables, iron trestle, 5' x 2', 6', B. F., No. 6 . . . . .	{ 1 per 6 single men, or less accommodated in tents. 1 per married man accommodated in tents.
12	Wash-stand . . . . .	1 per married man.

(a) See footnote (A) to Table 44.







**SECTION IV.**  
**SUPPLIES BY M. W. S. or P. W. D.**

Table 51.—Furniture authorized for the Staff College, Quetta.

Item No.	Articles.	Scale.	Remarks.
1	Almirahs, large	No. 14	
2	" lamp	1 (a)	
3	" small	1	
4	" map	4 (a)	
5	Blackboards and easels	4	
6	Boards, name	8	
7	" notice and easel	1 (a)	
8	" notice	3 (a)	
9	Bookcases, glazed	1	
10	" collapsible	57 (a)	
11	Bookshelves	8 (b)	As required.
12	" open	3 (a)	
13	" portfolio	1 (a)	
14	" revolving	1 (a)	
15	Boxes, lit		
16	Cases, for maps	3 (a)	
17	Chamber pot stands	1	
18	Chairs, cane-bottomed	137	
19	" arm, office	27	
20	" easy	61 (a)	
21	Coal scuttles	1	per fireplace.
22	Curtain poles (c)	14 (a)	
23	"	4 (b)	
24	Commodore	4	
25	Desks, standing	2 (a)	
26	" with cupboard and flap	4	
27	Fenders	1	per fireplace.
28	Fireguards	1	Do
29	Fire irons	1	Do.
30	Forms, with backs, 5'	No. 3	
31	" without backs, 5'	15	
32	Ladders, 18'	1	
33	" 10'	1	
34	" 14', bamboo	2	
35	" folding 6½'	2 (a)	
36	" lamp	3	
37	Platforms, with steps	4	
38	Racks, record	...	As required.
39	" pigeon hole	8	
40	" book	1 (a)	
41	" map	1 (a)	
42	" letter	1	
43	" office table	1 (a)	
44	" lat	4 (a)	
45	Receptacles, cookhouse, dry refuse	61	
46	" " wet refuse	■	
47	Screens, folding	6	
48	"	1	
49	"	3	
50	"	4	
51	Tables, 5' x 3' (d)	2 (a)	
52	" 12' x 6'	60	
53	" iron, trestle, 5' x 2', G. R. P., No. 6	1	
54	" war game, 36' x 12'	10	
55	" 3' x 2½'	1	Is 12 pieces.
56	" 9' x 4'	93	
57	" 7' x 3½'	1 (a)	
58	" writing	1 (a)	
59	"	2 (b)	
60	Teapots	11 (a)	
61	Washstands	1	

(a) For general library. (b) For library for directing staff.

(c) Brackets to carry the curtain poles will be provided as fixtures to the building. (d) or other smaller convenient sizes.

NOTE.—Such articles of furniture as are not included in the above table will be bought under the authority of the Commandant and paid for from the contingent grant of the college.

## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 55. Equipment for Cavalry School, Saugor.

Item No.	Articles.	For what purpose.	Authorised proportion.
1	Almirahs . . . . .	Quarters of— British officers other than students . . . . .	2 per quarter.
		British officer students . . . . .	1 Ditto.
2	Almirahs, large . . . . .	Commandant's office . . . . .	2
3	Benches . . . . .	Workshops . . . . .	1 per workshop.
4	Blackboards, and easels . . . . .	Lecture halls . . . . .	3 per hall.
6	Boards, inventory . . . . .	Officers' and other quarters, except liquor bar.	1 per quarter.
6	Bookshelves . . . . .	Commandant's office . . . . .	4
7	Boxes, kit . . . . .	British N. C. O. students . . . . .	1 per single N. C. O.
		Commandant's office . . . . .	2
		Lecture halls . . . . .	1 per hall.
		Riding school office . . . . .	1
		Armoury—British and Indian ranks . . . . .	4
8	Carts, watering . . . . .	Manages . . . . .	1 per manage
9	Chairs, barrack . . . . .	British N. C. O. students . . . . .	1 per single N. C. O.
		Commandant's office . . . . .	5
		Fencing hall . . . . .	1
		Lecture hall No. 3 . . . . .	21
		Sergeants' mess . . . . .	1 per member
10	Chairs, cane bottomed . . . . .	Quarters of— British Officers other than students . . . . .	6 per quarter.
		British officer students . . . . .	3 per quarter.
		Commandant's office . . . . .	8
		Lecture hall No. 1 . . . . .	52
		Riding school office . . . . .	12
11	Chairs, easy . . . . .	Quarters of— British officers other than students . . . . .	2 per quarter.
		British officer students . . . . .	1 per quarter.
12	Commodore . . . . .	“ . . . . .	2 per quarter.
		“ . . . . .	1 per quarter.
		“ . . . . .	1
13	Cots, iron trestle . . . . .	British N. C. O. students . . . . .	1 per single N. C. O.
14	Cots, newar, with poles . . . . .	Mess rooms . . . . .	1 per mess room.
		Sergeants' mess cookhouse . . . . .	1
15	Cupboards . . . . .	Quarters of— British officers other than students . . . . .	2 per quarter.
		British officer students . . . . .	1 per quarter.
16	Desks, long . . . . .	Lecture hall No. 2 . . . . .	8
17	Forms, with backs, 5' . . . . .	Commandant's office . . . . .	1
18	Forms, without backs, 10' . . . . .	Lecture hall No. 2 . . . . .	15
		Plunge baths . . . . .	2 per plunge bath.
19	Ladders, bamboo . . . . .	Fire engine . . . . .	8
20	Ladders, lamp . . . . .	Barracks . . . . .	1 per barrack.
21	Locks . . . . .	“ . . . . .	As required.
22	Map, stands . . . . .	Lecture halls . . . . .	3 per lecture hall.
23	Map, racks with 10 hooks . . . . .	Ditto . . . . .	1 per lecture hall.
24	Punkah fringes, 18' deep, ropes and canes . . . . .	British troops barracks except liquor bar.	As required.
25	Pointers, long . . . . .	Lecture halls . . . . .	2 per lecture hall.
26	Racks, with drawers . . . . .	Quartermaster's stores . . . . .	3
27	Racks, without drawers . . . . .	Ditto . . . . .	3
28	Receptacles, large, cookhouse, for wet refuse . . . . .	Officers' and sergeants' messes . . . . .	2 per cookhouse (slab)
29	Receptacles, small, cookhouse, for wet refuse . . . . .	Quarters of British officer students . . . . .	1 per cookhouse sink for each 6 quarters.
30	Receptacles, small, cookhouse, for dry refuse . . . . .	Cookhouses for officers' and sergeants' messes and permanent staff.	1 per cookhouse.
		Quarters of British officer students . . . . .	1 per cookhouse for each 6 quarters.
31	Receptacles, large, silt . . . . .	Latrines . . . . .	1 per latrine.
32	Tables, writing . . . . .	Quarters of— British officers other than students . . . . .	2 per quarter.
		British officer students . . . . .	1 per quarter.
		Commandant's office . . . . .	3





## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 55.—Equipment for Cavalry School, ~~Maugur~~—*contd.*

Item No.	Articles.	For what purpose.	Authorized proportion.	
23	Tables, dressing, with mirror	Quarters of—	2	per quarter.
34	Tables, toilet	" "	1	per quarter.
35	Tables, 5' x 2'—10" H F. No. 1	British N. C. O. students	2	per quarter.
		Commandant's office	1	per quarter.
		Quartermaster's stores	6	per single N. C. O.
		Lecture hall No 1	1	
		Riding school office	25	
		Fencing hall	1	
36	Tables, iron trestle 5' x 2' 6" H F No 5.	Sergeants' mess	1	Running foot per member.
37	Teapots	Quarters of—		
		British officers other than students	2	per quarter
38	Trestles, iron	British officer students	1	per quarter.
39	Tubs, G. I. lugged covers and wooden stands	Quartermaster's stores	12	
		Barracks	1	per barrack.

NOTE.—The permanent subordinate staff will be supplied with furniture on the scale laid down for the various ranks in the Tables concerned in section IV

## SECTION IV.

## SUPPLY BY M. W. S. or P. W. D.

Table 56.—Equipment for Divisional, Brigade and station Staff Officers, and for station staff offices where the staff officers receive no office allowance.

Item No.	Articles.	For what purpose.	Authorised proportion.	Remarks.
1	Almiratins, large and small . . .	For stationery, forms, maps and valuable records.	As required. Number to be fixed by Divisional or Brigade Commander.	
2	Book-cases, library pattern . . .	For office books . . .	Ditto.	
3	Book-shelves . . .	Ditto. . .	Ditto.	
4	Boxes, kit (with padlocks and keys) . . .	For confidential papers . . .	Ditto.	
5	Boxes, tin . . .	For holding stationery for courts-martial and confidential papers . . .	Ditto.	
6	Chairs, barrack . . .	For clerks . . .	1 per clerk and 2 spare	
7	" cane-bottomed . . .	For officers . . .	2 per officer.	
8	" cushion, arm . . .	Ditto . . .	1 per office of Divisional or Brigade Commander.	
9	Commodore . . .	Ditto. . .	1 per officer's water closet	
10	Dressing tables . . .	Ditto . . .	1 for officer's bath room, for all offices	
11	Forms, without backs, 5' . . .	For orderlies . . .	2 per office	
12	Pigeon-holes (sets of six) . . .	For clerks . . .	1 per clerk.	
13	Punkah fringes, 18' deep, ropes and canes (a) . . .	....	As required.	(a) To be washed at expense of office
14	Press tables . . .	....	1 per office.	
15	Racks for stationery . . .	For officers' tables . . .	1 per officer.	
16	Racks for records . . .	....	As required. Number to be fixed by Divisional or Brigade Commander.	
17	" maps . . .	....	As required.	
18	Tables, office, with drawers, B. F. No. 34 . . .	For officers, head clerks and superintendents.	1 per officer, head clerk or superintendent.	
19	Tables, office 5'3" x 2'9" x 2'8," with drawers on one side, B. F. No. 49. . .	For clerks.	1 per clerk.	
20	Tables, bedside, H. F. No. 1 . . .	Ditto. . .	1 spare	
21	" drawing . . .	Ditto . . .	1 per officer and 1 per clerk and one spare.	
22	Towel racks . . .	For officers . . .	When considered necessary by Divisional or Brigade Commander.	
23	Wash-hand stand . . .	Ditto . . .	1 per office.	
			Ditto	

Notes.—All other articles considered necessary by the General Officer Commanding which are not usually supplied by the Military Works services, may be bought under his authority and paid for from the contingent grant of the office concerned.







## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 57.—Equipment for Supply and Transport Offices

Item No.	Articles.	For what purpose	Authorised proportion.	Remarks.
1	Almirahs, large and small .	Stationery, forms, maps and valuable records.	As required. Number to be fixed by Divisional or Brigade Commander.	
2	Benches, wooden .	For contractors . . .	2 per Divisional and Station Supply office.	
3	Boards . . . . .	For notices . . . . .	1 per Divisional and Station supply office.	
4	Book-cases, library pattern .	For office books . . .	As required. Number to be fixed by Divisional or Brigade Commander.	
5	Book-shelves . . . . .	Ditto . . . . .	As required. Number to be fixed by Divisional or Brigade Commander.	
6	Boxes, kit, with padlocks and keys.	For confidential papers	As required. Number to be fixed by Divisional or Brigade Commander.	
7	Boxes, wooden . . . . .	For tenders . . . . .	1 per Divisional and Station Supply office.	
8	Chairs, cane-bottomed . . .	For officers . . . . .	2 per officer	
9	Chairs, barrack . . . . .	For apprentices . . .	6 per Divisional and 1 per Station Supply office	
		For clerks . . . . .	1 per clerk and subordinate	
			4 spare per Divisional and 2 per Station Supply office.	
10	Commodore . . . . .	For officers . . . . .	1 per officer's water closet,	
11	Dressing tables . . . . .	Ditto . . . . .	1 per officer's bathroom.	
12	Forms, without backs 6' . . .	For orderlies . . . . .	2 per office.	
13	Pigeon-holes (sets of six) . .	For clerks . . . . .	1 per clerk and subordinate	
14	Punkah fringes, 18' deep, ropes and canes (a)	... ..	As required.	(a) To be washed at the expense of office.
15	Press tables . . . . .	.....	1 per office	
16	Racks, for stationery . . . .	For officers' tables . . .	1 per officer.	
17	Racks, for records . . . . .	.....	As required. Number to be fixed by Divisional or Brigade Commander.	
18	„ for maps . . . . .	... ..	As required. Number to be fixed by Divisional or Brigade Commander.	
19	Tables, office with drawers H. F. No. 34.	For officers, head clerks and superintendents.	1 per officer, clerk or Superintendent.	
20	Tables, office 5'3" x 2'9" x 2'6" with drawers on one side, H. F. No. 40	For clerks and subordinate	1 per clerk or subordinate, 1 spare.	
21	Tables, bed-side H. F. No. 110	For officers and clerks . .	1 per clerk and subordinate 1 spare	
22	Tables, iron trestle 5' x 2' 6" H. F. No. 6.	For apprentices . . . .	6 per Divisional and 1 per Station Supply office.	
23	Towel racks . . . . .	For officers . . . . .	1 per office.	
24	Wash-hand, stand . . . . .	Ditto . . . . .	1 per office.	

NOTE.—All other articles considered necessary by the General Officer Commanding which are not supplied by the Military Works Services under this Table, may be bought under his authority and paid for from the contingent grant of the office concerned.

## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 53.—Equipment for schools of musketry.

Item No.	Articles.		Scale per		Remarks.
			Lecture room, of School musketry.	Each officer's at quarter Changia Gali and Pachmar.	
1	Almirahs, large	No	...	1	
2	Arm-racks	"	3	...	
3	Black boards and easels (a)	"	2	...	11 additional boards and easels are allowed per school of musketry, except Satara which is allowed 10 additional.
4	Blocks, anvil, 1½ cwt	"	1		Future.
5	Chairs, cane-bottomed	"	2	3	
6	" folding, Kabul pattern	"	30	...	To be replaced as worn out by chairs, cane-bottomed
7	Commodore	"		1	
8	Cots, newar	"		1	
9	Forms, with backs	"	10		
10	Tables, office, with drawers and cup-boards, B F, No 42	"	2		
11	Tables, 5' x 2' 10", B. F., No. 1	"	30	1	
12	" dressing	"	"	1	
13	Wash-hand stands	"	"	1	

(a) Black boards, with easels, are issued on loan to the Musketry School when at Hawal Pindi in order to avoid risk of damage to these stores during the move of the School from Changia Gali to Hawal Pindi.

Table 59.—Equipment for the Musketry Camps at Jafferpore and Hebbal (Bangalore).

Item No.	Articles.	Scale.	
		For Jafferpore.	For Hebbal.
1	Arm racks, with 11 L, padlocks and duplicate keys	1 per guard	1 per guard.
2	Boxes, lit, with brass padlocks and duplicate keys	1 for pouch ammunition	1 for pouch ammunition.
3	Carts, cookhouse	1	Nil
4	Carts, water, drinking	5	1
5	Cots, iron trestle	200 if available from stock	200 if available from stock.
6	Cupboards, mess	2	2
7	Forms, 5', without backs	2 per 6 men	2 per 6 men.
8	Receptacles, cookhouse (w/c refuse)	2 per cookhouse	2 per cookhouse.
9	" (B + refuse)	2 per cookhouse	2 per cookhouse.
		2 per latrine	2 per latrine.
		6	6
		2 per company or detachment.	2 per company or detachment.
13	Tables, iron trestle, 5' x 2' 6", B F., No 6	1 per 6 men	1 per 6 men.
14	" cookhouse, 3' x 2', B. F., No. 3 (a)	2 per cookhouse	2 per cookhouse.
15	Tubs, G I, with hinged covers, padlocks and keys and wooden stands for drinking water	2 per company	2 per company.

(a) See footnote (A) to Table 44.





## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 60—Equipment for Sappers and Miners survey school at Bangalore, and telegraph school at Trimmigherry.

Item No.	Articles	Scale for		Remarks.
		Survey school, Bangalore.	Telegraph school, Trimmigherry.	
1	Almirahs, large, with locks and keys, 6' x 4' x 3' No.	1	...	for drawing paper, etc
2	Black boards and easels . . . . . "	1	1	
3	Chairs, barrack . . . . . "	...	1	
4	Cots, iron trestle . . . . . "	...	1	
5	Cupboards, fitted with shelves, 1st down door, locks and keys, 5' x 4' x 3' 6"	1	...	For plans.
6	Forms, without backs, 5' . . . . . "	20	16	
7	" 6' 6" x 1' x 1' 6" . . . . . "	...	...	
8	Safes, wooden, with shelves, locks and keys, 6' x 4' x 3' . . . . . "	1	...	For student, 80 instrument's.
9	Tables, 6' x 3' x 2'—7" with drawers, locks and keys . . . . . "	1	...	For instructor
10	" drawing, 6' 6" x 4' x 3' 7" with drawers, locks and keys . . . . . "	10	...	For students
11	" 10' x 3' . . . . . "	...	7	
12	" 5' x 2' 10", H F, No 1 . . . . . "	...	1	For drinking water
13	Tubs, G I, with stand, cover, padlock and key . . . . . "	...	1	

Table 61.—Scale of furniture for the Commandant's and Engineer's offices of the Indian Central flying school, Sitapur.

Item.	Articles.	Scale for	
		Commandant's office	Engineer's office.
1	Almirahs, large . . . . .	2	1
2	Book cases, library pattern . . . . .	1	1
3	Bookshelves . . . . .	1	Ntl
4	Boxes, lit, with padlock and key . . . . .	1	1
5	" tin . . . . .	2	Ntl
6	Chairs, barrack . . . . .	4	2
7	" cane, bottomed . . . . .	1	1
8	" cushion, arm . . . . .	1	Ntl
9	Commodore . . . . .	1	1
10	Dressing table . . . . .	1	Ntl
11	Forms, without backs . . . . .	2	1
12	Pigeon-holes, sets . . . . .	3	1
13	Punkah fringes, 18" deep, ropes or canes . . . . .	As required	As required
14	Press table . . . . .	1	Ntl
15	Racks for stationery . . . . .	1	Ntl
16	Racks for records . . . . .	1	Ntl
17	Racks for maps . . . . .	1	Ntl
18	Tables, office, with drawers . . . . .	4	Ntl
19	Tables, bedside . . . . .	4	Ntl
20	" 5' x 2' x 10" . . . . .	Ntl	3
21	Towel racks . . . . .	1	Ntl
22	Wash-hand stand . . . . .	1	1
23	Boards inventory . . . . .	Ntl	1
24	Drawers for plans, sets . . . . .	Ntl	1

NOTE.—All other articles considered necessary by the Commandant of the School which are not usually supplied by the Military Works Services, may be bought under his authority and paid for from the contingent grant of the office.

## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 62.—Equipment for riding schools of British troops and non-sikh cavalry.

Item No.	Articles.	Scale.
1	Balls, sword practice . . . . .	3 per cavalry regiment and Govr.'s Bodyguard, Madras.
2	Bars, leaping, 24' . . . . .	1 per cavalry regiment, and stations at which Artillery Riding Masters are located.
3	Necks for practice posts . . . . .	As required for Governor's Bodyguard, Madras.
4	Posts for leaping bars . . . . .	3 per cavalry regiment.
5	Stands, military practice post, complete sets of 12 pieces each, viz. Four posts, with heads for cavalry cuts . . . . .	1 set for Governor's Bodyguard, Madras.
6	..... and Units.	1 per British cavalry regiment and 1 per B. A. Bde. If the barracks are close together. Where the barracks are scattered, and at stations having one or two Batteries of Artillery, one cart may be provided for each Battery at the discretion of the G. O. C.

Table 63.—Equipment for each of the central signalling schools at Kasauli and Poona.

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	REMARKS.
1	Book cases, library pattern . . . . .	For custody of instruments, papers, books, etc.	2	
2	Black boards . . . . .	For class room . . . . .	2	
3	Chairs, cane-bottomed . . . . .	For office . . . . .	2	
4	Forms, without backs, 5' . . . . .	For class room . . . . .	2	
5	Tables, office, with drawers and cupboards, B. F., No. 43 . . . . .	For Inspector . . . . .	23	
6	Tables, office, with drawers B. F., No. 34 . . . . .	For Asst. Inspector . . . . .	1	
7	" iron trestle, 5' x 2' 6" B. F., No. 8 . . . . .	For lectures . . . . .	1	
8	" Punkah fringes, 18" deep, ropes and canes, (a) . . . . .	For class room . . . . . For office of I. A. Signalling Southern Circle only.	23 As required.	(a) Washed at the expense of school.

Table 64.—Equipment for each signalling class for Indian N. C. O's. (on loan).

Item No.	Articles.	No. per class.	REMARKS.
1	Black boards and easels . . . . .	1	
2	Chairs, cane-bottomed . . . . .	1	For superintending officer.
3	Forms, without backs, 5' . . . . .	8	per 10 men.
4	Tables, 5' x 2'—10', B. F., No. 1 . . . . .	1	For superintending officer and 3 per 10 men.







## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table III.—Equipment for school of cookery at Poona.

Item No.	Articles.	Scale.	Item No.	Articles.	Scale.
1	Almirahs, large . . . . . No	2	5	Chairs, barrack . . . . . No	25
2	Boxes, kit (a) . . . . . "	1	6	Tables, 5' x 2' 10", B. F., No. 1 (b)	1
3	Black boards and enamel (a) . . . . . "	1	7	Tables, iron trestle 5' x 2' 6", B. F., No. 6. . . . . "	11
4	Bricks, kila dried (a) . . . . . "	500			

(a) Cost of renewals or repair should be met from the accessories grant.

(b) For use as a desk.

Table 65.—Equipment for British cavalry pioneering classes.

Item No.	Articles.	SCALE		REMARKS
		For instruction at stations in the plains where one or more regiments are stationed.	For instruction at Kasauli, Nilgiri, Murree and Wellington.	
1	Nails, iron, spike, No 183 (6") . . . . . lbs	50		For two spiked trestles.
2	Timber—			
3	braces, 14' x 9" x 1 1/2" or 2" . . . . . No	4	...	For two spiked trestles.
4	ledgers, 14' x 6" x 1 1/2" or 2" . . . . . "	2	...	
5	standards, 12' x 8" x 4" . . . . . "	4	...	
6	transoms, 12' x 9" x 2 1/2" to 3" . . . . . "	4	...	
7	road bearers, 15' to 20' x 8" dia. . . . . "	10	...	For 25 ft. of roadway.
8	shore transoms, 12' x 5" dia. . . . . "	2	...	To be issued with square ends cut away to facilitate rack lashing.
9	1 1/2" plank (cheese), 10' long, 12" wide . . . . . "	25	...	
10	spars, for ribands, 12' x 3" dia . . . . . "	4	...	For 25 ft. of roadway.
11	" for hand rails, 15' x 3" dia . . . . . "	4	...	
12	Timber, spar bridging—			
13	diagonals, 16' x 3" or 4" dia. . . . . "	4	...	For two-lashed trestles.
14	ledgers, 16' x 4" dia. . . . . "	2	...	
15	standards, 15' x 6" . . . . . "	4	...	
16	transoms, 14' x 8" . . . . . "	4	...	
17	Timber, bridging stores—			
18	standards 25' x 6" dia. at the top . . . . . "	...	8	100 c. feet for Murree and Wellington. For 25 ft. of roadway.
19	" 22' x 6" . . . . . "	...	4	
20	transoms, (fork) 18' x 10" dia throughout . . . . . "	...	2	
21	" 16' x 6" dia. throughout . . . . . "	...	6	
22	ledgers 16' x 6" dia. throughout . . . . . "	...	4	
23	diagonal braces, 20' x 3" dia. throughout . . . . . "	...	8	
24	shore transoms 16' x 5" . . . . . "	...	10	
25	road beams, (stout for bearers) 20' x 6" dia. through- out . . . . . "	...	20	
26	road beams (slight for ribands) 20' x 3" dia. through- out . . . . . "	...	10	
27	plank for roadway, 10' x 1' x 2" . . . . . "	...	60	
28	pickets, 5 ft. (for bollards) . . . . . "	10	20	
29	Plant, railway, old—			
30	chairs (with two trenails and two spikes to each) . . . . . "	...	10	For lastly demolitions.
31	fishplates . . . . . sets	...	4	
32	rails, as may be available . . . . . No.	...	4	
33	sleepers, 9' x 9" x 1 1/2", or as may be available . . . . . "	14	7	
34	Telegraph line—			
35	wire, iron, soft, No. 11 W. G. . . . . yds.	100	100	One intermediate and two terminal.
36	" " " 22 W. G. . . . . lbs.	2	2	
37	insulators, porcelain, white, shackles (with bolts and nuts) . . . . . No.	3	...	
38	insulators, porcelain, shackles, with bolts and nuts . . . . . "	3	...	
39	telegraph poles . . . . . "	...	12	

## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 67.—Equipment authorized for Remount Depôts.

Item No.	Articles.	Saharanpur.	Hapur.	Mona and Sargodha.	Calcutta.	Honur.	Ahmednagar.	REMARKS.
1	2	3	4	5	6	7	8	9
1	Almirahs, large . . . . . No.	4	4	5	2	3	3	
2	" small . . . . . "	4	4	5	2	3	3	
3	Bedsteads . . . . . "	28	20	40	6	12	...	For hospital purposes.
4	Boxes, kit . . . . . "	3	3	...	2	2	...	For N. C. O's.
5	Carts, filth . . . . . "	4	4	6	3	2	...	
6	" rubbish . . . . . "	3	3	4	1	2	...	
7	Chairs, barrack . . . . . "	21	21	21	5	11	2	
8	" cane-bottomed . . . . . "	3	3	3	3	3	3	
9	Cots, iron trestle . . . . . "	3	3	3	3	2	2	For N. C. O's
10	Forms, without backs, 5' . . . . . "	6	6	6	3	3	3	
11	Frames, diet sheet . . . . . "	1	1	1	30	1	1	
12	Ladders, lamp . . . . . "	1	1	1	1	1	1	
13	Mallets, dry earth . . . . . "	...	...	...	...	...	...	
14	Padlocks, brass . . . . . "	31	32	50	20	24	30	2 per sq. ft.
15	Receptacles, filth, large . . . . . "	10	10	12	5	16	8	
16	Screens, moveable . . . . . "	1	1	1	1	1	1	
17	Stands, for 8 glurrahs . . . . . "	1	1	1	1	1	1	
18	" 2 surahs . . . . . "	1	1	1	1	1	1	
19	" wash-hands . . . . . "	2	2	4	1	1	2	
20	Stools, wooden . . . . . "	6	6	6	4	4	4	
21	Tables, bedside, H. P., No 66 . . . . . "	30	20	40	12	12	...	
22	" dispensing, H. P., No 68 . . . . . "	2	2	4	2	...	2	
23	" iron trestle, 5' x 2' 6", B. P., No. 6 . . . . . "	13	13	13	8	12	12	
24	Tables, cookhouse, 3' x 2', B. P., No. 3 (a) . . . . . "	2	2	3	2	2	2	
25	Trays, dressing . . . . . "	7	7	16	7	6	3	

(a) See footnote (A) to Table 44.



**SECTION IV.**  
**SUPPLIES BY M. W. S. or P. W. D.**

**Table 69.—Furniture, etc., for officers' quarters at Forts Peshawar and Jamrud—*contd.***

Item No.	Articles.	Scale per station		Remarks.
		Fort Peshawar	Fort Jamrud.	
18	Footboards . . . . .	2	1	
19	Forks . . . . .	4	2	
20	" fish . . . . .	1	1	
21	Frying pan . . . . .	1	1	
22	Gridiron . . . . .	1	1	
23	Gurrahs and surahis . . . . .	12 each.	2 (Gurrahs.)	
24	Jugs, milk, half pint . . . . .	1	1	
25	Kettle iron (oral camp) with cover and lifter . . . . .	1	1	
26	Knives, table . . . . .	4	1	
27	" butcher . . . . .	1	1	
28	" kitchen . . . . .	1	1	
"	" . . . . .	12	1	One per room.
"	" . . . . .	2	1	
"	" . . . . .	4	2	
33	Purdahs . . . . .	14	-	(a) Washed at the expense of the officers concerned
34	Saw, butcher . . . . .	1	1	1 per outer door and window and inner bath-room doors.
35	Spoons, dessert . . . . .	4	2	
36	" kitchen . . . . .	2	1	
37	" table . . . . .	4	2	
38	" tea . . . . .	2	1	
39	Sugar basins with lids . . . . .	2	1	
40	Tables, 5' x 2' 10" . . . . .	4	2	
41	Table cloths, white (a) . . . . .	2	2	
42	Teapots, pinto . . . . .	2	1	
43	Teapots . . . . .	4	1	
44	Tea trays . . . . .	2	1	
45	Towels, horse . . . . .	2	1	
46	Tubs, G. I., without lids . . . . .	1	1	
47	Washhand stands . . . . .	2	1	

**SECTION IV.**  
**SUPPLIES BY M. W. S. or P. W. D.**

**Table 70 —Furniture, etc., authorised for the military posts at Zam, Jatta, and Drazinda in the Derajat Brigade and the rest-houses attached thereto.**

Item No.	Articles.	Scale.
<i>(Per Rest-house)</i>		
1	Almirahs, large with padlock and key . . . . .	1
2	Bedsteads . . . . .	2
3	Candle-sticks, with shades . . . . .	2
4	Carpets, (dunnos) . . . . .	1 per room.
5	Chairs cane bottomed . . . . .	4
6	Chamber utensils . . . . .	2
7	Chicks . . . . .	1 per door and window.
8	Commodos, complete (a) . . . . .	1 per bath room.
9	Cooking utensils, set . . . . .	1
10	Cook-room, requisites set (a) . . . . .	1
11	Crockery, cutlery, spoons and glass set (a) . . . . .	1
12	Dressing Table, with looking glass . . . . .	1
13	Fenders . . . . .	1 per fire-place.
14	Footboard . . . . .	1 per bath room.
15	Gurrahs and surahis . . . . .	1 As required.
16	Hat, coir door . . . . .	1 per room.
17	Heat safe . . . . .	1
18	Punkabs, complete, with fringes 18" deep, ropes and canes . . . . .	1 per room.
19	Purdahs . . . . .	1 per outer door and window and for inner bathrooms door.
20	Tables, 5' x 2' 10", H. P., No. I . . . . .	2
21	Teapots . . . . .	2
22	Towel horse . . . . .	1 per bathroom.
23	Tubs, G. I. without lids . . . . .	1
24	Washhand stands, complete, with crockery . . . . .	1 per bathroom.
<i>(Per Post)</i>		
1	Cots (charpoy) . . . . .	1 per combatant and follower. Cost not to exceed Rs. 2 each.







## SECTION IV.

## SUPPLIES BY M. W. R. or P. W. D.

Table II —Equipment for the building at Chandipore which serves as a rest house for officers of the Proof Department, Balasore.

Item No.	Articles.	Scale.
1	Bedsteads . . . . .	2
2	Commodore . . . . .	2
3	Cook room requisites (a)	...
4	Crockery (a)	.
5	Cutlery (a)	.
6	Glassware (a)	...
7	Mattresses (a)	2
8	Mirrors . . . . .	2
9	Toilet sets . . . . .	2
10	" tables . . . . .	2
11	Tubs, G I . . . . .	2
12	Washstands . . . . .	2

(a) As detailed in the annexure to A. D. No 13593-3 (Q. M. G. 3), dated 8th January 1914.

## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 72.—Equipment for Bodyguards.

Item No.	Articles.	SCALE FOR						Remarks.	
		Viceroy's Bodyguard.			At Barrackpore.	Governor's Body-guard, Madras.	Governor's Body-guard, Bombay.		
		At Ballygunge	At Wellesley Place.	At Dehra-Dun					
1	Almirahs, large	No.			1	..	..	1	
2	" small, for poisons	..	1	..	1	..	..	..	
3	Arm-racks	..	..	..	..	..	..	..	
4	Apparatus, hot water	..	1	..	1	..	..	..	
5	Boards, inventory, etc	..	..	..	..	..	..	..	
6	Boxes, kit	..	120	..	120	..	(a)	..	As required.
7	Chairs, cane-bottomed	..	12	..	2	..	..	2	(a) 1 per man with padlock and key.
8	Charpoys	..	127	(b)	2	15	..	..	(b) 1 per man.
9	Cots, iron, planks for	..	..	..	..	..	..	213	
10	" " " " " " " "	..	..	..	..	..	..	123	
11	Forms, with backs, 5'	..	1	..	1	..	..	..	
12	" " without backs, 6'	..	..	..	..	..	..	3	
13	Padlocks, and keys	..	..	..	..	..	..	{ 2 10	At Barrackpore. At Ghanchi Khud
14	Tables, dispensing, H. F. No. 68	..	1	..	1	..	..	..	
15	" camp, pieces, H. F. No. 67 D	..	..	..	..	..	..	3	
16	Transties, iron	..	4	..	8	..	..	..	
17	Trunks, camel	..	..	..	2	..	..	..	

Table 73.—Equipment for Commissioned and Warrant Officers of the Unattached List.

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.	Remarks.
1	Punkah, fringes, 18" deep, ropes and canes (a)	When occupying public quarters	.. As required.	(a) Washed at the expense of individual concerned.
2	Receptacles, small, for wet refuse	Cook-houses	1 per sink for plains and hill stations.	
3	Receptacles, small, for dry refuse.	Ditto	1 per cook-house in the plains or hills.	
4	Receptacles, fifth, large	Latrines with 3 or 4 seats attached to public quarters	1 per latrine in the plains.	
		Latrines with single seats attached to public quarters	1 " " " "	
5	" " small	Latrines with 3 or 4 seats attached to public quarters	2 per latrine in the hills.	
		Latrines with single seats attached to public quarters.	1 " " " "	

Table 74.—Equipment for ladies' waiting-room and officers' mess at the Season Dock, Bombay.

Item No.	Articles.	No.	Item No.	Articles.	No.
1	Benches, teakwood, 12' long, stuffed, and covered with oil cloth	7	7	Tables, teakwood, large, round	1
2	Chairs, easy	2	8	" dressing, large	1
3	" rocking	5	9	" washhand-stand	1
4	Couches, Cleopatra	1	10	" writing, teak wood	1
5	Screens, teakwood	1	11	" small round, folding	1
6	Stools, Gynaecological	1(a)	12	Tables, Gynaecological	1(a)
			13	Towel horse	1

(a) For Medical Inspection room, Colaba.





## SECTION IV.

## SUPPLIES BY M W S or P. W. D.

Table 75 — Equipment for trooping shed at Keamari, Karachi.

Item No.	Articles.	For what purpose.	Scale.
1	Almirahs	For trooping office	No. 1
2	Boxes, kit, with brass padlocks		1
3	Chairs, cane-bottomed		4
			2
			3
			40
4	Chairs, cane, arm		10
5	Forms, with backs, 5'		4
6	Forms, without backs, 5'		2
			20
7	Looking glasses	For men's shed and Invalids' room	150
8	Tables, camp, B. F., No 41	For bath-rooms	5
		For trooping office	4
		For Medical Inspection room	1
		For Ordnance and Supply and Transport Office	2
9	Tables, iron trestle, 5' x 2' 6", B. F., No 6	For women's waiting room	15
		For men's shed and Invalids' room	75
10	Tables, office, with drawers, B. F., No 31	For trooping office	3
11	Wash hand stand	For trooping office	1

Table 76 — Equipment for Telegraph Department signallers

Item No.	Articles.	Where required and for what purpose	Authorized proportion.	Remarks.
1	Boxes, kit	Married quarters	2 per married signaller.	
2	Chairs, cane bottomed		1 per unmarried do.	
3	" " easy		2 per married do.	
4	Commodore		1 ditto do.	
5	Cots, iron trestle	Mess	2 ditto do.	
6	Cupboards		1 per child over 10	
7	Forms, with backs, 5'		1 per unmarried signaller.	
8	Tables, 5' x 2' 10", B. F., No 1		1 per 3 children under 10	
9	Tables, iron trestle 5' x 2' 6", B. F., No 6		1 per 10 men or less	
10	Wash-stand	Married quarters	Two running feet per unmarried signaller.	
			1 per married signaller.	
			One running foot per unmarried signaller.	
			1 per married signaller.	

Table 77 — Stores allowed for the instruction of infantry in Field training.

## Details of one set. (a)

Item No.	Articles.	Scale.	Remarks.
1	Spars, rough, for teaching lashing—		
2	15' x 10' dia.	No.	(a) For distribution, see Army Tables Miscellaneous Services, Part II.
	15' x 6' "	6	

#### SECTION IV.

**SUPPLIES BY M. W. S. or P. W. D.**

Table 78.—Equipment for offices of *fort armaments* and *Inspectors of Ordnance Machinery*.

[illegible]

Table 19.—Equipment for certain special services.

Item No.	Articles	Where required and for what purpose.	Authorized proportion.
1	Adapters	For stand posts and hydrants in the screws on the hose supplied by Ord. Dept. are not	As required, 1 specially allowed for hydrant in B. and T. Corps stores at Bangalore.
2	Darrels, G. I. gals each	" " " " " " " " " " " "	100
3	Boxes, coal	" " " " " " " " " " " "	1 One large rectangular galvanised iron box capable of holding 80 lbs. of coal for each large fireplace and one small coal scuttle capable of holding 40 lbs. for each small fireplace.
4	Boxes, kit, japanned, steel, with locks and non-interchangeable keys	For sea service, No. 4, external measurements 2' 2" x 1' 3" x 1'.	1 per woman embarking. 1 per widower with children embarking.
5	Chains, padlocks and keys	For locking together arms of British troops when in tents. For arm racks in guard rooms in Manora Fort " " " Marsh Fort, Manora " " " I. Infy. battalion, Fort Sandeman.	1 Set per III rifle in the 1st, 2nd, 3rd, 4th and 7th Divs. 6 2 42
6	Chairs, cane-bottomed	{ Telegraph office, 1st S. and M. Moorkee { Family quarters at sanitarium	4 For use of clerks and telegraphists. 1 per each soldier's family of more than 3 children.
7	Cots, iron, trestle	{ Persian Gulf { Simla { Port St. George	1 per man of detachment I. I. 1 Ditto ditto. 70 For view of British Infantry (a)

(a) For use of data attached or passing through Madras.







## SUPPLIES BY M. W. S. or P. W. D.

Table 79 — Equipment for certain special services—*contd.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
9	Padlocks and keys, brass or copper, with labels, split rings and locks which are in large "suites" passed by master keys.	For magazines forming part of defence works in class I forts.	As required.
10	Padlocks, with duplicate keys with labels and split rings for the labels	For securing safety arms-racks other than racks of the Biggs' pattern, for British and Indian troops. For securing the arms of the British cavalry	As required. 34
1	" " " " " " " "	" " " " " " " "	As required.
1	" " " " " " " "	" " " " " " " "	As required.
1	" " " " " " " "	" " " " " " " "	As required.
14	keys. Padlocks and keys.	For use in Sassoon Dock, Colaba, during troopng season.	8
15	Padlocks with duplicate keys, labels and split rings	For bells of arms of Indian Troops in which pouch ammunition is stored.	As required.
16	Padlocks iron—	" " " " " " " "	8 16 3 1
18	Safes, single door, 36" x 26" x 24" fitted with Chubb's lock	British Infantry detachment at Bhamburda. For office of officers in charge of Defence Light Sections at Aden, Bombay, Calcutta and Karachi.	1 Set per curtain. 1 Per office.
19	Receptacles, fifth, 11" x 11", for hill stations.	For latrine at saluting battery, Simla.	1
20	Tripods, iron, 1' high	" " " " " " " "	1
21	Tanks, G. I. (five)	For all barracks and buildings in the hills having thatched or wooden roofs. For all barracks and buildings, which have neither thatched nor wooden roofs but have wooden walls, at stations, in the hills or plains where there are no fire engines, stand-pipes or hose.	1 Per room of 16 men. (a) As required.
22	Boxes, kit	British Infantry Battalion, Aden.	24
23	Cots, iron, trestle	For families . . . . .	16 To obviate moving articles with families.
24	Chairs, barrack	For Divine Service at Isthmus Position, Aden.	12
25	Cupboards	" " " " " " " "	1
26	Forms, without back, 6'	" " " " " " " "	6
27	Padlocks and keys, iron.	" " " " " " " "	1

(a) For family quarters, warrant officers and staff sergeants' quarters, and other regimental buildings to which this rule cannot be applied the number of tanks required will be fixed by the Asst. C. R. E.

## SECTION IV.

## SUPPLIES BY H. W. S. or P. W. D

Table 79.—Equipment for certain special services—*contd.*

Item No.	Articles	Where required and for what purpose.	Authorized proportion.
Tower Gate, Isthmus Position, Aden.			
29	Padlocks and keys, brass	To secure gate . . . . .	1
For Indian troops serving in the Burma Division			
30	Boards, inventory		As required
31	Boxes, dry earth, large size	For latrines and urinals . . . . .	1 Per latrine and urinary.
32	Ladders, lamp .	For lighting lamps in barracks . . . . .	1 per barrack.
33	Receptacles, fifth	For latrines . . . . .	2 per latrine.
34	" iron	For urinals . . . . .	1 per urinary.
35	Scoops, dry earth	Urinals . . . . .	1 per urinary.
		Latrines . . . . .	1 per seat in latrine.
For offices of 1st and 2nd class barrack-masters in Secunderabad and Burma Divns.			
36	Almirahs, with pigeon holes, 6' 6" x 4' 6" and 1' 10".		1 For office records.
37	Benches 4' 6" x 1' 3"	" "	2 per office.
38	Boxes, large, with lock and key.	" "	1 For security of barrack articles.
39	Chairs, without arms	" "	1 per barrack sergeant attending office.
40	" with arms	" "	2 per 1st class barrack master and 1 per 2nd class barrack master.
41	Desks, low	" "	1 for each accountant.
42	Tables, with two drawers, covered with blue cloth, with a shelf (1' above table), dimensions 4' 6" x 3' 6" x 2' 6".	" "	1 per barrack master.
43	Tables plain, with drawers, 4' 6" x 3' x 2' 6".	" "	1 per barrack sergeant attending office.
For war game building, Poona.			
44	Almirahs . . . . .	For use of players, etc. . . . .	1
45	Benches, high . . . . .		4
46	Chairs . . . . .		9
47	Desks . . . . .		5
48	Tables . . . . .		2
For Kriegspiel room, Rawal Pindi.			
49	Chairs . . . . .	For committee and examination purposes {	21
50	Tables . . . . .		12
Hot water apparatus.			
For allusionary purposes at the following stations—			
1st, 2nd and 3rd Divisions.			
51	Apparatus for heating water.	Peshawar, Nowshera, Risalpur, Attock, Rawal Pindi and Murre Hills, Sukhot, Campbellpore, Lahore Cantt. and Fort Lahore, Ferozepore, Amritsar, Multan, Jullundur, Ballouise, Ambala, Kasauli, Bolon, Dagahai, Subathu, and Jutogh.	1 per band and squadron of British Cavalry, band and coy. of Irish Infantry, and battery of R. A. The cost of heating and distributing the water is borne by the unit.





## SECTION IV.

## SUPPLIES BY M. W. S. or P. W. D.

Table 79.—Equipment for certain special services—*conold.*

Item No.	Articles.	Where required and for what purpose.	Authorized proportion.
51	Apparatus for heating water—(conold.)	<i>4th, 5th and 6th Divisions.</i>	
		Quetta, Nasirabad, Jubbulpore, Belgam, Poona, Ahmednagar, Mount Abu, Deolali, Pachmarhi, Jhansi, Mhow, Kirkee, Coleha, Purandhar and Nowgong.	1
		<i>7th and 8th Divisions.</i>	
		Meerut, Delhi, Chakrata, Muttra, Roorkhee, Bareilly, Ranikhet, Chaubattia, Lucknow, Cawnpore, Fyzabad, Allahabad, Lebona, Darjeeling, Katapahar, and Jalapahar	1
		<i>9th Division.</i>	
		Wellington . . . . .	1
		<i>Aden Brigade.</i>	
		British troops at Aden . . . . .	10
		<i>For orderly officer's Quarters, Fort Persepore.</i>	
		Almirah, small . . . . .	1
52	...	Chairs, cane bottomed . . . . .	3
53	...	Chairs, easy . . . . .	1
54	...	Commodore . . . . .	1
55	...	Cots, newar . . . . .	1
56	...	Cupboards, mess . . . . .	1
57	...	Meat safe . . . . .	1
58	...	Racks, towel . . . . .	1
59	...	Tables, cookhouse . . . . .	1
60	...	" dressing . . . . .	1
61	...	" writing, 2' x 1'—8' . . . . .	1
62	...	" Teapoy . . . . .	1
63	...	Wash-hand stand . . . . .	1
64	...	<i>For use in case of fire at the following stations in the 7th and 8th Divisions.</i>	
65	Fire ladders . . . . .	Chakrata . . . . .	6
		Ranikhet . . . . .	8
		Almora . . . . .	4
		Chaubattia . . . . .	4
		Naini Tal . . . . .	4
		Bareilly . . . . .	4
		Shahjahanpur . . . . .	4
		Kailana . . . . .	5

Per band and squadron of British Cavalry; band and coy. of Brit. in'y. coy and batt. of R. A.  
The cost of heating and distributing the water is borne by the unit.

For whole garrison.

## SECTION IV.

## SUPPLIES BY E. W. S. or P. W. D.

Table 50.—Table of stores supplied periodically.

Item No.	Stores.	No. or quantity.	For what purpose.
1	Brushwood . . . . . mds.	75	Supplied annually for each class of instruction for pioneers of each British cavalry regiment in the plains, and for classes held at Kasauli, Maliana, Murree and Wellington.
2	Grass, for thatching . . . . . bundles	500	
3	Nails, iron, spike, No 183, 6 <sup>7</sup> long . . . lbs.	25	
4	Railway plant, old chairs, with two trenchails and two spikes to each . . . No.	10	
5	Fish plates and bolts . . . . . sets	4	
6	Haile, as available . . . . . lengths	4	
7	Sleepers, 9' x 4" x 4½" or as available . . . . . No.	7	
8	Railway plant— old rails (2' long) . . . . . ft.	21	Supplied annually for explosive classes held at Kohat, Hanaa and D. I. Khaw.
9	Railway plant, old chairs, with two trenchails and two spikes to each . . . No.	5	
10	Fish plates and bolts . . . . . sets	2	Supplied annually to each Indian cavalry regiment, exco- sive of those located at Kohat, Hanaa and D. I. Khaw, and the 4den troop, for instruction in the use of ex- plosives.
11	Haile, as available . . . . . lengths	2	
12	Sleepers, 9' x 9" x 4½" or as available . . . . . No.	4	







## SECTION V.

## SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 81.—Equipment authorized for the Cavalry School, Sauger

Item No.	Articles.	Scale.	Remarks.
1	Field Medical panniers . . . . .	Pair.	1
2	" " companion . . . . .	No	1
3	" Surgical haversack . . . . .	"	1
4	" " cavalry bag . . . . .	"	1
5	Wallets, veterinary . . . . .	"	1
6	Veterinary equipment as allowed for a class 1, Station Veterinary Hospital, for 500 animals.		

Table 82.—Field medical equipment for the Recruiting Depot, Gorakhpore.

Item No.	Articles.	Scale.	Remarks.
1	Field Medical panniers . . . . .	Pair.	1
2	" " companion . . . . .	No.	1
3	" Surgical haversack . . . . .	"	1

SECTION V.  
SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 53 --Equipment authorized for Veterinary Hospitals of Remount Depots.

Item No.	Articles.	Sahasapur.	Hapur.	Mona and Sargodha.	Calcutta.	Meer.	Ahmednagar.	Remarks.
1	2	3	4	5	6	7	8	9
<i>Surgical Instruments.</i>								
1	Aspirator, with stop cork . . . No.	1	1	1	1	1	1	
2	Blistaries, cache . . . "	3	3	3	1	1	1	
3	" probe, pointed . . . "	1	1	2	1	1	1	
4	" sharp . . . "	1	1	2	1	1	1	
5	Cans, bleeding, zinc, graduated . . . "	1	1	2	1	1	1	
6	Cases, dental, large . . . "	1	1	1	1	1	1	
7	Castrators, Arnold's Reliance . . . "	1	1	2	1	1	1	
8	Catheters, elastic, gum, male . . . "	1	1	2	1	1	1	
9	" pewter, female . . . "	1	1	2	1	1	1	
10	Chisels, broad, 12" long . . . "	1	1	2	1	1	1	
11	" tooth (Gowing's) . . . "	1	1	2	1	1	1	
12	Clamps, castrating . . . prs.	1	1	2	1	1	1	
13	Directors, for bistouries . . . No	1	1	2	1	1	1	
14	Ecraseurs . . . "	1	1	2	1	1	1	
15	Extractors, tooth, molar . . . prs	1	1	2	1	1	1	
16	Fleams . . . "	1	1	2	1	1	1	
17	Forceps, artery . . . "	1	1	2	1	1	1	
18	" bone . . . "	1	1	2	1	1	1	
19	" bullet . . . "	1	1	2	1	1	1	
20	" dissecting . . . "	1	1	2	1	1	1	
21	" dressing, bow . . . "	1	1	2	1	1	1	
22	" pin, cutting . . . "	1	1	2	1	1	1	
23	" polypus . . . "	1	1	2	1	1	1	
24	" sandcrack . . . "	1	1	2	1	1	1	
25	" tooth . . . "	1	1	2	1	1	1	
26	" torsion . . . "	1	1	2	1	1	1	
27	Gags, mouth, Ferguson's . . . No	1	1	2	1	1	1	
28	Holders, caustic . . . "	2	2	4	1	2	2	
29	" needle . . . prs	2	2	4	1	2	2	
30	Instruments, dressing . . . pocket case	1	1	2	1	1	1	
31	" dissecting . . . cases	1	1	2	1	1	1	
32	" trephine . . . "	1	1	2	1	1	1	
33	Irons, balling, screw pattern . . . sets	1	1	2	1	1	1	
34	" firing, sets of six . . . "	1	1	2	1	1	1	
35	Irrigators, quart, with appliances . . . "	1	1	2	1	1	1	
36	Knives, butchers', F.M.E., with sheaths No.	1	1	2	1	1	1	
37	" neurotomy . . . "	6	6	8	4	4	4	
38	" pericæotomy . . . "	1	1	2	1	1	1	
39	" tendon . . . "	1	1	2	1	1	1	
40	Lansects, abacuss, common . . . "	2	2	4	1	2	2	
41	" bleeding . . . "	1	1	2	1	1	1	
42	" eye . . . "	2	2	4	1	2	2	
43	Lens, magnifying . . . "	1	1	2	1	1	1	
44	Machines, docking . . . "	1	1	2	1	1	1	
45	Microscopes, complete . . . "	1	1	2	1	1	1	
46	Mirrors, dental . . . "	1	1	2	1	1	1	
47	Needles, curved, for thread sutures . . . "	45	45	60	16	24	24	
48	" " wire . . . "	30	30	60	10	16	16	
49	" of sizes and kinds . . . "	50	32	60	10	16	16	
50	" Seton . . . sets	1	1	2	1	1	1	
51	Oleotric . . . No	1	1	2	1	1	1	
52	Ophthalmoscope, with lens, discs, and mirrors in case . . . "	1	1	2	1	1	1	
53	Patent, Needles . . . "	1	1	2	1	1	1	
54	Probes . . . "	1	1	2	1	1	1	
55	Probes, of sorts and sizes . . . "	2	2	4	2	2	2	





## SECTION V.

## SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 53.—Equipment authorized for Veterinary Hospitals of Remount Depots—*contd*

Item No.	Articles.	Saharanpur.	Hapur.	Mons and Sargodha.	Calcutta.	Rosur.	Ahmednagar.	Remarks.
1	2	3	4	5	6	7	8	9
<i>Surgical Instruments—concl'd.</i>								
56	Rasps, tooth . . . . . No.	1	1	2	1	1	1	
57	Saws, butchers', P.M.E. with sheaths . . . . .	1	1	1	1	1	1	
58	Scalpels, in case with forceps . . . . . cases	1	1	1	1	1	1	
59	Scissors, dressing . . . . . prs.	1	1	2	1	1	1	
60	" . . . . . " . . . . . "	1	1	2	1	1	1	
61	" . . . . . " . . . . . "	1	1	2	1	1	1	
62	Searchers, double edged . . . . . No.	1	1	2	1	1	1	
63	Spatula . . . . . "	2	2	4	2	2	2	
64	Specula, eye . . . . . "	1	1	2	1	1	1	
65	" . . . . . " . . . . . "	1	1	2	1	1	1	
66	" . . . . . " . . . . . "	1	1	2	1	1	1	
67	Staff, sound and forceps, stone . . . . . "	1	1	2	1	1	1	
68	Steel, butchers', P. M. E. . . . . "	1	1	2	1	1	1	
69	Stethoscopes, wooden . . . . . "	1	1	2	1	1	1	
70	Sticks, blood . . . . . "	1	2	2	1	1	1	
71	Syringes, brass . . . . . "	1	2	3	1	3	2	
72	" . . . . . " . . . . . "	1	1	2	1	1	1	
73	" . . . . . " . . . . . "	1	1	2	1	1	1	
74	Tenaculus (Asselin's) . . . . . "	1	1	2	1	1	1	
75	Thermometers, clinical . . . . . "	7	8	16	3	4	4	
76	Tourniquets . . . . . "	1	1	2	1	1	1	
77	Trocars . . . . . "	1	1	2	1	1	1	
78	Tubes, tracheotomy . . . . . "	2	2	4	2	2	2	
79	" . . . . . rubber tubing for drainage . yds.	4	4	6	2	2	2	
<i>Necessaries—permanent.</i>								
80	Bandages, rubber . . . . . No.	2	2	4	2	2	2	
81	Bottles, drenching . . . . . "	2	2	4	2	2	2	
82	Dredgers, for iodoform . . . . . "	1	2	4	1	2	1	
83	Funnels, enema . . . . . "	1	1	2	1	1	1	
84	" . . . . . " . . . . . "	1	1	2	1	1	1	
85	" . . . . . " . . . . . "	1	1	2	1	1	1	
86	Hones . . . . . "	1	1	2	1	1	1	
87	Horns, drenching . . . . . "	2	2	4	2	2	2	
88	Inhalers, chloroform . . . . . "	1	1	2	1	1	1	
89	Measures, britannia, of sizes . . . . . "	2	2	4	2	2	2	
90	" . . . . . " . . . . . "	1	1	2	1	1	1	
91	" . . . . . " . . . . . "	2	2	4	2	2	2	
92	" . . . . . " . . . . . "	1	1	2	1	1	1	
93	Pestles, iron . . . . . No.	2	2	4	2	2	2	
94	" . . . . . " . . . . . "	2	2	4	2	2	2	
95	" . . . . . " . . . . . "	1	1	2	1	1	1	
96	" . . . . . " . . . . . "	1	1	2	1	1	1	
97	Pots, decoction, tin . . . . . "	1	1	2	1	1	1	
98	" . . . . . " . . . . . "	1	1	2	1	1	1	
99	Scales and weights, deep, copper . . . . . sets	1	1	2	1	1	1	
100	" . . . . . " . . . . . "	1	1	2	1	1	1	
101	Slabs, wedgewood, 6½" x 6½" . . . . . No.	1	1	2	1	1	1	2 lbs., 4 oz., grains.
102	Spatula, bolus . . . . . "	2	2	4	2	2	2	
103	Strops . . . . . "	1	1	2	1	1	1	
<i>Necessaries—consumable.</i>								
104	Corks, phial . . . . . No.	180	195	360	60	66	99	
105	" . . . . . pint . . . . . "	180	195	360	60	66	99	

## SECTION 7.

## SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 63.—Equipment authorized for Veterinary Hospitals of Remount Depots—*contd.*

Item No.	Articles.	Sabarnagar.	Nagar.	Mona and Sargodha.	Calcutta.	Hosur.	Ahmednagar.	Remarks.
1	2	3	4	5	6	7	8	9
<i>Necessaries—consumable—concl.</i>								
106	Corks, quarts . . . . . No	180	195	360	60	96	96	
107	Gallipots, country . . . . . "	180	195	360	60	96	96	
108	" English . . . . . "	...	32	160	...	28	...	
109	Gauge, plain . . . . . yds.	15 yds.	percent.	of strength.				
110	" double cyanide . . . . . "	Ditto	Ditto	Ditto				
111	Ligature, flax . . . . . hands.	10	10	30	5	8	8	
112	" silk . . . . . ozs.	7½	8	15	2½	4	4	
113	Materials, for mounting and staining microscope	...	...	...	...	...	...	As required.
114	Phials, common, English, N.M. . . . . No.	45	48	90	15	24	24	
115	" " " " W.M. . . . . "	45	49	90	15	24	24	
116	Pins, common . . . . . papers	4	4	6	2	2	2	
117	" safety . . . . . No.	6	6	12	6	6	6	
118	Sponges . . . . . lbs.	7½	8	15	3½	4	4	
119	Tap, of sizes . . . . . pieces	4	4	6	2	2	2	
120	Tow, carbolized . . . . . lbs.	90	96	180	...	48	48	
121	" English . . . . . "	15	16	30	6	8	8	
122	Twine, English . . . . . balls	6	6	8	3	3	3	
123	Wire, for sutures . . . . . lbs.	2½	2½	5	...	1½	1½	
124	Wool, absorbent . . . . . "	16	16	30	...	8	8	
125	" antiseptic . . . . . "	6	6	10	2	3	3	
126	" carbolized . . . . . "	6	6	10	2	3	3	
<i>Medicines.</i>								
127	Acidum, aceticum . . . . . lbs.	15	16	30	5	6	6	
128	" arsenotum . . . . . oz.	19	20	38	6	8	8	
129	" benzoicum . . . . . "	32	32	60	10	12	12	
130	" boricum . . . . . lbs.	10	16	...	...	12	12	
131	" carbolicum, B.P. . . . . "	30	32	60	10	16	16	
132	" " com. . . . . "	...	64	...	...	...	...	
133	" citricum . . . . . oz.	...	22	...	...	9	9	
134	" gallicum . . . . . "	...	22	...	...	7	7	
135	" hydrochloricum . . . . . "	7	4	100	...	6	6	
136	" hydrocyanicum . . . . . "	19	2	38	...	2	2	
137	" nitricum . . . . . "	19	20	38	5	8	8	
138	" salicylicum . . . . . "	19	20	38	5	8	8	
139	" sulphuricum . . . . . "	19	20	38	5	8	8	
140	" tannicum . . . . . lbs.	30	32	60	10	16	16	
141	" tartaricum . . . . . oz.	32	32	60	16	18	18	
142	Aloes, barbadensis . . . . . lbs.	30	32	60	10	16	16	
143	Alumen . . . . . oz.	32	40	31	16	101	101	
144	Ammonii, carbonas . . . . . lbs.	30	32	60	10	16	16	
145	" chloridum . . . . . "	5	5½	10	1½	2½	2½	
146	Antimonium, tartaratum . . . . . "	5	5½	10	1½	2½	2½	
147	Argentii nitras . . . . . oz.	7	8	16	2	4	4	
148	Camphora . . . . . lbs.	15	16	30	5	8	8	
149	Camphorodys, or chlorodys . . . . . oz.	38	40	60	10	20	20	
150	Cantharis guir . . . . . lbs.	5	5½	10	1½	2½	2½	
151	Ceraflava . . . . . oz.	33	40	80	10	20	20	
152	Chloral hydras . . . . . "	28	40	80	10	20	20	
153	Chloroformum . . . . . lbs.	10	10½	20	3½	5½	5½	
154	Formalin, hydrochloras . . . . . oz.	2½	3½	7	1	1½	1½	
155	Formosolium . . . . . "	19	20	38	5	8	8	
156	Creta preparata . . . . . lbs.	15	16	30	5	8	8	







## SECTION V.

## SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 53.—Equipment authorized for Veterinary Hospitals of Remount Depots—*contd.*

Item No.	Articles.	Sahasapur.	Hapur.	Honn and Sargodha.	Calcutta.	Honur.	Almudager.	Remarks.
1	2	3	4	5	6	7	8	9
<i>Medicine—contd.</i>								
157	Cupri, sub acetat . . . . .	lbs. 10	10	18	5	8	8	
158	" sulphat . . . . .	15	18	30	5	8	8	
159	Dextrine . . . . .	"	"	10	"	"	"	
160	Extractum, belladonnae . . . . .	oz. 38	40	80	10	20	20	
161	" canabie Indicae . . . . .	1½	1½	2½	1	1	1	
162	" hyoscyami . . . . .	35	40	60	10	20	20	
163	" nuxvomicae . . . . .	19	20	38	5	8	8	
164	Ferri et quinine . . . . .	lbs. 5	5½	10	1½	2½	2½	
165	" Iodidum . . . . .	oz. 38	40	80	10	20	20	
166	" sulphat . . . . .	lbs. 30	32	60	10	16	16	
167	Flax, colloidum . . . . .	oz. 2½	4	7½	1	1	2	
168	Gentiana radix pulv. . . . .	lbs. 18	16	30	5	10	10	
169	Glycerinum . . . . .	oz. 30	32	60	10	16	16	
170	Hydrargi, Iodidum rubrum . . . . .	oz. 38	40	80	10	20	20	
171	" perchlor (corrosive sublimate) . . . . .	3½	4	7	1	2	2	
172	" subchloridum (calomel) . . . . .	19	20	38	5	8	8	
173	Iodoformum . . . . .	lbs. 5	5½	10	1½	2½	2½	
174	Iodum . . . . .	oz. 19	20	38	5	8	8	
175	Ipecacuanha, pulvis . . . . .	3½	4	7	1	2	2	
176	Liquor, ammoniac . . . . .	lbs. 15	16	30	5	8	8	
177	" arsenicalis . . . . .	15	16	30	5	8	8	
178	" strychninum . . . . .	oz. 1½	2	3½	1	1	1	
179	" zinc chloride . . . . .	lbs. 10	10½	20	3½	5½	5½	
180	Magnesi sulphat . . . . .	oz. 105	112	210	35	56	56	
181	Morphia, hypodermic injection . . . . .	oz. 3½	4	7	1	2	2	
182	Morphina, hydrochloridum . . . . .	7	8	15	2½	4	4	
183	Nuxvomica . . . . .	oz. 38	40	80	10	20	20	
184	Oil, cheepine . . . . .	lbs. 60	64	120	20	32	32	
185	Olum, arachis . . . . .	1	1½	2	1	4½	1	
186	" crotonis . . . . .	oz. 3½	4	7	1	2	2	
187	" eucalyptus . . . . .	3½	4	7	1	2	2	
188	" liosced . . . . .	lbs. 9½	"	"	"	"	"	
189	" mentha piperita . . . . .	oz. 1	1½	2	1	4	1	
190	" mustard . . . . .	"	"	"	"	"	"	
191	" petra . . . . .	lbs. 15	16	3	5	8	8	
192	" ricini . . . . .	45	43	90	15	24	24	
193	" sesami . . . . .	oz. 6	8	16	2	4	4	
194	" terebinthin . . . . .	lbs. 60	64	120	20	32	32	
195	Opil pulvis . . . . .	5	5½	10	1½	2½	2½	
196	Physastigmene . . . . .	oz. 14	"	"	"	"	"	
197	Pix, burgundica . . . . .	lbs. 15	14	30	5	8	8	
198	" liquida (Stockholm tar) . . . . .	60	64	120	20	32	32	
199	Plumbi acetat . . . . .	oz. 10	10½	20	3½	5½	5½	
200	Potasse caustica . . . . .	oz. 7	8	15	2½	4	4	
201	Potassil chlora . . . . .	lbs. 5½	6	60	2	2½	2½	
202	" Iodidum . . . . .	oz. 38	40	80	10	20	20	
203	" nitrat . . . . .	lbs. 15	16	30	5	8	8	
204	" permaanganas . . . . .	oz. 5½	6	11	1½	3	3	
205	Quinine, sulphat . . . . .	lbs. 10	10½	20	3½	5½	5½	
206	Resina . . . . .	15	16	30	5	8	8	
207	Rantonium . . . . .	oz. 20	24	40	10	19	19	
208	Sapo duris . . . . .	"	"	"	"	16	"	
209	Sapo mollis . . . . .	lbs. 5	5½	10	1½	2½	2½	
210	Sodii, bicarbonat . . . . .	oz. 30	32	60	10	16	16	
211	" salicylat . . . . .	oz. 4	6	8	2	3	3	
212	Solutio, antiseptic . . . . .	53	54	104	34	51	51	
213	Spiritus, ammoniac aromaticus . . . . .	lbs. 15	16	30	5	8	8	

## SECTION V.

## SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 83.—Equipment authorized for Veterinary Hospitals of Remount Depots—*concl'd.*

Item No.	Articles.	Saharanpur.	Harar.	Mons and Sargodha.	Calcutta.	Meer.	Ahmednagar.	Remarks.
1	2	3	4	5	6	7	8	9
<i>Medicines—concl'd.</i>								
214	Spiritus, æthers . . . . .	15	16	30	5	8	8	
215	" " nitrosi . . . . .	30	33	60	10	16	16	
216	" rectificatus . . . . .	15	16	30	5	8	8	
217	Strychnina . . . . .	3½	4	7	1	2	2	
218	Sulphur, sublimatum . . . . .	30	32	60	10	16	16	
219	Terebinth, venetice . . . . .	oz	...	...	...	8	8	
220	Tinctura, aconite . . . . .	19	20	33	5	8	8	
221	" arnica . . . . .	35	40	80	16	20	20	
222	" assafoetida . . . . .	30	32	60	10	16	16	
223	" canabis Indice . . . . .	33	40	80	10	20	20	
224	" camphoræ . . . . .	3	3½	6	2	2½	2½	
225	" cardamomi composita . . . . .	30	33	60	10	16	16	
226	" digitalis . . . . .	5	6½	10	1½	2½	2½	
227	" ferri perchloridi . . . . .	10	10½	20	3½	5½	5½	
228	" iodi . . . . .	5	5½	10	1½	2½	2½	
229	" myrrhæ et aloes . . . . .	30	32	60	10	16	16	
230	" nuxis vomice . . . . .	...	...	...	...	1½	...	
231	" opii . . . . .	40	42	80	13	21	21	
232	Unguentum, acidi borici (Lister's) . . . . .	38	40	80	10	20	20	
233	" hydrargyri . . . . .	38	40	80	10	20	20	
234	" hydr. oleat . . . . .	19	20	38	5	8	8	
235	" resicis . . . . .	5	5½	10	1½	2½	2½	
236	Vaseline (paraffinum molle) . . . . .	15	16	30	5	8	8	
237	Zinci, oxidum . . . . .	5	6½	10	1½	2½	2½	
238	" sulphas . . . . .	38	40	80	10	20	20	





## SECTION V.

## SUPPLIES BY MEDICAL STORE DEPARTMENT.

Table 84.—Stores supplied periodically to certain railway rest camps and all military prisons and detention barracks.

Item No.	Articles.	Scale.	Camps (a) (b) and prisons (b) at which allowed.	Remarks.
1	Potassium permanganate	Not to exceed 10 grains per chem per British soldier halted.	Jhansi . . . Rangoon . . .	(a) For use of details proceeding to and from Bombay. (b) For treating drinking water after being boiled or when in wells, and for the daily cleansing of vessels used for storing or conveying water
2	Ditto . . .	As required . . .	All military prisons and detention barracks	

Table 85.—Disinfectants for British Troops.

Item No.	Articles.	Scale.	Remarks.
1	Saponified cresol . . .	One gallon per 100 men per month.	Where the wet system of conservancy is in force.
2	Ditto . . .	17½ gallons per month . . .	To be supplied to Garrison Quarter Master, Fort St. George, Madras, for use in latrines and urinals in his charge.

Table 86.—Stores supplied annually to Mounted Infantry in Burma.

NOTE.—These are obtained from the Medical Store Depot, Rangoon, on indenta sanctioned by the S.V.O., Burma Division, and are kept at head-quarters of Battalions packed in medicine chests for issue as prescribed.

Item No.	Articles.	Scale per 100 ponies.	Item No.	Articles.	Scale per 100 ponies.	Item No.	Articles.	Scale per 100 ponies.
Medicines.			Medicines—continued.			Necessaries—continued.		
1	Acidum boricum . . oz.	8	18	Opil pulvis . . . oz.	1	35	Corks, phial . . . No.	6
2	" carbolicum . . .	10	19	Phenyle . . . lb.	2	36	" pint . . .	6
3	B. P. . . lbs.	1	20	Pix burgundica . . .	1	37	Gallipots, country . . .	6
4	Aloe barbadensis . . .	1	21	" liquida (tar Stockholm)	2	38	Gauze, antiseptic . . yds.	2
5	Ammonii carbonate . . .	1	22	Plumbi acetate . . .	1	39	Ligature, fax . . . oz.	1
6	Argentii nitras . . . oz.	23	23	Potassii nitras . . .	2	40	" silk . . .	1
7	Camphora . . .	8	24	Solution antiseptic (a) . oz.	4	41	Lint, carbolic . . .	6
8	Cantharis pulv. . .	1	25	Spiritus ammoniac aromaticus . . .	8	42	Phials, common-English, N. M. . . No.	2
9	Cupri sulphas . . . oz.	8	26	" aethers nitrocl . lb.	2	43	" common-English, W.M. . .	2
10	Extractum, belladonnae . .	2	27	Sulphur sublimatum . .	1	44	Plas, common . . paper	2
11	Ferri sulphas . . . lb.	8	28	Tinctura myrrhae et aloes . . oz.	8	45	" safety . . . No.	6
12	Gentiana radix pulv. . oz.	2	29	" opul . . lb.	1	46	Sponge . . . oz.	2
13	Glycerinum . . . lb.	2	30	Vaseline (paraffin molle)	1	47	Tape, broad . . . pieces	1
14	Hydrargyri iodidum rubrum . oz.	1	31	Zinci oxidum . . . oz.	8	48	" for sutures . . .	1
15	" subchloridum (calomel)	1	32	" sulphas . . . lb.	1	49	Tow, carbolic . . . lb.	1
16	Iodoformum . . .	1	33	Necessaries.	1	50	" English . . .	2
17	Oleum sesami . . . lb.	1	34	Bandages, hand loom . No	6	51	Twine, English . . . balls	1
				" puttee cloth . .	2	52	Wool, absorbent . . . h	1
						53	" bore . . . oz.	2

(a) Antiseptic solution is made of perchloride of mercury 248 grs., chloride of sodium 24 grs., 6 grains of lead acetate, rectified spirit 1 pint. One ounce diluted up to 1 pint with water makes a solution of perchloride of mercury equal to 1 in 1,000 parts.

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attains majority during the pendency of the suit, he cannot claim to file a fresh written statement so as to supersede that filed by his guardian *ad litem* <sup>2</sup>

O. 6 R. 7  
Notes 1-3

**2. New ground of claim.** — Where a plaint is defective, it cannot be supplemented by a subsequent statement <sup>1</sup> A claimed one half of £500 alleging that B the defendant, had received it as trustee for himself and the plaintiff A in equal shares B pleaded that he received only £311, half of which he paid into Court A thereupon replied that B ought to have received the full £500, and that having wrongfully compromised with the debtor, is liable for half of £500 It was held that this was a new ground of claim which could not be allowed <sup>2</sup>

**3. Inconsistent allegations.** — A party cannot in subsequent pleading make any allegation inconsistent with what he has alleged originally <sup>1</sup> Thus if a statement of claim (i.e., plaint) alleges merely a negligent breach of trust, the reply must not assert that such breach of trust was fraudulent <sup>2</sup> If such inconsistent allegations are made in a subsequent pleading without obtaining leave to amend, the Court will be justified in ignoring it, and the fact that a formal order rejecting it is not passed will not be a ground for remanding the case for retrial <sup>3</sup> But where both parties understand the real point in issue and give evidence, the fact that a pleading subsequent to the plaint and the evidence is at variance with the original pleading is immaterial <sup>4</sup>

**R. 8. [New.]** Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of

Denial of contract

the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

O. 6 R. 8

[R. S. C., O. 19 R. 20.]

**1. Denial of contract.** — Where the defendant disputes the legality or sufficiency in point of law of the contract set up by the plaintiff, he must plead specifically

(16) AIR 1916 Mad 903 (905)

(22) AIR 1929 Oudh 204 (206, 207)

(28) AIR 1929 Sind 103 (104) 23 Sind L R 370  
(Change of case at last moment without amendment—Disallowed)

2. (37) AIR 1937 Pat 625 (626) (AIR 1935 Mad 117, Relied on)

**Note 2**

1 (02) 1902 All W N 85 (38)

[See (36) AIR 1936 P C 27 (29) (P C) (It is *res inter alios acta* to limit a new head of claim without a proper amendment of pleadings)]

2 (18-6) 3 Ch D 251 (259) Farquhar v Henderson

**Note 3**

1 (1851) 5 M & W 1 Inl App 271 (290) (PC)

(3) AIR 1912 Pat 31 (33) (Court should not allow party to make a new case at a late stage in the suit)

(18) AIR 1919 Lah 136 (157)

(13) 18 Ind Cas 553 (554) (Lah)

(36) AIR 1936 Cal 465 (463)

(37) AIR 1937 Lah 795 (796)

[See (37) AIR 1937 All 763 (765) (Partition suit — Plaintiff mentioning weight and value of ornaments listed with plaint—In such case, such mention cannot be considered conclusive or irrebuttable)]

[See also (39) AIR 1939 Sind 137 (142) I L R (1939) har 830 (New defence raised which cuts at the root of proceedings and which does not arise from pleadings—Plaintiffs should be allowed and proceedings conducted in fair and proper manner)]

[But see (13) 21 Ind Cas 61 (62) (All) (Incompetency in the defence not considered)]

2. (18-6) 3 L R Ir 364 Kings v Corker

3 (10) AIR 1930 Nag 147 (146)

4 (14) AIR 1914 All 473 (4-1)

[See also (3) AIR 1936 Cal 173 (154)]

O. 6 R. 8  
Note 1

the grounds of his objection, it is not sufficient merely to traverse any allegation the plaintiff may have made<sup>1</sup>. Thus, where in a suit on a contract of mortgage the defendant denied the consideration for the mortgage it was held that he could not at the trial contend that the mortgage was not *duly* attested, and was therefore invalid<sup>2</sup>. But no Court will enforce an *illegal contract*, if the illegality is duly brought to the notice of the Court and if the person invoking the aid of the Court is himself implicated in the illegality, it matters not whether the defendant has or has not pleaded the illegality<sup>3</sup>. The reason is that a Court will not assist a plaintiff where his own case discloses the illegality of the transaction.

O. 6 R. 9

**R. 9. [New.]** Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

[R. S. C., O. 19 R. 21.]

### Synopsis

#### 1 Scope of the Rule

#### 2 Precise words when necessary

**1 Scope of the Rule.**—Rule 2 of this Order provides that every pleading shall contain a statement in a concise form of the material facts on which the party pleading relies. Where such a material fact is mentioned in a document it is sufficient under this rule to state the *effect* of the document as briefly as possible without setting out the whole or any part thereof. Thus in an action brought by the devisees of land under a will for the recovery of the land devised, it was held that it was not necessary to set out the precise words of the will<sup>1</sup>. A party is, however, bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims<sup>2</sup>. It is not enough for him to say simply that by virtue of a certain deed he is entitled to the property claimed by him<sup>3</sup>.

**2. Precise words, when necessary.**—In an action for libel or slander the precise words complained of are material and should always be set out *verbatim*<sup>1</sup>.

#### Order 6 Rule 8 — Note 1

1 { 32) AIR 1932 All 399 (1932 203) 53 All 953  
[Suit on unconditional acknowledgment—Limitation must be specifically pleaded in regard to

(31) 27 All 266 (270 271) (Facts showing illegality cited in cross examination of defendant by plaintiff = *pleader*)  
(1897) 2 Q. B. 724 (31 732) Scott v Brown

#### Order 6 Rule 9 — Note 1

1 (1896) 1 Q. B. 551 (558) Darbyshire v Leigh  
2 { 16) AIR 1916 Cal 679 (659)  
3 (1878) 4 Q. B. D. 127 (135 136) Phillips v Hill ps

#### Note 2

1 (1879) 4 C. P. D. 125 (128 129) Harris v Warce  
[See also (1892) 7 App. Cas. 741 (772) Capital and Counties Bank v Henty]

# R. 10. [New.] Wherever it is material to allege malice, O. 6 R. 10

Malice, knowledge, etc.

fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

[R. S. C., O. 19 R. 22. See Rr. 2 and 4 above.]

## Synopsis

- |                       |                         |
|-----------------------|-------------------------|
| 1. Scope of the Rule. | 3. Fraudulent intention |
| 2. Malice.            | 4. Knowledge            |

**1. Scope of the Rule.** — The circumstances from which malice, fraudulent intention or other condition of the mind is to be inferred, constitute really the *evidence* in proof of such condition of mind, and need not therefore be pleaded, in accordance with the rule enacted in Rule 2 *ante* that only the material facts should be pleaded, but not the *evidence* by which they are to be proved. But, where a certain condition of mind such as insanity is relied on by a party for his claim or defence, he must allege it as a fact in his pleading and where he does not do so, and the fact of the existence of such state of mind is only brought out in the evidence, the Court should not act on such fact.<sup>1</sup>

**2. Malice.** — Where malice is a material ingredient of the plaintiff's case as being a necessary part of his cause of action, as in suit for damages for slander or malicious prosecution, it should be alleged specifically in the plaint.<sup>1</sup> Similarly, where a mistaken *bona fide* belief and good faith are the grounds for applying the rule of equitable subrogation, they must be distinctly alleged in the pleadings and proved.<sup>2</sup>

**3. Fraudulent intention.** — See O 6 R 4 Note 2 *ante*. Where there is fraud there is no room for the doctrine of acquiescence to operate which is only a form of estoppel.<sup>1</sup> As to the requisites of an acquiescence, see the undermentioned case.<sup>2</sup>

**4. Knowledge.** — If knowledge or the absence of it is a material factor in the case, it should be expressly alleged.<sup>1</sup> Thus, where insanity is set up as a defence to an action for breach of contract, it must be alleged and proved that, at the time of the contract, the plaintiff had knowledge of such insanity.<sup>2</sup>

### Order of Rule 10 — Note 1

1. (39) AIR 1938 Nag 204 (208) (Plea of insanity to avoid the effect of a deed — Circumstances

### Note 3

1. (30) AIR 1930 Cal 678 (684)  
2. (30) AIR 1930 Oudh 235 (243).

### Note 4

1

1. (01) 6 Bom L R 704 (720, 721)

(01) 25 Cal 591 (593)

(1833) 5 B & Ad 559 (596) Mitchell v Jenkins

[See also (1881) 8 Q B D 167 (170), Hicks v Faulkner

(07) 31 Bom 37 (45) (Suit for damages against a letter carrier for refusal to receive nomination paper — Malice necessary to be alleged)]

2. (31) AIR 1931 Mad 110 (118)

and ignorance of servant must be proved (In (1896) 2 Q B 109 (111) Osborne v Chappell (In

2 Stone

O. 6 R 11

**R. 11.** [New.] Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material

[ R S C., O. 19 R 23 See S. 80 ]

1. Notice — Wherever the giving of a notice is a condition precedent to the exercise of the right of suit the plaintiff must plead and prove that the notice had been given and the condition precedent fulfilled<sup>1</sup>

O. 6 R 12

**R. 12.** [New.] Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative

[ R S C., O. 19 R 24 ]

1. Implied contract or relation. — In an action brought on a contract the contract and the breach thereof must be alleged and proved<sup>1</sup> If the contract is an implied contract the facts should be stated from which the plaintiff contends that a contract is to be implied. This rule enacts that where the contract is to be implied from a series of letters or conversations or from a number of circumstances such letters conversations or circumstances need be referred generally and not in detail

O. 6 R. 13

**R. 13.** [New.] Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (e.g., consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim)

[ R S C., O 19 R 25 ]

Order 6 Rule 11 — Note 1

1 (24) AIR 1924 Nag 162 (163)

Order 6 Rule 12 — Note 1

1 (24) AIR 1924 All 449 (450) 46 All 35 (Pre-emption suit)

**1. Presumption of law.** — As to the presumption in the case of a bill of exchange, see Section 118 of the Negotiable Instruments Act (XXVI of 1881)

**O. 6 R. 13  
Note 1**

Where the plaintiff is or was in possession of any land, it is sufficient as against a wrongdoer, to aver possession only, he need not set out his title as the same will be presumed, in accordance with the maxim *omnia præsumentur contra spoliatores*—every presumption is made against a wrongdoer<sup>1</sup>

**R. 14.** [Ss. 51, 115.] Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

**O. 6 R. 14**

Pleading to be signed.

[1877, S. 51; 1859, S. 27. See S. 2, cl. 20.]

### Synopsis

1. Pleading to be signed
2. Signature by persons duly authorized.
3. Omission to sign pleadings — Effect.

### Other Topics (miscellaneous)

"Absence or other good cause" See Note 2

Duty of Court to see to signature of parties See Note 1

Signature by mukhtear See Note 2

**1. Pleading to be signed.**—The object of requiring every pleading to be signed by the party is to prevent, as far as possible, disputes as to whether a suit was instituted with the plaintiff's knowledge and authority<sup>1</sup> Judges are bound to see that the pleadings are signed properly<sup>2</sup> In cases where the plaint contains allegations of fraud which must be false or true to the knowledge of the plaintiff, the defendant can insist on the plaintiff himself signing the plaint<sup>3</sup> There is no difference between vakalats, affidavits and pleadings as to the procedure by which they can be signed<sup>4</sup>

This rule is made applicable to proceedings under the undermentioned local Acts<sup>5</sup>

**2. Signature by persons duly authorized.** — Under the corresponding Sections of the Codes of 1859 and 1877, there were no provisions for the signing and verification of the pleading by the authorized agent of the party, but it was held, by applying Section 36 of the Code of 1877 (now O 3 R 1), that an authorized agent could validly sign the pleading on behalf of the party<sup>1</sup> In view of these decisions the

#### Order III Rule 13 — Note 1

1 18m LC(12th Jan 1896) *Armory v Delamirie*

#### Order III Rule 14 — Note 1

1 (25) AIR 1925 Sind 275 (275)

2 (14) AIR 1914 Low Bur 195 (199)

3 (87) 1 All 505 (507 508)

4 (1-5) AIR 1913 Cal 175 (176) 51 W.L.R. 242

5 The Bengal Tenancy Act VIII of 1859, s. 143 clause (2)

The Orissa Tenancy Act II of 1913 Ss. 70 (2), 156 (2) and 211 (4)

The Bengal Drainage Act VI of 1880 s. 51 R. Sub-s. (3) cl. (g)

#### Note 2

1 (79) 3 Cal L.R. 573 (580)

(80) 4 Bom 413 (411)

(72) 3 Cal 1 Rep 15 (16)

(64) 1 South W R 213 (215)

O. 6 R 14  
Notes 2-3

Legislature expressly added a proviso in Section 51 of the Code of 1882 (now O 6 R 14) under which an authorized agent may validly sign a pleading under certain circumstances namely, where the party pleading is by reason of absence or for other good cause unable to sign the pleading.<sup>2</sup> The absence must be of such a kind as makes it impossible for the party to sign the pleading e.g. absence on a sea cruise or a journey into unknown regions where communication is impracticable the words 'other good cause' are however of wider significance and leave the matter entirely to the discretion of the Court.<sup>3</sup>

The question as to when a person can be said to be duly authorized by the party depends upon the circumstances of each case.<sup>4</sup> A pleading signed by an unauthorized person is not valid<sup>5</sup> but in such a case the Court may permit the party himself to sign it later<sup>6</sup> or if the person signing it is subsequently authorized treat the original plaintiff itself as valid provided there is no question of limitation.<sup>7</sup>

As to the signing and verification of pleadings in suits by or against corporations, see O 29 R 1 Note 8 and as to the signing and verification of pleadings in suits by or against firms see O 30 R 1 Note 13.

**3 Omission to sign pleadings—Effect** — An irregularity in the signature or verification of a plaint is a mere defect of procedure<sup>1</sup> and does not affect the jurisdiction of the Court.<sup>2</sup> An omission or mistake in the signature is not fatal to the suit but is capable of being cured by appropriate amendments.<sup>3</sup> In fact the proper course in such cases is not to dismiss the suit or reject the plaint but to get the plaint amended.<sup>4</sup> An

{ 60 } 6 Suth W R 1140 50 (60)

2 { 03 } 25 All 431 (485)

{ 91 } 1891 All W N 152 (152)

enacts that it applies only where there is no other provision to the contrary this rule is a proviso to the contrary in so far as the authorized agent can sign only under specified circumstances.)

{ 14 } AIR 1914 Low Bur 173 (175) {Agent can

{ 94 } 16 All 420 (425)

{ 99 } 1899 Pan Re No 5 p 23 {Pr Nepal residing within jurisdiction — Agent cannot sue unless specially authorized}

{ 03 } 2 Low Bur 41 (40 43)

6 { 14 } AIR 1914 Low Bur 191 (192 193)

{ 20 } AIR 1912 Bom 113 (115) 46 Bom 160

7 { 03 } 25 All 635 (637)

### Note 3

1 { 27 } AIR 1927 All 514 (514 515)

signing the plaint—Defendant may waive objection)

2 { 31 } AIR 1931 All 507 (512) 54 All 57 (S B)

{ 11 } 10 Ind Cas 731 (732) (Nag)

{ 15 } AIR 1915 Cal 444 (449)

3 { 17 } AIR 1917 All 90 (91) 89 All 343

{ 05 } AIR 1925 Mad 660 (668 669) {Plaint signed by agent without leave—But leave subsequently obtained cures the defect}

{ 12 } 17 Ind Cas 590 (581) (Mad)

{ 96 } 6 Mad L Jour 213 (218) {Plaint initially presented without plaintiff's signature but later on presented with signature before time fixed by Court}

4 { 98 } 20 All 412 (445)

{ 96 } 18 All 395 (399 400) {If the defect is discovered in appeal the Appellate Court may send

objection to such a defect if not taken by the defendant at the earliest possible opportunity cannot be allowed to be raised for the first time in appeal.<sup>5</sup> Where several persons institute a suit it is not necessary that all should sign the plaint. It is sufficient that one of them signs the plaint with the other plaintiffs *knowledge and authority*.<sup>6</sup> In *Mohini Mohan Das v. Bungsi Buddan Saha Das* 1 L R 17 Calcutta 580 their Lordships of the Privy Council said: 'There is no rule providing that a person named as co plaintiff is not to be treated as plaintiff unless he signs and verifies the plaint.

Where however the authority and knowledge of the plaintiffs not signing the plaint are not established the institution of the plaint will not be valid.<sup>7</sup>

O. 6 R. 14  
Note 3

### Local Amendment

#### CALCUTTA

Insert the following

'R 14A — Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in Rule 14 of this Order of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall until duly changed as aforesaid be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution and shall hold good subject as aforesaid for a period of two years after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat.

O. 6 R. 14A  
(Calcutta)

### R. 15. [Ss 51, 52, 115] (1) Save as otherwise provided

O. 6 R. 15

Verification  
of pleadings

by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case

[See (37) AIR 1937 1 esb 17 (18) (The defect

(96) 1896 Pun Re No 49 p 133 (Objection raised at a late stage)

(29) AIR 19 9 Mad 90 ("91) (High Court will not ordinarily interfere in revision)

(11) 10 Ind Cas 731 (732 733) 7 Nag L R 33

(23) AIR 1923 Rang 206 206) 1 Rang 42 (S 59 C P C applies to such a case)

6 (37) AIR 1937 Snd 9 (10) 6 G Snd L R 167

(24) AIR 1937 1 at 104 (106) 31 at 6"

(37) AIR 1937 1 esb 17 (18)

[See (39) AIR 1939 Nag 42 ("41) 1 L R (1939) Nag 515 (If it is found that a person was duly authorised to sign a mortgage the question whether his signature was made by him or by somebody else on 1st half sheet of material — 1st Cl 15-0 F. 0. 0. 11)

7 (14) AIR 1914 Mad 400 (431)

son in 1 S 59 of old Code — Not good law after 14 All 390 (1)

5 (1900) 22 All 53 (51 54)

(O) 11 C. I W N 871 (872) (Written statement received by the Court and objected to by the plaintiff though not signed and verified according to law)

(30) AIR 1910 Pat 636 (638) (Petition under O. 21 R. 6 s. 4 by Harpaz of the decree holder)



O. 6 R. 16  
Notes 2-3

*embarrassing*<sup>1</sup> Merely unnecessary pleading without its being scandalous or otherwise objectionable will only affect the cost of the pleading.<sup>2</sup> But where the pleading in addition to its being unnecessary also attributes improper motives to the defendant<sup>3</sup> or charges the defendant with dishonest conduct<sup>4</sup> or makes it embarrassing for the defendant<sup>5</sup> it will be ordered to be struck out. Where however a plaintiff<sup>6</sup> or a written statement<sup>7</sup> is unnecessarily prolix and verbose or argumentative or is full of matter which is wholly irrelevant or non understandable it can be dealt with under this rule.

**3 "Scandalous"** — A Court has a general jurisdiction to prevent any of its processes being used for the purpose of disseminating scandalous and irrelevant matter.<sup>1</sup> Where such matter is introduced in the pleadings the Court may order the same to be expunged.<sup>2</sup>

Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous.<sup>3</sup> Very often if allegations made are *unnecessary* they will likewise be scandalous.<sup>4</sup> Thus where a plaintiff alleges in his plaint dishonest conduct against the defendant but no relief is sought on that ground the allegations will be struck out as scandalous and embarrassing.<sup>5</sup> Where in an action by a wife against her husband for rectification of her marriage settlement a statement was made in the plaint that the plaintiff declined to live with the defendant on account of his having committed an assault on a young girl the allegation was held to be scandalous and was ordered to be struck out.<sup>6</sup> Allegations as to partiality against the Judge made in a memorandum of appeal were expunged by the High Court in the undermentioned case.<sup>7</sup>

But a pleading or allegation which is alleged to be scandalous cannot be struck out if it is *necessary* or *relevant* to the issue or one of the issues in the action.<sup>8</sup> Indeed a matter cannot be considered as scandalous at all if it is *material* to the issue (i.e. will affect the result of the action if proved to be true) however grave the imputations may be whether of immorality or otherwise.<sup>9</sup> The Court will not in an application to expunge or strike out allegations alleged to be scandalous go into the question of their truth or falsehood. The only question is are they *relevant* to the issues in the suit? If they are they cannot be expunged.<sup>10</sup>

## Note 2

- 1 (1888) 38 Ch D 263 (270) Knowles v Robert's  
(1897) 84 L T Jour 45 Rock v Purshell

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- 5 (1878) 7 Ch D 473 (486) Davy v Garrett  
6 (67) 8 S with W R 235 (297-298)  
(29) 114 Ind Cas 906 (907) (All)  
7 (67) 7 S with W R 212 (213)  
(74) 12 Eng L R App 19 (20) (Plea of offer without prejudice irrelevant)  
(69) 3 Eng L R App 12 (12)

## Note 3

- 1 (1884) 54 L J Ch 205 (206) Re Miller (Certain parts of the bill of costs were ordered to be expunged.)  
(91) 15 Bom 488 (490-491) (Application for bill — Defamatory allegations against the trying

suit)

Story's Equity Pleadings 10th Edn § 270  
(Even though the point is raised by a stranger)

- 3 (1873) 8 Ch 499 (504) Christie v Christie  
(09) 14 Cal W N 153 (156)  
4 (1886) 55 L T 313 Brooking v Maudslay  
(09) 14 Cal W N 153 (157)  
(1879) 40 L T 455 Coyle v Cumming  
5 (1886) 55 L T 313 Brooking v Maudslay  
6 (1879) 40 L T 455 Coyle v Cumming  
7 (99) 22 Mad 155 (160)

- 10 (1873) 8 Ch 499 (503) Christie v Christie  
(09) 14 Ind Cas 380 (381) (Cal)

## 4. "Or which may tend to prejudice, embarrass or delay the fair trial." —

The question whether a pleading is embarrassing is, in each case, a question for the Judge to decide in view of the facts and circumstances of the particular case.<sup>1</sup> "The rule that the Court is not to dictate to the parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to the modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law and if a party introduces a pleading which is unnecessary, and it tends to *prejudice, embarrass* and delay the trial of the action, it then becomes a pleading which is beyond his right."<sup>2</sup> A claim or defence which a party is not entitled to make use of,<sup>3</sup> or a pleading which is ambiguous or unintelligible,<sup>4</sup> or a pleading which contains unnecessary or irrelevant allegations,<sup>5</sup> is embarrassing and may be struck out. But a pleading cannot be struck out as irrelevant unless the irrelevancy is quite clear.<sup>6</sup> Nor is a pleading necessarily embarrassing merely because of the fact that it states *inconsistent* or *alternative allegations*.<sup>7</sup> Where the plaint was verbose, extremely long, involved and impossible to understand, and did not raise any fact which would show that the Judge had jurisdiction to hear the case, it was held by the High Court of Allahabad<sup>8</sup> that the proper course was to strike out the plaint under this rule or to make an order for its amendment. Similarly, where particulars are called for from a defendant under O 6 R 5 and he fails to comply with the order, the defence may be struck out under this rule, if without the particulars his pleading is obscure, incomplete and embarrassing.<sup>9</sup>

This rule applies to a pleading which tends to prejudice or embarrass or delay a party at the *actual trial* of the suit as well as one which tends to embarrass him at any stage of the action.<sup>10</sup>

## 5. Matter may be struck out or amended at any stage of the proceeding.—

The rule empowers the Court to strike out or compel the amendment of any pleading at any stage of the proceeding.<sup>1</sup> But the rule being discretionary the Court may refuse to exercise its power unless the application is made at the earliest opportunity.<sup>2</sup> An objection under this rule is no ground for interference when the point is taken for the first time in appeal.<sup>3</sup>

## Note 4

1. (1918) 2 K. 11 200n (206n) Russell v. Stubbs (Per Lord Halsbury)

2. (1888) 11 Ch. D. 263 (270, 271) Knowles v. Roberts (Per Bowen, L. J.)  
(17) AIR 1917 Oudh 389 (389, 390)

allegations from a defence—Irrelevancy must be apparent at the first glance)

(1887) 57 L. T. 858, Tomkinson v. S. E. Ry. Co.

7. (1887) 35 Ch. D. 492 (500), In re Morgan Owen v. Morgan

(1892) 15 Ch. D. 492 (492, 493) — — — — —

11n  
(1889) 38 Ch. D. 263 (269), Knowles v. Roberts (Claim which a plaintiff is not entitled to raise)  
(1876) 1 Ex. D. 361 (363) Preston v. Lamont (Defence which a defendant is not entitled to make)

4. (1878) 7 Ch. D. 478 (486) Dyer v. Garrett  
(10) 7 Ind. Cas. 166 (169) (Cal)

(1884) 49 L. T. 772 Lumb v. Beaumont

5. (1897) 1 Q. B. D. 571 (575, 576) Russell v. Stubbs

(79) 10 R. M. H. C. R. 425 (425)

6. (1914) 111 L. T. 512 (514) London Corporation v. Merton (L. J.) — Striking out

8. (20) 114 Ind. Cas. 906 (907) (All)

9. — — — — —

1. (18) AIR 1915 Oudh 463 (464) 20 Oudh Cas 192

(17) AIR 1917 Oudh 3-9 (3-9, 300) (Revision against order to set out of two inconsistent allegations—Allowed)

2. (75) 9 R. M. S. 3-11

3. (17) AIR 1917 Mad 254 (254) (Objection as to alternative pleas cannot be taken for the first time in appeal)

O. 6 R. 16  
Notes 2-3

*embarrassing*<sup>1</sup> Merely unnecessary pleading without its being scandalous, or otherwise objectionable, will only affect the cost of the pleading.<sup>2</sup> But where the pleading in addition to its being unnecessary also attributes improper motives to the defendant,<sup>3</sup> or charges the defendant with dishonest conduct,<sup>4</sup> or makes it embarrassing for the defendant,<sup>5</sup> it will be ordered to be struck out. Where, however, a plaintiff or a written statement<sup>7</sup> is unnecessarily prolix and verbose, or argumentative, or is full of matter which is wholly irrelevant or non understandable, it can be dealt with under this rule.

**3. "Scandalous."** — A Court has a general jurisdiction to prevent any of its processes being used for the purpose of disseminating scandalous and irrelevant matter.<sup>1</sup> Where such matter is introduced in the pleadings, the Court may order the same to be expunged.<sup>2</sup>

Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous.<sup>3</sup> Very often, if allegations made are unnecessary, they will likewise be scandalous.<sup>4</sup> Thus, where a plaintiff alleges in his plaint dishonest conduct against the defendant, but no relief is sought on that ground, the allegations will be struck out as scandalous and embarrassing.<sup>5</sup> Where, in an action by a wife against her husband for rectification of her marriage-settlement, a statement was made in the plaint that the plaintiff declined to live with the defendant on account of his having committed an assault on a young girl, the allegation was held to be scandalous and was ordered to be struck out.<sup>6</sup> Allegations as to partiality against the Judge, made in a memorandum of appeal, were expunged by the High Court in the undermentioned case.<sup>7</sup>

But a pleading or allegation which is alleged to be scandalous cannot be struck out, if it is necessary or relevant to the issue or one of the issues in the action.<sup>8</sup> Indeed a matter cannot be considered as scandalous at all, if it is material to the issue (i.e., will affect the result of the action if proved to be true), however grave the imputations may be, whether of immorality or otherwise.<sup>9</sup> The Court will not, in an application to expunge or strike out allegations alleged to be scandalous, go into the question of their truth or falsehood. The only question is are they relevant to the issues in the suit? If they are they cannot be expunged.<sup>10</sup>

## Note 2

1. (1888) 39 Ch D 263 (270, 271) Knowles v. Roberts

(1887) 84 L T Jour 45 Rock v. Purshell  
[See also (73) 10 Bom II C R 425 (426)]

2. (1901) 1 T. & D. 600 (K. v. ...)

suit)

Story v. Equity Pleadings 10th Fdn S 270

4  
5. (1878) 7 Ch D 473 (486) Davy v. Garrett

6. (67) 33 Suth W R 295 (297, 298)

(29) 114 Ind Cas 906 (907) (All)

7. (67) 7 Suth W R 212 (213)

(74) 12 Beng L R App 19 (20) (Plea of offer without prejudice irrelevant)

(69) 3 Beng L R App 12 (12)

## Note 3

1. (1884) 54 L J Ch 205 (206) Re Miller (Certain parts of the bill of costs were ordered to be expunged.)

(91) 15 Bom 488 (490, 491). (Application for bail — Defamatory allegations against the trying

(1879) 40 L T 455, Coyle v. Cumming.

5. (1886) 55 L T 343, Brooking v. Maudslay.

6. (1879) 40 L T 455, Coyle v. Cumming

7. (39) 22 Mad 155 (160)

8. (1878) 33 Ch D 205 (206) (K. v. ...)

10. (1878) 8 Ch 493 (503) Christie v. Christie.  
(09) 4 Ind Cas 890 (891) (Cal)

15. "On such terms as may be just"  
 16. How amendments should be made.  
 16a. Court not having jurisdiction over suit if  
 can allow amendment of plaintiff.  
 17. Who can apply for amendment.

18. Extent of amendment.  
 19. Effect of amendment and limitation  
 20. Appeal  
 21. Revision

O. 6 R, 17  
 Note 1

*Other Topics (miscellaneous)*

- Amendment based on barred claim See Note 5  
 Amendment by fresh plaintiff See Note 11  
 Amendment by proper Court See Note 13  
 Amendment — When in the discretion of Court  
 See Notes 1 and 2  
 Amendment wholly non suiting plaintiff See  
 Note 4  
 Amendment based on subsequent cause of action  
 See Notes 9 and 12

- Amendment by Appellate Courts See Note 13  
 Amendment on payment of costs See Note 15  
 General principles relating to amendments See  
 Notes 1 2 and 3  
 Merely technical amendments See Note 11  
 Suits for specific performance or damages See  
 Notes 3 and 9  
 Useless and immaterial amendments See Note 11

**1. Scope of the Rule.** — Section 53 of the old Code which dealt with amendment, return and rejection of the plaint ran as follows

'The plaint may, at the discretion of the Court, —

- (a) at, or any time before, the settlement of issues, be rejected, if it does not disclose a cause of action,  
 (b) at, or any time before, the settlement of issues be returned for amendment within a time to be fixed by the Court and upon terms as to the payment of costs occasioned by such amendment as the Court thinks fit, if it —  
 (i) is not signed and verified as hereinbefore required,  
 (ii) does not state correctly and without prolixity the several particulars hereinbefore required, or contains particulars other than those so required,  
 (iii) is wrongly framed by reason of non joinder or misjoinder of parties or joins causes of action which ought not to be joined in the same suit, or  
 (iv) is not framed in accordance with the provisions of Section 42,  
 (c) at any time before judgment, be amended by the Court upon such terms as to the payment of costs as the Court thinks fit

Provided that a plaint shall not be amended either by the party to whom it is returned for amendment, or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character

When a plaint is amended under this Section, the amendment shall be attested by the signature of the Judge'

The amendment of proceedings in Courts have been dealt with under this Code in various parts thereof —

- 1 Section 152 deals with amendments of *judgments, decrees and orders*
- 2 Section 153 confers a general power on the Court to amend any defect or error in *any proceeding in a suit*
- 3 Order I Rule 10 provides for the amendment of a plaint by striking off or adding *parties to a suit*
- 4 Order II Rule 16 deals with the compulsory amendment of the *opponent's* pleading
- 5 The present rule deals with the amendment with the leave of the Court, by a party of his *own* pleading

O. 6 R. 17  
Note 1

6 Order 14 Rule 5 deals with the amendment of the issues framed in the case

It will be seen from a comparison of Section 53 of the old Code with the present rule, that the latter is very much wider in terms than the old Section. It consists of two parts—

- (a) the Court *may*, at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and
- (b) all such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties *shall* be made

In dealing with the analogous provision as to amendment of issues namely, O 14 R 5, their Lordships of the Privy Council observed that the first portion of that rule left the matter of amendment of issues entirely to the discretion of the Court, while the second portion made it imperative on the Court to make all such amendments as may be necessary for the purpose of determining the real matter in controversy between the parties.<sup>1</sup> This duty has, however, been interpreted to be only a *rule of conduct*, which is subject to the inherent power of the Court to prevent injustice and abuse of process of the Court.<sup>2</sup> In a case under the corresponding English Rule (O 28 R 1), Lord Esher said

"A rule has been enunciated by the Court which is rather a rule of conduct than a rule of rigid law such as can never be departed from, because I take it that the Court might depart from it, if there were very exceptional circumstances in any particular case leading the Court to think that it would not be right to apply it. It is nevertheless a rule of conduct which must generally be followed."<sup>3</sup>

The object of the rule is that Courts should get at and try the *merits* of the cases that come before them, and should consequently allow all amendments that may be necessary for the purpose of determining the real question in controversy between the parties, provided it can be done without causing *injustice* to the other side. In *Cropper v Smith*,<sup>4</sup> Bowen, L J, observed as follows

"It is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice as anything else in the case is a matter of right."

The provisions of this rule also apply to the trial of cases before the Sikh Gurdwaras Tribunal under the Sikh Gurdwaras Act (VIII of 1925),<sup>5</sup> to cases before a Subordinate Judge deciding a dispute under the Madras District Municipal Election Rules,<sup>6</sup> and to all suits, appeals and proceedings before the Deputy Commissioner and to all appeals from decisions therein, under the Chota Nagpur Tenancy Act.<sup>7</sup>

This rule is not exhaustive of the powers of the Court as regards amendment

Order 6 Rule 17 — Note 1

1. (12) 16 Ind Cas 250 (252) 35 Mad 607 39 Sind 40)  
Ind App 218 (P C)

2. (14) AIR 1914 Sind 40 (41) 8 Sind L R 23 5 (28) AIR 1928 Lah 325 (327) 9 Lah 649

3. (1896) 16 Q B D 556 (558) Steward v North Metropolitan Tramways Co (Cited in AIR 1914 5. (26) AIR 1926 Mad 1018 (1043)  
7. See ■ 265 (3) Bengal Act VI of 1908

and hence, though the rule only refers to *pleadings* the Court has also power to allow the amendment of *applications*.<sup>8</sup>

Section 5 of the Provincial Insolvency Act renders the provisions of this rule applicable to proceedings under the Act<sup>9</sup> and a petition in insolvency can be amended under this rule<sup>10</sup>

O. 6 R. 17  
Notes 1-2

**2. The Court may allow either party to alter or amend — Discretion of Court.** — As has been noticed in the above Note, the amendment of pleadings is in the discretion of the Court. Under Section 53 of the old Code, the discretion was somewhat limited as to the time and the extent of the amendment allowable. But this rule confers a very wide discretion on the Courts in the matter of amendment of pleadings.<sup>1</sup> The discretion must, however, be exercised on *judicial principles* and not in an arbitrary, vague or fanciful manner,<sup>2</sup> or so as to cause *injustice* to the opposite side. The main considerations to be borne in mind in exercising the discretion are that the rules of procedure have no other aim than to facilitate the task of administering justice,<sup>3</sup> that multiplicity of suits should be avoided<sup>4</sup> and that the interests of substantial justice should be advanced.<sup>5</sup> Thus, a Court should allow the amendment of a pleading where there has been a clerical error, or a *bona fide* wrong description of property or where there has been a mistake of law or fact,<sup>6</sup> provided there is no

8. (198) AIR 1938 Pat 209 (210) (A Court has jurisdiction to allow an amendment of an application for leave to sue in *forma pauperis*, by including an item of property which was originally omitted from the application or annexure thereto)

9. (35) AIR 1935 Mad 202 (203) (Where the words with intent to defeat and delay his creditors were omitted but the act of insolvency was clearly set out held that there being a formal defect arising from the omission of certain words the amendment to include those words should be allowed (1897) 1 Q B D 391, *Weldon v. Neal* Rel on)

10. (85) AIR 1938 Mad 58 (55)

(35) AIR 1935 Mad 202 (203)

Note 2

2. See Note 6 to Preamble

(11) 11 Ind Cas 481 (491) (Cal)

(84) 7 All 79 (93) (FB)

3. (28) AIR 1928 Oudh 305 (306)

(33) AIR 1933 Cal 271 (273 274)

(36) AIR 1936 Pat 140 (149)

4. (16) AIR 1916 Mad 316 (316)

(81) 5 Bom 181 (183) (Additional court fee collected on the excess claim covered by amendment of plaint)

(81) 5 Bom 609 (613 614) (Party should not be put to the expense of a new suit if it can be avoided)

(72) 9 Bom H C R 1 (6) (FB)

(99) 25 Cal 371 (390) (As far as possible all matters in dispute between the same parties should be decided in the same suit)

(66) 11 Moo Ind App 468 (486) (PC) (Money bond executed by A—Suit against A and B for combining to get A's estate illegally transferred—Plaint was amended to recover money against A alone)

be regarded)

(30) AIR 1930 Bom 219 (250)

(37) AIR 1937 Oudh 491 (497) 13 Luck 524 (The main consideration to be borne in mind while allowing amendment of pleadings are the advancement of the interest of substantial justice and the avoidance of the multiplicity of litigation)

6. (13) AIR 1923 Nag 123 (124) 19 Nag I R 96 (Vakalatnama not bearing the signature)

(25) AIR 1915 All 534 (534) (Wrong provision of law quoted in the plaint)

O. 6 R. 17  
Notes 2-3

injustice to the other side which cannot be compensated by the award of costs<sup>7</sup> It has been held that the Court can only *allow* the amendment of a plaint but not amend a plaint itself or direct its amendment<sup>8</sup> Nor can a Court compel a plaintiff to change the character of his suit<sup>9</sup>

**3. Amendment of plaint introducing new case.** — Under Section 53 of the old Code, the rule as to amendments was more rigid and restricted than it is under the present Code. It was specifically provided by the proviso to that Section that no amendment could be allowed which converted a suit of one character into a suit of another and inconsistent character<sup>1</sup> Thus, in the following classes of cases it was held that the amendment prayed for altered the character of the suit and was consequently disallowed —

Suit against the defendant on the basis of his being a trespasser — amendment into a suit for rent based on a subsisting tenancy<sup>2</sup> Suit for rent on the basis of tenancy — amendment into a suit for damages for use and occupation<sup>3</sup> Suit based on one ground of claim — a

(82) AIR 1932 Bom 367  
mutim signing plaint—T  
later }

(81) AIR 1931 Cal 770 (7)  
filing suit in firm name.

in question and so he is bound to sue for cancellation of the decree )

#### Note 3

1. (72) 19 Sath W R 12 (14) Ind App Sup Vol 181 (PC) (New case will not be allowed to be set up)

(87) 9 All 183 (191) (Plaint not to be returned

property in the plaint )

(28) AIR 1928 Nag 203 (205) (Bona fide mistake whether of law or fact — Following AIR 1924 Rang 249)

(25) AIR 1925 Oudh 718 (719) (Omission of word due to inadvertence)

(16) 82 Ind Cas 512 (512) (U P B R) (A clerical error as to the number of the plot in an ejectment suit)

(11) 11 Ind Cas 827 (828) (Rang) (A clerical

too rigidly enforced — Amendment of plaint should be allowed even at late stage)

7. See Note 5 below

(33) AIR 1933 Lah 245 (245) 33 Pun L N 694 (635)

(33 1900) 1893 1900 Low Bur Rul 518

2 (80) 13 Bom 664 (668)

3 (99) 27 Cal 239 (242)

(95) 22 Cal 752 (756)

(But see (62) 2 Ind Cas 920 (921) 12 Oudh Cas 140

(69) 11 Ind Cas 346 (349) (Cal) ]

4 (70) 2 N W P H C R 407 (408) (Claim based on gift by will claim based on inheritance)

(83) 5 All 456 (459)

(87) 12 Bom 431 (434)

(95) 22 Cal 562 (565) (Suit on basis of plaintiff being in permissive possession—Amendment on

favour the judgment is pronounced should be called upon to amend his pleadings)]

9. (30) AIR 1930 Cal 42 (46) 57 Cal 349

(33) AIR 1933 Lah 172 (173) (Where the plaintiff bases his claim for possession on his title and defendant alleges adverse possession, it is

to establish right of ownership amendment into claim for an easement<sup>5</sup> Suit based on one title amendment into claim based on another title<sup>6</sup> Suit alleging one kind of fraud amendment into a claim based on another kind of fraud<sup>7</sup> Suit for rent amendment into suit for possession<sup>8</sup> or for a declaration of title<sup>9</sup> Suit based on letting and hiring amendment into suit based on the relationship of principal and agent<sup>10</sup> Suit based on the invalidity of a transaction amendment into one based on the validity thereof<sup>11</sup> Suit for share of property on the basis of non division amendment into claim for partition<sup>12</sup> Suit for possession amendment into claim for resumption<sup>13</sup> Suit for ejectment on the ground of tenant holding over amendment into claim for partition<sup>14</sup> Suit on the basis of a contract amendment of claim on the basis of tort<sup>15</sup> Suit based on a plea of transfer of property amendment into a plea of contract to transfer property<sup>16</sup> See also the undermentioned cases<sup>17</sup>

As has been seen in Note 2 above, the powers of amendment under the present Code are much wider than they were under the old Code. The proviso in the old Section that no amendment could be allowed which changed the character of the suit has been omitted<sup>18</sup> and a new provision has been introduced by O 6 R 17 which implies that even an amendment introducing a new ground of claim or an allegation of fact inconsistent with the original pleading may be allowed in proper cases.

#### Illustrations

1 A sues B for the recovery of the sum of money due on settlement of accounts of a dissolved partnership. He subsequently applies to amend his plaint by substituting a claim for accounts of a dissolved partnership. Here the amendment clearly effects a change in the character of the suit but the Court is not powerless as it was under the old Code to allow the amendment.<sup>19</sup>

that the property was found to be public property )

5 See the following cases

(1864) 2 Bom H C R A C 176 (178) (Claim to establish right of ownership over land—Claim to easement over same not to be decreed unless claimed alternatively )

(07) 34 Cal 51 (53) (FB) (Do — There is no harm in claiming the relief in the alternative )

(78) 2 All 669 (670 671)

(72) 18 Suth W R 274 (274) (Claim as owner of whole property by purchase from A claim as heir or as joint purchaser with him )

(72) 19 Suth W R 12 (14) Ind App Sup Vol 131 (PC)

(70) 12 Suth W R 487 (488) (Claim as heir of N claim as heir of J )

7 (87) 11 Bom 620 (638) 14 Ind App 111 (PC)

[See (16) AIR 1915 Cal 120 (123) (Two distinct theories of fraud set up in the plaint and at trial )]

8 (95) 19 Bom 803 (807)

9 (95) 19 Bom 803 (807)

10 (80) 5 Cal 601 (605)

11 (07) 34 Cal 572 (5 9) (Suit for setting aside mortgage deed into one for redemption )

(83) 7 Bom 155 (161) (Original claim based on iment based

relief does not alter the character of a suit )

(68) 9 Suth W R 206 (209)

(01) 24 Mad 377 (385) 28 Ind App 46 (PC)

17 (78) 1 All 591 (599) (Suit for pre-emption—

Plaintiff not alleging in plaint he was ready and willing to pay the price found to be true by the Court—On date of final disposal seeking to so amend his plaint—Court not bound to allow the amendment )

(09) 4 Ind Cas 837 (839) 34 Bom 515 (Suit for dissolution of partnership—Suit for specific item )

(01) 25 Bom 337 (349 350) 27 Ind App 216 (PC)

(01) 25 Bom 337 (349 350) 27 Ind App 216 (PC)

(01) 25 Bom 337 (349 350) 27 Ind App 216 (PC)

(01) 25 Bom 337 (349 350) 27 Ind App 216 (PC)

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(01) 25 Bom 337 (349 350) 27 Ind App 216 (PC)

(01) 25 Bom 337 (349 350) 27 Ind App 216 (PC)

(01) 25 Bom 337 (349 350) 27 Ind App 216 (PC)



O. 6 R. 17  
Note 3

■ I sues *B* for the specific performance of a contract alleged to have been entered into by *B* with *A*. Subsequently he applies for the amendment of the plaint so as to convert it into a suit for damages for breach of the said contract. The Court has power to allow the amendment if it does not cause injustice to the other side.<sup>20</sup>

3. *A* files a suit against *B* for possession of lands on the basis of a compromise entered into by the parties and filed by them in a previous suit. The compromise was neither registered nor embodied in the decree. *A* subsequently applies for amendment of the plaint by converting it into a suit for the specific performance of the contract embodied in the compromise. The amendment could be allowed.<sup>21</sup>

4. *A* and *B* entered into an agreement for sale of goods by *A* to *B* the goods to be taken delivery of by *B* on a certain date. *B* failed to take such delivery and *A* re-sold the goods more than two months after the date of the breach of the contract by *B* and then filed a suit for damages against *B* on the basis of such re-sale. Finding that owing to the delay in making the re-sale he may not get damages on the basis of re-sale he applied for an amendment of the plaint by claiming damages on the basis of breach of contract itself. It was held that such amendment should be allowed.<sup>22</sup>

But though under the present Code there is no such rigid rule as was enacted in the old Code against the allowing of the amendment converting a suit of one character into a suit of another and inconsistent character<sup>23</sup> and the whole matter is entirely in the discretion of the Court still as a general rule the Court will not in the exercise of such discretion allow an amendment converting a suit of one character into a suit of another character.<sup>24</sup>

There is no limitation however on the wide powers of amendment that can be exercised by the Court under this Code and that is that the Court cannot by way of amendment substitute one distinct cause of action for another, or change the subject matter of the suit. In *Va Shuc Mya v Maung Po Hnaung*<sup>25</sup> their Lordships of the Privy Council observed as follows:

All rules of Court are not only but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that

20 (28) AIR 1924 P C 908 (218 719) 52 Bom 597 55 Ind App 360 (PC) (See the precaution the Privy Council desires to be taken before allowing amendment)

21 (17) AIR 1917 Mad 624 (675)

22 (95) AIR 1925 Sind 222 (293)

(24) AIR 1924 Bom 340 (301)

(17) 11 Ind Cas 674 (878) (Rang) (A converse case)

23 See the illustrations given above

(27) AIR 1927 Lah 103 (104) 8 Lah 257 (Suit for recovery of purchase money on the basis of vendor's lien—Amendment into a suit for damages for breach of contract allowable)

(26) AIR 1926 Mad 909 (910) (Suit based on exclusive ownership—Plaint allowed to be amended into one for partition by co-sharers)

(23) AIR 1928 Nag 151 (152) 19 Nag L R 69 (Claim for share was allowed to be changed into claim for maintenance)

[See also (29) AIR 1928 Nag 241 (242) (No express restriction on the discretion of the Court provided it is judiciously exercised)]

24 (27) AIR 1927 P C 18 (20) 54 Ind App 55 6 Pat 323 (PC)

(33) AIR 1933 Pat 443 (443) (Amendment could not be allowed being made at a late stage and as it substantially changed the character of the suit)

(34) AIR 1934 Oudh 118 (118)

(37) AIR 1937 Rang 413 (416)

[See (29) AIR 1928 Lah 712 (714) (What

amounts to alteration of nature of suit discussed—Nature of suit is not altered by mere change in wording of plaint or introduction of fresh details)]

See also the following cases

(13) 18 Ind Cas 807 (809) (Lab) (Suit in federal jurisdiction—Change into suit on behalf of plaintiff allowed on the ground of inconsistency in claims)

(14) AIR 1914 Mad 460 (461) 15 Ind Cas 299 (301) 37 Mad 529 (Suit for partition cannot be converted into one for partition)

25 (29) AIR 1922 P C 249 (250 251) 48 Ind App 214 4 Upp Bur Rul 30 48 Cal 832 (PC)

(15) AIR 1919 Cal 904 (906 907) 43 Cal 305

(11) 9 Ind Cas 774 (775) (Low Bur) (Radical amendments not to be made in second appeal)

(37) AIR 1937 Oudh 488 (442) 13 Luck 219 (Suit for partition—On Court holding that there was partnership between plaintiff and defendant plaintiff praying that the suit be treated as one for dissolution of partnership—Plaintiff's prayer would not be allowed)

(35) AIR 1935 Rang 496 (497) (Where a Burmese husband claims a declaration based on the assertion that the land was known property but fails he will not be allowed to substitute his previous claim by a claim based on his interest in that property as bought by his wife during marriage for the two claims are entirely different—AIR 1927 P C 249 Applied)

26 (22) AIR 1922 P C 249 (250 251) 48 Ind App 214 4 Upp Bur Rul 30 48 Cal 832 (PC)



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Notes 4-5

refuse the application to amend " A sued B a Tramway Company for damages caused by their negligence in keeping their tramway in bad repair B simply denied negligence and did not plead that the liability to keep the tramway in repair did not belong to them but to the local authority At a subsequent stage of the case B applied for amendment of the written statement to raise the said plea At the time of the application A's remedy against the local authority was time barred It was held that the proposed amendment displaced the plaintiff's suit and should not be allowed <sup>3</sup>

Where in a suit for libel the defendant applied at the time of trial to amend the written statement so as to include a plea of privilege the application was disallowed on the ground that it would be unfair at that stage to allow the amendment <sup>4</sup> An amendment of the written statement should as a general rule be refused when the plaintiff has called all his evidence on the issues of fact raised by the written statement and has closed his case <sup>5</sup> unless the plaintiff is given an opportunity to call further evidence to rebut the new case set up <sup>6</sup> A defendant who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement cannot be allowed at a later stage to change his front and make out a new case by denying that fact <sup>7</sup> But where in an ejectment suit the defendant pleaded exclusive possession and denied the plaintiff's title as landlord and also set up a claim to be in possession under a *mouwarri* lease granted by the plaintiff's predecessor in title it was held that the effect of the alternative plea was merely to put the plaintiff to the proof of a title which would justify his prayer for ejectment and could therefore be allowed to be raised <sup>8</sup> Again where on the facts appearing in the plaintiff's evidence a new defence of law arises there is no reason why it should not be taken by way of amendment even after the plaintiff has closed his case on the facts Thus a plea that the suit is barred by virtue of Section 23 of the Contract Act was allowed to be raised in so far as it arose out of the plaintiff's evidence <sup>9</sup>

The improbability or the unconvincing nature of the new defence sought to be raised is not in itself a ground for refusing to allow an amendment of a written statement by the inclusion of such defence <sup>10</sup>

See also the undermentioned decision <sup>11</sup>

**5 Amendment taking away right accrued to a party by lapse of time —** The object of the rule being to get at and try the merits of the case and to do substantial justice between the parties no amendment will be allowed which will work *injustice* to one of the parties The rule of conduct of the Court is that however negligent or careless the first omission may have been and however late the proposed amendment the amendment should be allowed if it can be made without *injustice to the other side* <sup>1</sup> One of the classes of cases in which an amendment will work *injustice*

(35) AIR 1935 Pat 463 (465) (The Court will not allow an amendment that would involve a com

6 (14) AIR 1914 Mad 59 (61)

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It is to be noted that all powers of amendment are to be exercised in all cases, and it is to be noted that the power to amend is to be exercised in all cases, and it is to be noted that the power to amend is to be exercised in all cases.

O. & R. 17  
Note 3

The reason of the above rule is that the substitution of a totally new case in place of the original one cannot be said in any sense to be an amendment of the original claim. Nor can it be said that a totally new case is necessary for the purpose of determining the real question in controversy between the parties, that is, the controversy disclosed in the case as originally framed.

It follows from the principles set forth above that under the present Code

(1) An amendment will generally be allowed where the nature of the suit is not altered provided it does not cause prejudice or surprise to the opposite party.<sup>27</sup> Such amendments were allowed under the old Code also.<sup>28</sup>

(2) An amendment may be allowed even if it introduces a new ground of claim or an allegation of fact inconsistent with the original pleading where the Court thinks it just and necessary.<sup>29</sup>

27 (12) 10 Ind Cas 55 (1881) (Cal) (Only test under the new Code is whether the amendment is material and with justice.)

(3) AIR 1933 All 374 (1933) 55 All 256

(33) AIR 1933 Nag 82 (33) 23 Nag L R 115

(34) AIR 1933 Lah 221 (1933) (Suit by a partner for a specific sum as if it was a debt had been struck—Amendment stating that balance had been struck was not alter nature of suit.)

(35) AIR 1934 Lah 472 (1934) (Claim of rights defunct—Amendment should be allowed.)

(36) AIR 1933 Lah 215 (1933)

(37) AIR 1933 Lah 11 (1933)

(38) AIR 1933 Rang 21 (1933)

(39) AIR 1933 Muz 21 (1933)

(40) AIR 1931 Nag 20 (1931) 20 Nag L R 379

(41) AIR 1925 Nag 62 (1925)

(42) AIR 1927 Outh 505 (1927)

(43) AIR 1937 P C 42 (1937) 16 Cal 141 (1937)

(44) AIR 1937 Cal 485 (1937)

(45) AIR 1935 Lah 91 (1935) (Appellate Court can allow amendment converting declaratory suit in form of possession suit is only a question of form.)

(46) AIR 1935 Mad 202 (1935) (Amendment for remedying formal defect arising from omission of certain words held should be allowed.)

(47) AIR 1936 Mad 151 (1936) (Haint reading certain document in particular way—Amendment by reading the document in another way must be allowed as it is not introducing new and inconsistent claim.)

(48) AIR 1933 Muz 353 (1933) (In the matter of rectifying defects in pleadings which do not affect any substantial rights it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay. Any carelessness or delay can always be punished,

(49) AIR 1935 Outh 501 (1935) (Amendment adding new ground of exemption from limitation can be allowed.)

28. (7) 3 Ind Cas 100 (1900) 34 Bom 20 (Amendment referring to a document not included in the list of documents annexed.)

(8) 10 Ind Cas 201 (1901) (Claim to a share as a creditor of a claimant's estate.)

(9) 21 All 456 (1901) (Suit for mortgage—Conversion into a suit for a money decree.)

(10) 1904 All W N 25 (1904) 29 (Claim for pre-

as other substituted for it.)

(11) 5 Bom L R 823 (1900) (Suit for bare declaration into one for possession.)

(12) 1895 Bom P J 551 (1901) (Suit by the purchaser of a house alleging it to be negotiable was allowed to be amended into one on a non negotiable instrument.)

(13) 4 Bom 222 (1900) (Suit to establish plaintiff's exclusive right to the partnership property—Amendment into one for dissolution of partnership and account.)

(14) 11 Cal L Jour 612 (1918) 619

(15) 9 Cal 795 (1904)

(16) 23 Mad 500 (1902) 503

(17) 5 Bom 496 (1900) (Suit for possession—Share of joint property—Amendment into claim for partition.)

(18) 1893 1 un Re No 106 p 123

(19) 8 Bom 168 (1900) (Suit for ejectment—Conversion into suit for redemption.)

(20) 7 Bom 146 (1900) (Do.)

[See (7) 5 Cal L Jour 527 (1900) (Suit for ejectment and mesne profits—Amendment into a suit for redemption was not allowed in this case.)]

[See also (8) 6 Bom 495 (1900) (Suit for possession by mortgage—Amendment into suit for foreclosure.)]

29 (11) 11 Ind Cas 827 (1900) (Low Bur) (English Courts do not refuse an amendment simply because it introduces a new case.)

**D. 6 R. 17**  
**Notes 4-5**

refuse the application to amend.<sup>2</sup> *A* sued *B*, a Tramway Company for damages caused by their negligence in keeping their tramway in bad repair. *B* simply denied negligence and did not plead that the liability to keep the tramway in repair did not belong to them but to the local authority. At a subsequent stage of the case *B* applied for amendment of the written statement to raise the said plea. At the time of the application, *A*'s remedy against the local authority was time barred. It was held that the proposed amendment displaced the plaintiff's suit and should not be allowed.<sup>3</sup>

Where in a suit for libel, the defendant applied at the time of trial to amend the written statement so as to include a plea of privilege the application was disallowed on the ground that it would be unfair at that stage to allow the amendment.<sup>4</sup> An amendment of the written statement should, as a general rule, be refused when the plaintiff has called all his evidence on the issues of fact raised by the written statement and has closed his case,<sup>5</sup> unless the plaintiff is given an opportunity to call further evidence to rebut the new case set up.<sup>6</sup> A defendant, who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement, cannot be allowed at a later stage to change his front and make out a new case by denying that fact.<sup>7</sup> But where in an ejectment suit the defendant pleaded exclusive possession and denied the plaintiff's title as landlord, and also set up a claim to be in possession under a *mouvass* lease granted by the plaintiff's predecessor in title, it was held that the effect of the alternative plea was merely to put the plaintiff to the proof of a title which would justify his prayer for ejectment and could, therefore, be allowed to be raised.<sup>8</sup> Again, where on the facts appearing in the plaintiff's evidence a new defence of *law* arises there is no reason why it should not be taken by way of amendment, even after the plaintiff has closed his case on the facts. Thus, a plea that the suit is barred by virtue of Section 23 of the Contract Act was allowed to be raised in so far as it arose out of the plaintiff's evidence.<sup>9</sup>

The improbability or the unconvincing nature of the new defence sought to be raised is not in itself a ground for refusing to allow an amendment of a written statement by the inclusion of such defence<sup>10</sup>

See also the undermentioned decision <sup>11</sup>

**5. Amendment taking away right accrued to a party by lapse of time.—**

The object of the rule being to get at and try the merits of the case and to do substantial justice between the parties no amendment will be allowed which will work *injustice* to one of the parties. The rule of conduct of the Court is that "however negligent or careless the first omission may have been and however late the proposed amendment, the amendment should be allowed if it can be made without *injustice* to the other side." <sup>1</sup> One of the classes of cases in which an amendment will work *injustice*

(85) AIR 1935 Pat 463 (465) (The Court will not allow an amendment that would involve a com

Encumbered Estates Act—Additional claims can not be allowed )

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**Note 3**

1 (1893) 32 W R (Fng) 262 (263) *Clampede v*  
Commercial Union Association (Per Breet M R)  
(10) ■ Ind Cas 788 (790) (Cal) (Putting in a docu-  
ment of acknowledgment to save limitation  
when there ■ a well founded claim)

to the opposite party is where it takes away from a party a right accrued to him by lapse of time.<sup>1</sup> As a rule, therefore, a plaintiff will not be allowed to amend his plaint by introducing a new cause of action which since the date of the plaint has become barred by the statute of limitation.<sup>2</sup> In other words, to amend a plaint should be allowed as will take away a shield defence under the law of limitation.<sup>3</sup> Thus, where a plaintiff, though entitled to various alternative reliefs, sued only for one of the reliefs within the period of limitation, it was held that he should not be allowed to amend the plaint in such a way as to set free his other reliefs which had become time barred at the date of the amendment.<sup>4</sup>

(31) AIR 1931 B m 590 (731) (Suit against joint family—Claim in the alternative against defendants as partners)

(32) AIR 1927 Cal 733 (735) (Whether the plaint of two persons can be amended when the application of one of them is a matter of doubt)

(23) AIR 1922 Cal 25 (27) (Suit for declaration of title—Amendment for recovery of possession not allowed)

include a new plea where even if all the pleas been raised earlier defendant could not have succeeded.)

(37) AIR 1917 Cal 485 (487)

(See also (7) 22 Cal 674 (712-713))

(38) AIR 1935 Mad 202 (203)

(39) AIR 1935 Mad 66 (67)

(3) AIR 1935 Pat 86 (88) (Such a case might arise when a person who was a necessary party to a suit was not implicated and a step is taken to implead him after the suit is barred against him)

(14) AIR 1914 All 902 (903)

(59) 4 J. L. C. 62 (57) (15 m)

(15 m) 1 C. L. D. 714 (795-796) *Relief vs. Relief*

(20) AIR 1911 Cal 187 (188)

(19) AIR 1911 Cal 187 (188)

(31) AIR 1931 Mad 12 (13) (Amendment which involves the trial of a suit is barred in the face of it barred cannot be allowed)

(31) AIR 1931 Mad 11 (12) (Suit for possession as reversioner to last male owner—Amendment that properties were still in possession of the last male owner and that plaintiff was heir)

(25) AIR 1929 Mad 829 (829)

(35) AIR 1925 Mad 917 (918) (Application to amend when suit

Rul 170

ent in

parties  
would be

S. R. 69  
period of

limitation)

(38) AIR 1938 Nag 588 (589) ILR (1939) Nag 191

(26) AIR 1926 Mad 827 (829) (Original claim was for recovery of money on a loan dated 28th January 1916—Amendment into a claim as on

ent allowed //

S. (14) AIR 1914 All 80 (83) 36 All 370

O. 6 R. 17  
Notes 6-8

be allowed<sup>8</sup>

### 7. Amendment to be refused when the application is not in good faith.—

It is one of the necessary conditions for the exercise of the Court's discretion in allowing an amendment, that the applicant has acted in good faith<sup>1</sup> While, therefore, as a general rule, leave to amend ought not to be refused if the applicant has acted *bona fide*,<sup>2</sup> it will be refused where he has been acting *mala fide*<sup>3</sup> Courts will infer want of *bona fides* from *great delay* in applying for leave to amend<sup>4</sup> An amendment which seeks to reargue the same questions and lead further evidence, is an abuse of the process of the Court and hence should not be allowed<sup>5</sup>

### 8. Amendment by adding or substituting a new plea of fraud —

Where fraud of one kind has been pleaded, an amendment introducing a new and distinct kind of fraud in substitution of the fraud pleaded, will not be allowed especially after all the evidence has been given<sup>1</sup> "It is a well known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind of fraud cannot upon the failure of proof, be substituted for it"<sup>2</sup> The reason is that such a substitution will as a rule *entirely change the character of the suit as originally laid* On the same principle where no fraud has at all been alleged in the original plaint, a new plea of fraud will not, except where strong grounds exist, be allowed to be raised by way of amendment<sup>3</sup> In *Bentley v. Black*,<sup>4</sup> Lord Esher, M R, said

'It has long been the universal practice, except in most exceptional circumstances not to allow amendments for the purpose of adding a plea of fraud where fraud is not pleaded in the first instance

Where the fraud is disclosed only in the pleading of the defendant or on his cross examination, such a circumstance may justify an amendment by adding a new plea of fraud<sup>5</sup> Thus, where the plaintiff sued on a mortgage executed by the defendant, and the defendant pleaded that he was a minor on the date of the mortgage and that the mortgage was therefore, void, the plaint was allowed to be amended by raising the plea that the defendant was guilty of fraudulent misrepresentation that he had attained majority at the time of the execution of the mortgage<sup>6</sup> But the Court will in every case require to be satisfied about the truth, and substantiality, of the proposed amendment and why the allegations were not originally made, before it grants the amendment<sup>7</sup> Where, in a 'passing off' action, the omission to refer to fraud in the

8. (31) AIR 1931 Pat 426 (427) 10 Pat 630

Note 7

(36) AIR 1936 Mad 545 (547)

{See also (37) AIR 1937 Pat 572 (575) 16 Pat 527 (Plaint based on forged document — Amendment in second appeal will not be allowed)}

be allowed only when a party has an honest case to raise)

(30) AIR 1930 Nag 295 (296) 27 Nag L R 226

2 (1878) 10 Ch D 393 (397) *Tildesley v Harper*  
(Cited in 1 Ind Cas 632)

(11) 11 Ind Cas 481 (491, 495) (Cal)

(21) AIR 1921 Lah 867 (868)

(29) AIR 1929 Rang 33 (34)

■ (10) ■ Ind Cas 600 (601) (Low Bur)

(30) AIR 1930 Pat 321 (321) (Suit for possession whether can be converted into one for redemption)

(35) AIR 1935 Mad 50 (51)

### Note 8

1 (87) 14 Ind App 111 (121) 11 Bom C<sup>o</sup> (PC)

2 (87) 14 Ind App 111 (125) 11 Bom C<sup>o</sup> (PC)

3 (28) AIR 1928 Mad 759 (760)

4 (1933) 9 T L R 580

5 (1889) 14 P D 56 (59) *Riding v Hawkins*

6 (98) 25 Cal 371 (388, 390)

7. (24) AIR 1924 Mad 893 (895)

plea was due to an oversight and there were circumstances to show that the plaintiff intended from the very outset to allege fraud it was held that in the interests of justice the amendment should be allowed.<sup>8</sup> Where the plaintiff sued for the recovery of a certain sum of money on the basis of his title by inheritance and the defendant pleaded a sale of such right to himself the plea was allowed to be amended, by raising the plea that the sale was invalid owing to the fraud of the defendant.<sup>9</sup>

See also the unmentioned decisions<sup>10</sup>

**9. Amendment by adding new reliefs or claims.** — An alteration merely in the relief claimed in the suit does not, as a general rule, change the character of the suit, and an amendment seeking such alteration will be allowed if it does not cause injustice to the other side.<sup>1</sup> The same principle will apply to the addition of new reliefs in the plaint. Where a claim to which the plaintiff is entitled has been left out by a bona fide mistake, or by inadvertence, or on a misapprehension of facts, an amendment will be allowed by adding the claim so left out.<sup>2</sup> Where, however, the omission is a deliberate one, no amendment will be refused.<sup>3</sup> Where, by virtue of circumstances arising subsequent to the institution of the suit, the plaintiff becomes entitled to a larger or other relief than the one claimed, amendment may be allowed so as to add such other relief.<sup>4</sup> All reliefs *in addition* to the main relief asked in the plaint may be allowed to

<sup>8</sup> (1912) AIR 1924 Mad 779 (760)

<sup>9</sup> (1911) AIR 1909 Cal 913 (914)

<sup>10</sup> (3) AIR 1937 Mad 1463 (1470) (Suit by minor after becoming major against ex-governor for accounts—plaint may be amended by making it one for recovery of specific sum of money plus to the minor as to the balance of the account of the guardian.)  
(35) AIR 1935 Mad 10 (11) (A suit on a promissory note cannot be converted into a suit based on fraud or deceit, especially at a late stage.)

**Note 9**

(193) 20 Cal 805 (805)

(95) 22 Cal 693 (710)

(33) AIR 1933 Rang 247 (249)

(84) AIR 1934 Mad 267 (268) (Additional relief asked for by way of amendment, out of abundant caution due to conflict of decisions, amendment should be allowed.)

(31) AIR 1934 Rang 266 (267) (Amendment within limitation.)

(97 OI) 2 Upp Bur Rul 231

(34) AIR 1934 Mad 600 (600) (Suit by minor for

to allowed.)

(19) AIR 1915 Mad 160 (161) (Promissory note executed by person on his own behalf and as

bonally allowed.)

(19) AIR 1915 Mad 160 (161) (Promissory note

(19) AIR 1915 Mad 160 (161) (Promissory note

(19) AIR 1915 Mad 160 (161) (Promissory note

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(19) AIR 1915 Mad 160 (161) (Promissory note

(19) AIR 1915 Mad 160 (161) (Promissory note

(19) AIR 1915 Mad 160 (161) (Promissory note

for declaration that decree was not binding on

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(12) 17 Ind Cas 646 (647) (Cal)

(19) AIR 1919 Cal 904 (907) 46 Cal 305

4. (29) AIR 1929 Cal 519 (520) 58 Cal 622

(25) AIR 1925 Cal 944 (944)

(07) 6 Cal L Jour 74 (80 81)



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Notes 6-8

be allowed \*

### 7. Amendment to be refused when the application is not in good faith.—

It is one of the necessary conditions for the exercise of the Court's discretion in allowing an amendment, that the applicant has acted in good faith.<sup>1</sup> While, therefore, as a general rule, leave to amend ought not to be refused if the applicant has acted *bona fide*,<sup>2</sup> it will be refused where he has been acting *mala fide*.<sup>3</sup> Courts will infer want of *bona fides* from *great delay* in applying for leave to amend.<sup>4</sup> An amendment which seeks to reargue the same questions and lead further evidence, is an abuse of the process of the Court and hence should not be allowed.<sup>5</sup>

### 8. Amendment by adding or substituting a new plea of fraud —

Where fraud of one kind has been pleaded, an amendment introducing a new and distinct kind of fraud in substitution of the fraud pleaded, will not be allowed especially after all the evidence has been given.<sup>1</sup> "It is a well known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind of fraud cannot upon the failure of proof, be substituted for it."<sup>2</sup> The reason is that such a substitution will as a rule entirely change the character of the suit as originally laid. On the same principle where no fraud has at all been alleged in the original plaint, a new plea of fraud will not, except where strong grounds exist, be allowed to be raised by way of amendment.<sup>3</sup> In *Bentley v Black*,<sup>4</sup> Lord Esher, M R, said

"It has long been the universal practice, except in most exceptional circumstances not to allow amendments for the purpose of adding a plea of fraud where fraud is not pleaded in the first instance

Where the fraud is disclosed only in the pleading of the defendant or on his cross examination such a circumstance may justify an amendment by adding a new plea of fraud.<sup>5</sup> Thus, where the plaintiff sued on a mortgage executed by the defendant, and the defendant pleaded that he was a minor on the date of the mortgage and that the mortgage was therefore, void, the plaint was allowed to be amended by raising the plea that the defendant was guilty of fraudulent misrepresentation that he had attained majority at the time of the execution of the mortgage.<sup>6</sup> But the Court will, in every case, require to be satisfied about the truth and substantiality, of the proposed amendment and why the allegations were not originally made, before it grants the amendment.<sup>7</sup> Where in a "passing off" action, the omission to refer to fraud in the

8. (81) AIR 1931 Pat 426 (427) 10 Pat 630

Note 7

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(86) AIR 1936 Mad 545 (547)

[See also (37) AIR 1937 Pat 572 (575) 16 Pat 597 (Plaint based on forged document—Amendment in second appeal will not be allowed)]

4 (24) AIR 1924 Mad 883 (885)

(18) AIR 1918 Sind 11 (8) 13 Sind L R 1 (An appeal allowed for amendment in suit to set aside

be allowed only when a party has an honest case to raise.)

(80) AIR 1930 Nag 295 (296) 27 Nag L R 296

2. (1878) 10 Ch D 393 (397) *Tildeley v Harper* (Cited in 4 Ind Cas 653)

11 Ind Cas 481 (491 485) (Cal)

1921 Feb 307 (866)

(84)

w Bar  
for possession

Note 8

1. (87) 14 Ind App 111 (121) 11 Bom 620 (PC)

2 (87) 14 Ind App 111 (125) 11 Bom 620 (PC)

3 (28) AIR 1908 Mad 759 (760)

4 (1893) 9 T L R 580

5 (1880) 14 P D 56 (59) *Bridges v Hawkins*

plaint was due to an oversight and there were circumstances to show that the plaintiff intended from the very outset to allege fraud it was held that in the interests of justice the amendment should be allowed.<sup>8</sup> Where the plaintiff sued for the recovery of a certain sum of money on the basis of his title by inheritance and the defendant pleaded a sale of such right to himself the plaint was allowed to be amended by raising the plea that the sale was invalid owing to the fraud of the defendant.<sup>9</sup>

See also the undermentioned decisions<sup>10</sup>

**9 Amendment by adding new reliefs or claims** — An alteration merely in the relief claimed in the suit does not, as a general rule change the character of the suit and an amendment seeking such alteration will be allowed if it does not cause injustice to the other side.<sup>1</sup> The same principle will apply to the addition of new reliefs in the plaint. Where a claim to which the plaintiff is entitled has been left out by a *bona fide* mistake or by inadvertence or on a misapprehension of facts an amendment will be allowed by adding the claim so left out.<sup>2</sup> Where however, the omission is a deliberate one, leave to amend will be refused.<sup>3</sup> Where, by virtue of circumstances arising subsequent to the institution of the suit the plaintiff becomes entitled to a larger or other relief than the one claimed, amendment may be allowed so as to add such other relief.<sup>4</sup> All reliefs ancillary to the main relief asked in the plaint may be allowed to

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minor as late through the fraud of the guardian )  
(35) AIR 1935 Mad 50 (51) (A suit on a promissory note cannot be converted into a suit based on fraud or deceit especially at a late stage )

**Note 9**

- 1 (33) 20 Cal 805 (808)  
(35) 22 Cal 697 (710)  
(33) AIR 1933 Rang 247 (249)  
(34) AIR 1934 Mad 267 (268) (Additional relief asked for by way of amendment out of abundant caution due to conflict of decisions amendment should be allowed)  
(34) AIR 1934 Rang 266 (267) (Amendment within limitation)  
(37 OI) 2 Upp Bur Rul 231  
(34) AIR 1934 Mad 600 (600) (Suit by minor for

tion—Subsequent prayer for possession)

- (25) AIR 1925 Oudh 555 (556) (Do)  
(28) AIR 1923 Lah 112 (112) (Do)  
(23) AIR 1923 Mad 553 (557) (Omission to add further relief of redemption—Amendment allowed in second appeal)  
(See also (35) AIR 1935 Pat 365 (366) (Suit on

for declaration that decree was not binding on him—Suit should not have been dismissed and amendment ought to have been allowed)  
(35) 28 Mad 500 (501 502) (Relief available to the

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ment affecting the form of the relief can be permitted)  
(34) AIR 1934 Rang 266 (267) (Amendment of prayer and not of cause of action—Relief one which plaintiff is entitled to claim—Defendant not deprived of any defence—Amendment should

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be allowed<sup>5</sup>

### 7 Amendment to be refused when the application is not in good faith —

It is one of the necessary conditions for the exercise of the Court's discretion in allowing an amendment that the applicant has acted in good faith<sup>1</sup> While therefore as a general rule leave to amend ought not to be refused if the applicant has acted *bona fide* it will be refused where he has been acting *malà fide*<sup>2</sup> Courts will infer want of *bona fides* from *great delay* in applying for leave to amend<sup>3</sup> An amendment which seeks to reargue the same questions and lead further evidence is an abuse of the process of the Court and hence should not be allowed<sup>4</sup>

**8 Amendment by adding or substituting a new plea of fraud —** Where fraud of one kind has been pleaded an amendment introducing a new and distinct kind of fraud in substitution of the fraud pleaded will not be allowed especially after all the evidence has been given<sup>1</sup> It is a well known rule that a charge of fraud must be substantially proved as laid and that when one kind of fraud is charged another kind of fraud cannot upon the failure of proof be substituted for it<sup>2</sup> The reason is that such a substitution will as a rule entirely change the character of the suit as originally laid On the same principle where no fraud has at all been alleged in the original plaint a new plea of fraud will not except where strong grounds exist be allowed to be raised by way of amendment<sup>3</sup> In *Bentley v. Black*<sup>4</sup> Lord Esher M. R. said

It has long been the universal practice except in most exceptional circumstances not to allow amendments for the purpose of adding a plea of fraud where fraud is not pleaded in the first instance

Where the fraud is disclosed only in the pleading of the defendant or on his cross examination such a circumstance may justify an amendment by adding a new plea of fraud<sup>5</sup> Thus where the plaintiff sued on a mortgage executed by the defendant and the defendant pleaded that he was a minor on the date of the mortgage and that the mortgage was therefore void the plaintiff was allowed to be amended by raising the plea that the defendant was guilty of fraudulent misrepresentation that he had attained majority at the time of the execution of the mortgage<sup>6</sup> But the Court will in every case require to be satisfied about the truth and substantiality of the proposed amendment and why the allegations were not originally made before it grants the amendment<sup>7</sup> Where in a passing off action the omission to refer to fraud in the

■ (31) AIR 1931 Pat 426 (427) 10 Pat 630

#### Note 7

1 AIR 1931 Pat 426 (427)

(36) AIR 1936 Mad 545 (547)

[See also (37) AIR 1937 Pat 572 (575) 16 Pat 507 (Plaint based on forged document — Amendment in second appeal will not be allowed)]

4 (21) AIR 1924 Mad 883 (885)

(18) AIR 1918 Snd 6 (8) 13 Snd L.R. 1 (An application for amendment in order to get advantage over the other side in the course of

be allowed only when a party has an honest cause to raise)

(30) AIR 1930 Nag 295 (296) 27 Nag L.R. 206

2 AIR 1930 Nag 295 (296) 27 Nag L.R. 206

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AIR 1924 Pat 426

#### Note 8

1 (67) 14 Ind App 111 (191) 11 Bom 620 (PC)

2 (67) 14 Ind App 111 (125) 11 Bom 620 (PC)

3 (98) AIR 1908 Mad 759 (760)

4 (1890) 9 T.L.R. 580

5 (1899) 14 P.D. 56 (59) Ridgway v. Hawkins

6 (96) 23 Cal 371 (383 390)

7 (24) AIR 1924 Mad 843 (885)

■ (10) 11 Ind Cas 600 (601) (Low Bur)

(30) AIR 1930 Pat 321 (321) (Suit for possession on whether can be converted into one for redemption)

(25) AIR 1935 Mad 50 (51)

Where, however, the proposed amendment is likely to cause injustice to the other side, it will not be allowed.<sup>9</sup> Thus, where the application for leave to amend was made at a very late stage of the proceedings and the grant of the leave would have necessitated practically a trial of the whole case over again, it was held that leave should be refused.<sup>10</sup> Where the relief claimed by way of amendment was totally different from, and inconsistent with, the relief originally claimed it was held by the High Court of Lahore that leave to amend should be refused.<sup>11</sup> In *Ardeshir II Mama v Flora Sassoon*,<sup>12</sup> where a suit for specific performance, or, in the alternative, for damages, was sought to be amended so as to convert it into a suit for damages only, their Lordships of the Privy Council observed as follows:

That the Court should have the power of granting such an amendment in a proper case is salutary and indeed necessary. But it is one to be most carefully and judiciously exercised in all the circumstances of each individual case and with due regard to its effects upon the position both of the plaintiff and the defendant. Indeed so serious in many cases, is the exercise

**10. Amendment by adding a new ground of relief.**—The same principles as are applicable to cases of amendments by adding *new reliefs*, apply to amendments by adding *new grounds of relief*. Thus, a new ground in support of the relief claimed cannot be said to alter the character of the suit and will as a general rule be allowed.<sup>1</sup>

- (12) 13 Ind Cas 203 (204) (Mad)  
(12) 16 Ind Cas 947 (947) (Mad) (Suit for partnership account—Addition of prayer for dissolution)  
(88) AIR 1933 Lah 45 (215) (Do)  
(13) 21 Ind Cas 77b (779) (Mad)  
(15) AIR 1915 Mad 452 (453) 39 Mad 677

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Consideration valid in part—Suit can be amended into one for redemption)

- (18) AIR 1918 Mad 1142 (1145) (Plaintiff can be allowed to amend his plaint which prayed for redemption of the whole mortgage by praying for recovery in the alternative of his share and for partition and possession of such share on payment of the proportionate amount of the mortgage)  
(27) AIR 1927 Mad 212 (213)  
(29) AIR 1929 Mad 273 (274) (Suit for rent and possession—Addition of prayer for declaration of title)  
(68) 10 Suth W R 362 (363) (Suit for enhancement of rent for specific share of land can be

instituted without praying for partition—Amendment by adding a prayer for partition)

- (17) AIR 1917 Low Bur 72 (72)  
(22) AIR 1922 Sind 46 (46) (Suit for specific performance or in the alternative for damages—Amendment by giving up claim for specific performance)  
(But see (14) AIR 1914 Low Bur 225 (225) (Suit by vendee for possession—Vendor's father interested in the property sold—Vendor cannot

9. [See (12) 14 Ind Cas 537 (539) (All)]

10. (92) 15 Mad 255 (258)

(98) 21 Mad 288 (291)

11. (20) AIR 1929 Lah 449 (450)

12. (28) AIR 1928 P C 209 (219) 52 Bom 507; 55 Ind App 360 (P C)

#### Note 10

1. (5) 8 Oudh Cas 266 (270) (Suit for declaration of title on ground of survivorship—Amendment by pleading that even if partition had taken place the plaintiff had a preferential title)  
(31) AIR 1931 Bom 590 (591, 592) (Suit against certain persons as members of a joint Hindu family—Amendment by pleading in the alternative that the defendants were in any event liable as partners of a firm)  
(10) 8 Ind Cas 79 (81) (Cil) (Alternative ground in support of claim for injunction)  
(25) AIR 1925 Oudh 523 (524) (Original claim on custom—Amended claim independent of custom)  
(32) AIR 1932 Mad 603 (604)  
(9) 10 Bom L R 346 (349)

specific performance of contract in alternative could be claimed)

- (10) 8 Ind Cas 477 (479) 1 Upp Bur Rul 30 (Suit for divorce between Burmese spouses was

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In the undermentioned case,<sup>2</sup> the plaintiff was allowed to amend his plaint by adding another ground even where he had adduced false evidence in support of his first ground, where the falsity of the claim did not extend to the whole of the title that was set up, but was confined to particular link in the chain. As regards the amendment of pleadings of parties who deliberately put forward false claims, see the undermentioned cases.<sup>3</sup>

11. "As may be necessary for the purpose of determining the real questions in controversy." — The main object of allowing amendments is to get at the rights of the parties,<sup>1</sup> and to avoid multiplicity of suits, where the dispute can be settled in the suit already instituted without unfairness or injustice to the other side.<sup>2</sup> "However the necessity to amend may have arisen, leave to amend should always be given and at any stage in the proceedings in order to allow the real question at issue between the parties to be raised on the pleadings, unless the party applying for leave has acted in bad faith or the amendment will cause some injury to the opposite party for which he cannot be fully compensated by costs or otherwise."<sup>3</sup> Thus, where the properties in the plaint are wrongly described,<sup>4</sup> or some properties are omitted from the

2. (33) AIR 1933 Cal 273 (274)

3. (33) AIR 1933 Cal 271 (274)

**Note 11**

1. (19) AIR 1919 Cal 304 (307) 45 Cal 303

(35) AIR 1935 Pat 463 (465)

2. (21) AIR 1921 Nag 161 (162)

(25) AIR 1925 Nag 195 (196) (Amendments should be made to shorten litigation)

(13) 19 Ind Cas 250 (200) (All)

(20) AIR 1920 Lih 220 (222)

(25) AIR 1925 Mad 585 (595) (Amendments which will enable the final settlement of the dispute between the parties should be allowed)

(20) AIR 1926 Pat 427 (429) 5 Pat 746 (Question of fact to be raised by amendment, already taken into consideration adduced—Amendments should be allowed)

(2) 14 Buth W R 424 (430) (Action on promissory notes—1 out of the consideration illegal—Amendment allowed in application to recover so much of the consideration as was not illegal)

(23) AIR 1923 Rang 100 (101)

(35) AIR 1935 All 551 (552) (Suit objecting to constructions made by defendants on certain plot—Plaintiff not knowing in what capacity defendants made construction—Plaintiff applying for amendment of plaint on defendant's reply—Held it should be allowed)

(28) AIR 1933 Mad 709 (709) (Suit by mortgagees to enforce his half share in mortgage—Sub mortgagees made defendants but subsequently transposed as co-plaintiffs—Application by them for amendment of plaint by including other half share held should be allowed)

(37) AIR 1937 Nag 84 (84) I L R (1937) Nag 151 (Declaratory suit—Suit for declaration of Maharkh watan—Subsequent amendment for reliefs of possession and injunction—Separate suit for possession in time if amendment would have been refused—Possession being consequential relief on title, amendment held not contrary to law)

3. (25) AIR 1925 Mad 950 (958).

(33) AIR 1933 Rang 401 (403) 1938 Rang L R 521

See also the following cases

(14) AIR 1914 Mad 17 (17)

(32) AIR 1932 Bom 175 (176)

(70) 14 Buth W R 181 (182)

(26) AIR 1926 Nag 265 (266)

(25) AIR 1925 Oudh 555 (556).

(22) AIR 1922 Oudh 276 (267)

(25) AIR 1925 Sind 26 (28)

(23) AIR 1923 Mad 2 (5) (Mortgage suit—Amendment though necessitating decision as to ownership of property was allowed)

(35) AIR 1935 Mad 168 (160) (Amendment adding a new ground of exemption from limitation)

(26) AIR 1926 Mad 764 (755) (Amendment not affecting defendant's liability to pay)

(13) AIR 1915 Mad 994 (996)

4. (26) AIR 1926 Nag 313 (314)

(25) AIR 1925 Oudh 92 (93) 10 Luck 496

(32) AIR 1932 Pat 335 (350) 11 Pat 624 (Particulars of survey plots)

(11) 20 Ind Cas 476 (477) 23 All 610

(25) 17 All 234 (231)

(74) 21 Buth W R 187 (187) (One of the boundaries of one of the plots claimed if omitted can be supplied by amendment)

(70) 14 Buth W R 474 (474) (Quantity of land in defendant's possession not specified—Defect can be remedied by amendment)

[See (35) AIR 1935 Rang 523 (523) (Property incorrectly described in plaint, preliminary decree and final decree—Amendment can be allowed in final decree under inherent power)]

[See also (36) AIR 1936 P C 932 (934) 10 Pat 1 63 Ind App 441 (P C) (Suit for partition of estate left by deceased—Partition of entire estate claimed and no occasion for differentiating between ancestral property and self acquired properties of deceased—Finding that former not partition but only the latter—Plaintiff should be given an opportunity of proving what items were self acquired properties of deceased)]

plant by inadvertence<sup>8</sup> or where there is a mistake in the statement of the cause of action,<sup>9</sup> or a *bona fide* mistake in making the necessary averments in the plaint,<sup>7</sup> or in drawing up the pleadings,<sup>10</sup> or the suit is brought under a wrong Act<sup>11</sup> an amendment will be allowed to rectify the omission or mistake. See also the cases cited below.<sup>10</sup>

But the questions in controversy between the parties which have to be brought out clearly and decided are, save in exceptional cases the questions in controversy between the parties *when the parties joined issue* that is when the defendant puts in his written statement they do not include now questions which the defendant neither wished nor intended then to dispute but which, at a later stage in the proceedings either because he has changed his mind or because something has happened after he filed his written statement, he thinks it profitable to dispute.<sup>11</sup> An amendment which will be useless if made as for instance an amendment setting up a claim or defence which is bad in law,<sup>12</sup> or an amendment which, if allowed *would still leave the claim or defence as amended unsupportable*<sup>13</sup> cannot be said to be necessary for the purpose of determining the real question in controversy in the suit. Again a merely *technical plea* cannot be said to be necessary for the purpose of determining the real questions in controversy between the parties and therefore it was held that it should not be allowed to be set up by way of amendment.<sup>14</sup>

**12. Amendment by introducing new cause of action.**—It has been seen in Note 3 *ante* that there is a limitation on the wide powers of the Court to amend

5 (14) AIR 1914 Lah 263 (261 265) 1914 Pun Re No 67

(24) AIR 1931 Cal 640 (r42) (Omission in an application for leave to sue in *forma pauperis* due to inadvertence)

(16) AIR 1916 L at 317 (319) 1 Pat L Jour 393 (Partition suit—Items omitted by inadvertence might be brought in by amendment)

6 (69) 11 Suth W R 223 (223)

(30) AIR 1930 All 474 (476)

7 (10) 6 Ind Cas 876 (877) (Mad) (Defective averments should be allowed to be amended)

(75) AIR 1925 Nag 9 (10)

(71) 7 Beng L R 333 (334)

(72) 9 Bom H C R 1 (6)

(35) AIR 1935 Pat 86 (87) (No averment in plaint that notice under S 80 has been served even though such notice has been served as a fact—Amendment of plaint to include such averment must be allowed)

[See (35) AIR 1935 Mad 158 (159 160) (Amendment adding a new ground of exemption from limitation)]

8 (21) 62 Ind Cas 652 (653) (Mad) (Clerical error made in the plaint)

(30) AIR 1932 Lah 28 (29) (Want of verification in pleading may be amended)

(13) 18 Ind Cas 444 (445) 40 Cal 541 (Technical defect in the mode of relief asked)

(10) 7 Ind Cas 251 (250) (Cal) (Plaint—Not pro

certain pleas by mistake or thinking they were

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titled

wrongly in name of firm by mistake—Provisions of Partnership Act should not be too rigidly enforced—Amendment of plaint should be allowed even at late stage)

[See also (33) AIR 1933 Mad 410 (411) (Amendment of plaint for stating relief originally intended accurately and clearly can be allowed)]

9 (73) 19 Suth W R 61 (62)

10 (37) AIR 1937 Nag 173 (174) ILR (1937) Nag 514 (Plaintiff wrongly described as man die in plaint—Plaint *held* could be amended by striking out the word *mandir* and substituting word *deity* for it)

(37) AIR 1937 Oudh 290 (291) 18 Luck 157 (Where a suit was brought by one of two co-mortgagors to recover his share only but it was found that the mistake was due to wrong advice and that the amendment of plaint would not have changed the cause of action *held* that the plaintiff should be given permission to amend the plaint for the ends of justice)

11 (25) AIR 1915 Mad 950 (953)

12 (23) AIR 1923 Mad 245 (246) (Negligence and Amendment of plaint—Not allowed)

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14 (11) 10 Ind Cas 532 (534) (Cal)

(34) AIR 1931 All 11 (19) (Amendment to include mere technical plea of limitation—Not allowed)

Amendment by plaintiff signing later—Allowed  
(26) AIR 1926 Nag 395 (396) (Omission to raise

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pleadings namely, that the Court cannot, by way of amendment, substitute *one distinct cause of action for another*<sup>1</sup> Where the plaintiff sued for specific performance of a contract alleged to have been entered into by the defendant with him in 1912 and on his failure to establish the alleged contract sought to amend the plaint by setting up another and independent contract of 1903, it was held by their Lordships of the Privy Council that such amendment could not be allowed Their Lordships said

'When once that contract has been negatived to permit the plaintiff to set up and establish another and an independent contract altogether would in their Lordships opinion, be to go outside the provisions established by the Code of Civil Procedure to which reference has been made It would be a regrettable thing if when in fact the whole of a controversy between two parties was properly open rigid rules prevent its determination but in this case their Lordships think that the rules do have that operation and that it was not open to the Court to permit a new case to be made'<sup>2</sup>

In the following instances amendments were refused as introducing a new and distinct cause of action—

(1) Claim on the basis of *Uttima* adoption amendment into claim based on *apathitha* adoption<sup>3</sup>

(2) Claim based on negligence : amendment into claim based on nuisance<sup>4</sup>

(3) Suit based on fraud and instigation of false claims on the part of the defendant amendment into claim based upon an implied contract of indemnity<sup>5</sup>

#### Note 12

2 Ind Jur (WS) 118 (Plaint not to be amended)

1 (38) AIR 1988 Mad 53 (5a) (An amendment which enables the creditor to allege new acts of insolvency which have become unimpeachable and have ceased to be acts of insolvency under § 9 Provincial Insolvency Act and which he neither relied nor intended to rely when presenting his petition in insolvency cannot be allowed)

(36) AIR 1936 Pat 535 (58c) (An amendment which involves a substantial alteration of the cause of action namely, to change a suit for declaration into one for possession should not be permitted more especially when the suit is brought long after the expiry of the period of limitation)

(39) AIR 1938 Rang 125 (126) (Where a person brings a suit for recovery of possession of land but it is found that in fact his claim is for redemption of an unprovable usufructuary mortgage such person cannot be allowed to amend the pleadings by bringing his suit on his title the causes of action for the two suits being different)

See also the following cases

(27) AIR 1917 Mad 890 (960)  
(16) AIR 1916 Mad 695 (69-)  
(16) AIR 1916 Mad 1212 (1213) (Plaint not to be amended so as to set up a totally different title and cause of action)  
(19) AIR 1919 Gudd 217 (248) (Starting a new trial on a cause of action deliberately abandoned—Amendment will not be allowed in second appeal)

(18) AIR 1918 Mad 641 (681) 40 Mad 365 (FB)  
(26) AIR 1926 Rang 49 (50) 3 Rang 483 (Claim of one kind cannot be converted into claim of another kind)

(20) AIR 1920 Low Bur 92 (93 94)  
(19) AIR 1919 L pp Bur 29 (29) 3 L pp Bur Rul 171

not entitled to add a new cause of action

found to be forged—Suit cannot be amended to one on account stated in the previous year)

(94) 21 Cal 997 (1005) 21 Ind App 168 (PC)  
(91) 15 Bom 93 (98) (Leave to sue under Clause 12 Letters Patent will not be given in respect of a different cause of action after the institution of the suit)

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Amendment into suit for redemption of different mortgage]]

(But see (16) AIR 1916 Mad 1042 (1073) (Suit for specific performance can be decreed on a contract different from the one set up when time is not essence of contract and there has

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(See however (23) AIR 1925 Rang 128 (182) ■

4.  
5 (13) 21 Ind Cas 935 (936) (Mad)

(1) Claim for declaration of ownership amendment into claim for specific performance of a contract<sup>6</sup>

(5) Claim to establish title to an *archaka* office and for mesne profits of certain lands attached to the office amendment into an alternate claim for reasonable wages for having rendered *archaka* service in suit temple<sup>7</sup>

(6) Suit on the basis of a contract amendment raising plea that there was no contract at all<sup>8</sup>

(7) Suit for redemption amendment so as to convert it into one for enforcing a right as owner<sup>9</sup>

(8) Plaintiff suing alleging right to sue on behalf of a certain committee on filing to establish such right, amendment by adding as parties persons who had such right<sup>11</sup>

Where in answer to an application for amendment it is alleged that such amendment would change the cause of action the Court must look to the *substantial nature* of the claim and not to the *formal* manner in which it is inserted<sup>11</sup> A mere change in the *date* of the cause of action<sup>12</sup> or the correction of a clerical error<sup>13</sup> or amendments to disclose further details of a fact which support or amplify a cause of action already sued on<sup>14</sup> or the correction of a misdescription of property,<sup>15</sup> cannot be said to introduce such a *distinct* cause of action as will entail a rejection of the application for amendment. Thus where the plaintiff sued to set aside a sale on the ground that the defendants had taken advantage of his youth, he having just attained majority, and afterwards applied to amend the plaint by adding that on the date of the sale he was a minor, it was held that the amendment was merely for the purpose of amplifying and developing the original cause of action and should be allowed<sup>16</sup>. Similarly a plaint can be amended by putting in the necessary ground of exemption from limitation for the suit such as an acknowledgment of liability<sup>17</sup>. Where in respect of an *original liability* to pay a certain sum of money a document such as a promissory note or a mortgage is taken and the plaintiff in a suit on such document finds that the document is inadmissible in evidence owing to some technical defect amendment of the plaint by claiming relief as on the basis of the original liability does not as a general rule, amount to a substitution of a distinct cause of action and should

- (31) AIR 1931 Lah 535 (59")  
7 (28) AIR 1928 Mad 828 (829)  
■ (27) AIR 1927 Mad 973 (973)  
9 (29) AIR 1929 Rang 179 (181) 7 Ring 140  
(16) AIR 1916 Low Bur 71 (72) 8 Low Bur 418  
(21) AIR 1921 Lah 53 (53)  
11 (26) AIR 1926 Mad 577 (577)  
10 (26) AIR 1926 Sind 264 (264) 21 Sind L R 830  
(38) AIR 1938 Pat 400 (401) (Amendment altering mere form of suit should be allowed)  
12 (7) AIR 1926 Mad 128 (129) (Change in the date as to when cause of action arose)  
(33) AIR 1933 Sind 131 (133)

- 14 (25) AIR 1925 Nag 9 (11)  
(81) 5 Bom 609 (613 614)  
(20) AIR 1920 Low Bur 99 (93 94) (Amendment as to date of cause of action)  
15 (37) AIR 1937 Lah 595 (596) (Amendment of application for adjudication as insolvent)  
16 (25) AIR 1925 Mad 188 (188)  
17 (09) 3 Ind Cis 159 (160) 34 Bom 250  
(18) AIR 1918 Mad 1200 (1200)  
(18) AIR 1918 Lah 220 (220) 1918 Ind Re No 107  
(27) AIR 1927 Mad 504 (505)  
(28) AIR 1928 Sind 17 (20) 22 Sind L R 272



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therefore, be allowed<sup>18</sup> Again, where subsequent to the institution of the suit by the plaintiff, events happen which give the plaintiff a new cause of action for the relief claimed or the right to a new or additional relief he will, as a general rule, be allowed to amend the plaint by moulding it in an appropriate manner<sup>19</sup> Thus where the plaintiff sues to redeem a particular mortgage, and the defendant denies that mortgage but sets up another mortgage the plaintiff may be allowed to amend the plaint by

a party to amend its pleadings by permitting him to substitute the ground of exemption from limitation for another }

(26) AIR 1935 Mad 158 (159)

18 (22) AIR 1929 Lah 394 (394) (Insufficiently stamped hundis )

(20) AIR 1930 Mad 910 (911) (Do )

(27) AIR 1937 Mad 378 (378) (Do )

(24) AIR 1924 Mad 520 (521) (Do )

(31) AIR 1931 Oudh 54 (56) (Do )

(26) AIR 1926 Mad 1124 (1124 1125) (Mortgage for amount due on vetted accounts — Suit on mortgage — Disputing character of mortgage denied — Amendment into claim on basis of running account )

(30) AIR 1930 Mad 168 (170 172)

(35) 89 Cal W N 1235 (1241)

(33) AIR 1935 All 353 (357) 57 All 459 (Suit on promissory note — Plaintiff finding his suit as such may fail applying for amendment by falling back on original consideration — Amendment held should be allowed )

(30) AIR 1936 Rang 508 (509) 14 Rang 383 (Promissory note — Suit for recovery of debt thereunder time-barred — Application to amend plaint to allow creditor to sue for original debt — Amendment should be allowed )

(38) A I R 1938 Rang 461 (467) 1938 Rang L R 621 (Mortgage suit — Claim based on pro note and transfer by deposit of title deeds — Pro note inadmissible because of some defect in it — Amendment to base claim on original transaction — Other party if not deprived of defence amendment can be allowed )

(38) AIR 1934 Pat 205 (207) 17 Pat 268 (Plaintiff in suit on hand notes is entitled to recover his claim on the original loan when hand notes are not admissible provided plaint is amended )

(36) AIR 1936 Mad 785 (787) (F B) (Suit on promissory note barred by limitation — Plaint amended so as to base claim on original debt )

(35) AIR 1935 Rang 392 (394)

(36) AIR 1936 Mad 632 (633) (Amendment of plaint allowing plaintiff to base his cause of action on fresh promise to pay time barred debt — Fresh promise being original cause of action amendment allowed )

(37) AIR 1937 Pat 656 (656)

See also the following cases

(33) AIR 1933 Nag 57 (62) 22 Nag L R 141 (Facts for the original cause of action fully stated — Formal amendment not necessary )

(30) AIR 1930 Bom 474 (476)

(25) AIR 1925 Rang 292 (292) 11 Rang 183 (F B)

(30) AIR 1930 Lah 559 (560)

(20) AIR 1920 Mad 836 (836) (Suit on a pro note — Amendment into suit based on pro note as well as original consideration — Allowed )

(39) AIR 1930 Mad 81 (35) (Suit on promissory note — Note insufficiently stamped — Amendment of plaint by falling back on a previous promissory note allowed )

(35) AIR 1935 Mad 888 (890) (Suit on hundis — Hundis found inadmissible in second appeal — Amendment of plaint allowed )

As to cases where the loan and the note are simultaneous see the following cases

(32) AIR 1932 Mad 693 (691)

(See (14) AIR 1914 Mad 657 (659) 38 Mad 600 (Suit on pro note which is inadmissible — Payment of money at the time of execution of note does not give rise to independent obligation — Relief cannot be granted upon such obligation )

(See also (30) AIR 1930 Bom 66 (68)

(33) AIR 1933 Bom 476 (477 478) 67 Bom 809 (Suit on promissory note — Cause of action on original loan giving rise to pro note can be set up by amendment at trial or appeal )

(But see (25) AIR 1925 Mad 851 (852) (Suit on pro note insufficiently stamped — Consideration of note being antecedent debt — Relief based on antecedent debt cannot be granted )

(32) AIR 1932 Bom 894 (896)

19 (26) AIR 1926 Mad 6 (19)

(15) AIR 1915 Sind 25 (27) 11 Sind L R 61

(25) AIR 1925 Pat 163 (178)

(31) AIR 1931 Nag 10 (12) 26 Nag L R 848

(25) AIR 1925 Mad 1021 (1023)

(31) AIR 1921 Lah 220 (221) (Suit for injunction may be changed into one for possession )

(12) 16 Ind Cas 734 (735) (Mad) (Suit for declaration — Securing of possession by defendant after suit — Adding of prayer for possession — Court in order amendment )

(34) 12 Mad 136 (138)

(31) AIR 1931 Mad 405 (500)

(24) AIR 1924 Mad 800 (310)

In the following cases relief based upon such new cause of action was granted although amendment was not asked for

(23) AIR 1923 All 500 (502)

(17) AIR 1917 Mad 193 (200) (Appellate Court can take cognizance of subsequent events )

(16) AIR 1918 Oudh 105 (106) (Plea based on subsequent events can be raised )

(10) AIR 1919 Lah 267 (269) 1919 Pan Re No. 127. (Decree can be given without amendment )

(18) AIR 1918 Mad 143 (143) (Relief on cause of action arising subsequent to suit can be granted )

(35) AIR 1935 Oudh 22 (23) 10 Luck 270 (But in such cases opposite party must be given an opportunity to amend his pleading )

claiming relief on the basis of that mortgage,<sup>20</sup> except where the plaintiff is guilty of *mala fides*.<sup>21</sup> For other instances, see the undermentioned cases.<sup>22</sup> But where the cause of action is foreign to the original cause of action on which the suit was brought, the amendment cannot be allowed. Thus, where A, the endorsee of a promissory note, sued B on the note, and it was found that the note was void as infringing the Paper Currency Act, and the plaintiff thereupon obtained an assignment of the original obligation and applied to add this cause of action, it was held that it could not be allowed inasmuch as the cause of action based on the assignment of the original obligation was quite distinct from the cause of action based on the assignment of the promissory note itself.<sup>23</sup> On the question if Courts can give relief on a cause of action accruing after the institution of the suit, see Note 4 to O 7 R 7 *infra* and cases cited in Point 19 above.

O. 6 R. 17  
Notes 12-13

**13. "At any stage of the proceedings."** — Under the old Code a plaint could only be returned for amendment in certain cases specified, *at or before the settlement of issues*.<sup>1</sup> The Court could also *at any time before judgment* amend the plaint.<sup>2</sup> The

[See also (22) AIR 1912 Oudh 266 (267) (Suit for declaration of title — During pendency of suit

to be dismissed)

(71) 7 Beng L R App 65 (65) (Substitution of parties due to subsequent events)

[But see (27) AIR 1927 Cal 56 (57) (Distinct cause of action — Not allowed)

(10) 5 Ind Cas 699 (701) 6 Nag L R 17]

**20.** (80) 4 Bom 591 (588) (Suit for redemption — Defendant admitting mortgage but proving that it was of another date and for a different amount — Relief granted to plaintiffs upon facts proved by defendant)

(93) 17 Bom 365 (368) (Do)

(93) 27 Bom 271 (276, 278) (Do)

(10) 7 Ind Cas 115 (117) 82 All 651 (Suit on a later mortgage — Later mortgage containing covenant not to redeem it before redeeming the earlier one — Amendment into suit on both mortgages allowed)

(98) 5 Bom L R 643 (645) (Suit for redemption — Defendant denying suit mortgage but prior mortgage which was admitted by him was then alive — Amendment of plaint for redemption of earlier mortgage)

(97) 30 Mad 388 (390) (Suit for redemption — Plaintiff failing to prove mortgage set up by him — Plaintiff may be allowed to redeem on basis of different mortgage under which defendant claims to hold)

(17) AIR 1917 Mad 495 (498) (Suit for redemption — Defendant denying suit mortgage but claiming to hold under other different mortgages — Plaintiff can be allowed to amend his plaint so as to claim redemption of one of the mortgages set up by defendant)

(29) AIR 1919 Oudh 483 (485) 11 Luck 421 (Suit for redemption — Defendant denying suit mortgage but claiming to hold under two earlier mortgages — Amendment of plaint so as to claim redemption of earlier mortgages allowed)

[See also (30) AIR 1930 Sind 98 (98) (Suit for

dismissal)]

[But see (38) AIR 1939 Oudh 16 (16) 18 Luck 669]

21 (16) AIR 1918 Vol 1 121 (122) (Plaintiff fabricating a document)

[See also (37) AIR 1937 Pat 572 (575) 16 Pat 527 (A party coming to Court with a forged document should not be allowed to amend his plaint in second appeal)]

22 (10) 5 Ind Cas 699 (701) 6 Nag L R 17

dants — Amendment does not substitute distinct cause of action)

23 (31) AIR 1931 Mad 533 (533)

### Note 13

1 (85) 7 All 79 (81) (FB)

(85) 7 All 860 (862)

(66) 5 Buth W II 234 (234) (Plaint cannot be amended after settlement of issues)

(80) 2 All 671 (675) (Plaint amendment as per the order made at the first hearing — It cannot afterwards be returned for amendment)

(66) 10 Buth W R 121 (122) (Plaint cannot be amended in Appellate Court)

(80) 2 All 663 (671) (Appellate Court cannot

ment at the final hearing)

(75) 10 Bom H O R 17 (18) (Not alleging any cause of action against one of the defendants)

(85) 9 Bom 358 (361) (Plaint disclosing no cause of action)

(9) 96 2 Upp Bur Rul 251 (Cause of action

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Note 13

present rule now makes it clear that the amendment can be made *at any stage of the proceedings*<sup>3</sup> It may, thus, be allowed before or at or after the trial or before the final decree in the case<sup>4</sup> or in appeal<sup>5</sup> or in second appeal<sup>6</sup> or in revision<sup>7</sup> or even in an appeal before the Privy Council<sup>8</sup> A Court of Appeal may also remand the case directing the lower Court to amend the plaint and proceed with the trial<sup>9</sup> Mere delay, therefore, in applying for an amendment will not be a ground for refusing an amendment<sup>10</sup> But where the application is made at such a late

Court after judgment )

(30) AIR 1937 Pat 576 (574) 1937

by trial

(25) AIR 1937 Cal 431 (435) (When defendant

{ Amendment not changing character of suit and not unfair can be made in appeal before High Court }

{ 37) AIR 1936 All 230 (227) 55 All 505 (Lat the opposite party should not be prejudiced or taken by surprise) }

{ 35) AIR 1935 Lah 91 (91) (Appellate Court can allow amendment converting declaratory suit into one for possession) }

{ 35) AIR 1935 Mad 589 (590) }

{ 38) AIR 1938 Pat 400 (401) }

{ See also (35) AIR 1935 Lah 318 (319) }

6 See Section 108 ante

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{

{

ed )

{ 30) AIR 1936 Mad 545 (547) (Necessary amendment can be permitted even in second appeal—Principles to be observed stated) }

{ See (35) AIR 1935 Pat 504 (500) 15 Pat 46 (See also the effect of the

2 Pat

given an opportunity to adduce evidence on the new case adopted by the petitioner )

{ 37) AIR 1937 Pat 576 (574) (Suit instituted in name of firm by mistake—Amendment to be

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(PC)

{ 67) 11 Moo Ind App 469 (456) (P C)

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{ 15) AIR 1919 Oudh 154 (155) (Amendment of plaint may be allowed in appeal under excep

stage that under the circumstances, it will cause injustice or injury to the opposite party if the leave to amend is granted the application will be refused<sup>11</sup> Thus the Court will as a rule be disinclined to grant leave to amend —

- (1) Where it introduces a totally new case<sup>12</sup> or necessitates a fresh trial on the letting in of fresh evidence<sup>13</sup>
- (2) Where the amendment will lead to needless complications<sup>14</sup>
- (3) Where the plaintiff is negligent or has taken his stand deliberately on a certain basis<sup>15</sup>

plaint by withdrawing claim against property out of jurisdiction allowed)

- (34) AIR 1935 Mad 983 (3-9) (In the matter of rectifying defects in pleadings which do not affect any substantial rights it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay)
- (35) AIR 1935 Lat 473 (4-5) (The significance of delay lies not in the quantity of time that has elapsed but in what has transpired during that time)

11. (25) AIR 1925 P C 179 (170) 47 All 459 (P C)

- (36) AIR 1939 Bom 101 (101-102) (Leave asked for in second appeal refused)
- (37) AIR 1933 Lat 443 (444) (Nature of error altered by amendment)
- (21) 61 Ind Cas 329 (329) (Lah)
- (12) 18 Ind Cas 128 (180) (Cal)
- (86) 1886 Pun Re No 68 p 144
- (21) AIR 1921 Lah 156 (156)
- (18) AIR 1918 Lah 186 (188)
- (14) AIR 1914 All 302 (303) (Amendment to introduce a new cause of action when it was

tion that rule is invalid — Amendment by claim ing possession of property)

- (34) AIR 1938 P C 123 (123) 32 Sind L R 418 I L R (1938) Mad 616 (P C)
- (34) AIR 1938 Nag 393 (390) I L R (1939) Nag 191

13. (92) 15 Mad 255 (257-259)
- (33) AIR 1933 Lah 676 (677) 14 Lah 640
- (21) AIR 1921 Cal 195 (127)
- (15) AIR 1915 Lah 177 (177)

(28) AIR 1928 Lah 599 (600) 9 Lah 291 (When no cause of action at all was alleged and suit was dismissed amendment not allowed to introduce the same)

(31) AIR 1931 Lah 260 (262) (Suit to recover price of goods supplied refused to be amended into a suit to recover damages for breach of contract)

(98) 21 Mad 288 (291) (Further evidence necessary)

(11) 12 Ind Cas 200 (202) (Lpp Bur) (Fresh issues and fresh evidence)

(19) AIR 1919 Cal 534 (535-536) 46 Cal 108

(28) AIR 1978 Bom 516 (518) 57 Bom 640

(See (30) AIR 1930 Rang 140 (142) 7 Rang 800]

14 (28) AIR 1923 Lah 375 (376) 9 Lah 588 (Amendment changing plaintiff's name from temple to idol)

(25) AIR 1925 Mad 441 (442) (To convert a suit for maintenance of certain members alone of a tawazhi into a suit on behalf of the whole tawazhi)

15 (77) AIR 1927 Bom 521 (525) 51 Bom 749

his suit for possession into one for a right of way)

(18) AIR 1918 Pat 230 (233) (More than a year after issues when the case was ready for hearing running a completely new point)

(87) 11 Bom 620 (673) 11 Ind App 111 (P C) (Amendment applied for when the evidence had been taken)

(73) 10 Bom H C R 187 (187)

(28) AIR 1973 Cal 223 (226) (Amendment defeating plea of defendant cannot be allowed)

(28) AIR 1978 Mad 878 (820)

[See (33) AIR 1933 Cal 668 (673) 60 Cal 801]

12 (77) 99 Ind Cas 979 (980) (Lah)

(34) AIR 1934 Oudh 118 (118)

(28) AIR 1978 Lah 933 (934)

(29) AIR 1979 Lah 710 (711) (After a period of two and half years)

(21) AIR 1921 Lah 53 (55) (Plaintiff having prayed for redempcion was not allowed to amend his plaint for possession of property on the foot

stage)

(39) AIR 1938 Cal 271 (274) (In this case however considering the facts and circumstances the amendment was allowed on the ground that it would be more in furtherance of justice to do so)

(28) AIR 1928 Lah 32 (33) (Suit in ejectment cannot be amended in second appeal as on basis of permissive possession)

(28) AIR 1928 Lah 32 (33) (Suit in ejectment cannot be amended in second appeal as on basis of permissive possession)

claim in revision)

(18) AIR 1918 Nag 148 (149) (Suit for declaration)

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Note 13

(4) Where, notwithstanding objection by the opposite party, the plaintiff insists on proceeding with the suit as framed <sup>16</sup>

(5) Where the plaintiff has had several opportunities to apply for amendment but has slept over his rights for a very long time <sup>17</sup>

See also the undermentioned cases <sup>18</sup>

(30) AIR 1930 Pat 371 (321) (Suit for possession

(37) AIR 1937 Mad 484 (487)

18 { 14) AIR 1914 All 484 (485) (Plaintiff in suit for ejectment asking plaint to be amended so as

remedies open to him )

(28) AIR 1929 Oadh 185 (196 137)

(86) AIR 1936 Mad 545 (547) (For allowing amendment in second appeal it should be seen whether the conduct of the party seeking the amendment has been *bona fide* and he has come to Court with clean hands and whether by the exercise of due diligence the relief for amendment could have been sought earlier )

(37) AIR 1937 Sind 92 (93) 31 Sind L R 406 (Application to amend description in plaint—Plaint instituted by living person in name of and verified on behalf of a dead person—Living person's name cannot be substituted under O 1 R 10 in place of dead person—Plaintiff guilty of gross neglect—He cannot be allowed to amend under O 6 R 17 )

16 (91) 15 Mad 255 (257)

(26) AIR 1926 Mad 988 (989) (Suit for injunction—Plaintiffs out of possession—Objection to frame of suit by defendants—Plaint yet not sought to be amended—Failure of plaintiff in trial Court—Application for amendment filed in appeal )

(82) 8 Cal 277 (278)

(97) 24 Cal 584 (588)

16 AIR 1930 Pat 371 (321)

(10) 11 Ind Cas 519 (513) (All)

(24) AIR 1924 1 at 310 (311) 2 Pat 919 (Where the mistake is *bona fide* amendment will be allowed )

appeal )

(71) 21 Suth W R 208 (200) (FB) (Where there is reason to think that omission to claim alter

defendant to raise objections in bar not taken in original statement )

(C7) 3 Mad H C R 372 (378) (Defect on the face of the plaint which would have rendered it inadmissible is not a matter for amendment at the final hearing of the suit )

(36) AIR 1936 Pat 185 (189) (Suit barred under

possession )

Amendment of plaint sought—Amendment re

f date in

in delay )

{ plaint sought in appeal on ground of mistake in

**14. Opportunity to be given to the opposite party to amend his pleading.** — Where a pleading is allowed to be amended, an opportunity should be afforded to the opposite side to meet the new case by filing any additional statement or letting in such further evidence as may be necessary<sup>1</sup> Where, however, a party raises a contention not covered by his pleading, the Court cannot direct the opposite party to file a statement in answer to such contention, without first directing the former to amend his pleading and deciding that the amendment is necessary<sup>2</sup>

**15. "On such terms as may be just."** — These words give the Judge an unfettered discretion as to the terms to be imposed in granting an amendment of the pleadings<sup>1</sup> As a general rule an amendment will only be allowed on the terms that the cost of the application for leave to amend, and of the costs occasioned by, and in consequence of, the amendment shall be paid by the party amending in any event<sup>2</sup>

typing—No sufficient explanation offered why mistake was not discovered earlier—Appellate Court will not exercise its discretion in allowing amendment)

(38) AIR 1933 Pat 558 (559) (Suit under O 21, R 103 C P C for declaration and possession —Amendment of plaint by deleting claim for possession to avoid payment of additional court fee—Application for leave to amend plaint in second appeal by including claim for possession —Leave refused)

(39) 1939 Oudh W N 1138 (1140) (Where a party has obtained an adjudication of his claim from the trial Court or has argued his case in respect

of court fee)

(30) 40 Cal W N 1233 (1236) (Suit challenging patent sale brought in wrong form—Objection in written statement—Amendment of plaint should not be allowed in Appellate Court when objection is taken when limitation for bringing suit has expired)

(38) AIR 1938 P C 123 (120) 82 Sind L R 418 I L R (1938) Mad 646 (P C) (Held that the relief of so wide and exceptional a nature should not have been entertained by way of amendment at the end of the trial)

(37) AIR 1937 Pat 572 (575) 16 Pat 527 (A party will not be allowed to amend the plaint in second appeal when he comes to the Court

(  
Allowing amendment in second appeal is improper)

(1938) 10 Cal 2d 100 (100)

(1938) 10 Cal 2d 100 (100)

(1938) 10 Cal 2d 100 (100)

(1938) 10 Cal 2d 100 (100)

(1938) 10 Cal 2d 100 (100)

(1938) 10 Cal 2d 100 (100)

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(1938) 10 Cal 2d 100 (100)

(1938) 10 Cal 2d 100 (100)

(1938) 10 Cal 2d 100 (100)

(1938) 10 Cal 2d 100 (100)

#### Note 14

1 (12) 16 Ind Cas 785 (786) (Cil) (Because the case was pending for a long time no exception

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for  
trial independently of Rules 23 and 25 of Order 41)

(75) 23 Suth W R 172 (173)

(14) AIR 1914 Mad 59 (61)

(34) AIR 1934 Bom 407 (410)

(35) AIR 1935 Oudh 22 (23) 10 Luck 270 (New events arising during progress of suit giving rise to new cause of action)

(34) AIR 1934 All 278 (276) 56 All 429

[See (17) AIR 1917 Lih 301 (302) 1917 Pun Ro No 83]

2 (16) AIR 1916 Mad 903 (907)

#### Note 15

1 (1932) = Q B 317 (318 319) Woolley v Broad (See also (34) AIR 1934 Cal 100 (103 104) (Amendment of plaint before trial has begun should be allowed—Defendant can be compensated in costs—That another suit in which

evidence or pleading rendered nugatory by the amendment)

(95) 22 Cal 692 (711 713) (In appeal and in ordering a remand a party amending has been ordered to deposit all costs upto date within a specified time)

Related amendment can be allowed only on condition of payment of costs)

(34) AIR 1934 All 273 (276) 56 All 423 (A

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claim at the stage of second appeal from what he had either in trial or in Appellate Court)

**O 6 R 17**  
**Notes 15-18**

The terms should be such as will prevent the opposite party from being prejudiced by the amendment.<sup>3</sup>

An order directing a plaintiff to pay in cash the costs of amendment of the plaint after he has been found to be a *pauper* is not proper.<sup>4</sup> Where a party accepts under an order costs which but for the order would not at that time be payable he cannot afterwards object that the order ought not to have been made.<sup>5</sup> Where an amendment of a pleading is allowed on condition of the party paying to the opposite party a certain sum as costs and such sum is paid and accepted by the opposite party the latter cannot afterwards object to the order allowing amendment.<sup>6</sup>

**16 How amendments should be made** — Under the old Code the plaint could be *returned* for amendment in certain cases specified.<sup>1</sup> Under the present Code it would seem that the pleading should not be *returned* for amendment but is to be kept on the Court's file with direction to the parties to amend if necessary.<sup>2</sup> Where however the Court has no pecuniary jurisdiction to entertain the suit the Court should under the provisions of O 7 R 10 of the Code return the plaint to the plaintiff who may amend it by deleting certain reliefs claimed and re-present the same to the Court.<sup>3</sup>

It is not however essential that the amendment should be made on the face of the plaint itself; it may be made even on a separate sheet of paper though it is usually done on the plaint itself.<sup>4</sup>

**16a Court not having jurisdiction over suit, if can allow amendment of plaint** — A Court which has no jurisdiction to entertain a suit is not competent to allow an amendment of the plaint which if granted would bring the suit within its jurisdiction.<sup>1</sup> But it can return the plaint for presentation to the proper Court and the plaintiff can amend the plaint and re-present it to the same Court.<sup>2</sup>

**17 Who can apply for amendment** — Where a suit is instituted by two plaintiffs it is doubtful whether one of them alone can apply for amendment of the plaint.<sup>1</sup>

**18 Extent of amendment** — A pleading can be amended only to the extent allowed by the Court. Thus where a plaint was ordered to be amended by *addition of parties* and the plaintiff also altered the *relief claimed* it was held that the plaintiff

3 (1887) 36 Ch D 770 (774) *Curtis v Spence*  
 (9) AIR 1922 Bom 385 (385) 47 Bom 104  
 (17) AIR 1927 Mad 1009 (1009)  
 (33) AIR 1933 Mad 410 (411)  
 (34) AIR 1934 Cal 554 (555-556) 61 Cal 433 (Per Lord Williams J *Ghose J contra*)  
 (84) AIR 1934 Nag 163 (163) 30 Nag L R 347 (Unless he accepts the costs expressly reserving at that time his right to challenge that order) — "

(97) 1 Cal WN 574 (576) (Laid aside or bed in the plaint cannot be denied)  
 [See also (93) 97 Mad 80 (84-85) (Suit filed for null far onusness)]

2 (71) AIR 1921 Sind 160 (166) 17 S and LR 2 3  
 [See however (13) 19 Ind Cas 679 (672) (Mad) (Pleadng may be returned to a party if he applies for it)]

3 (28) AIR 1928 Mad 559 (559-560)

4 (93) 1893 All W N 995 (275)

**Note 16a**

1 (35) AIR 1935 All 842 (843)  
 (38) AIR 1938 All 17 (18) ILR (1938) All 40  
 2 (39) AIR 1938 All 17 (18) ILR (1938) All 40

**Note 17**

1 (27) AIR 1927 Cal 733 (73)

Appeal is valid though in a case costs were tendered on due date.]

**Note 16**

1 (11) 10 Ind Cas 922 (923) (Low Bur)

must be taken as originally framed, even though the unauthorised amendment as to relief was not objected to either by the Court or by the other party.<sup>1</sup>

A Court cannot allow an amendment which has the effect of ousting its own jurisdiction over the suit.<sup>2</sup>

**19. Effect of amendment and limitation.** — Where, in a suit against several defendants, the Court cannot take cognizance of the claim as against some of the defendants, and in consequence thereof the plaintiff amends his plaint by restricting his claim only as against the other defendants, the effect of the amendment is as if the suit had never been commenced in respect of the former.<sup>3</sup>

Where an amendment is allowed under this rule, such amendment relates back to the date of the suit as originally filed where no party is added.<sup>4</sup> But where the plaint in a suit for possession of certain plots of land is subsequently amended by the inclusion of certain other plots, it is not a case of amendment properly so called, but a case of an addition of entirely new lands and as regards such lands the suit will date only from the day when the claim was made in respect thereof<sup>5</sup> and not from the date when the application was granted. Similarly, the amendment of a plaint by the addition of a necessary party cannot relate back to the date of the filing of the suit.<sup>6</sup> See Note 41 to O 1 R 10 *ante*. See also the undermentioned decision.<sup>7</sup>

A plaint can be allowed to be amended under this rule although at the time of the amendment the suit (if instituted then) would have been barred by limitation.<sup>8</sup> See also Note 5 *supra*. It has been held by the Nagpur Judicial Commissioner's Court<sup>9</sup> that where an amendment of the plaint is made on the direction of the Court on the ground that the suit as framed was not maintainable, all orders passed by the Court against the defendants previously (*e.g.* order for attachment before judgment) are vacated automatically.

**20. Appeal.** — Under the old Code orders *returning plaints* for amendment were appealable under clause 6 of Section 583.<sup>1</sup> But no appeal lay from an order

#### Note 18

1 (10) 7 Ind Cas 505 (525) (Lah)

2 (25) AIR 1979 Mad 400 (400)

#### Note 19

1 (19) AIR 1919 Low Bur 42 (43) 9 Low Bur Rpt 275

2 (84) AIR 1934 Lah 412 (412) (Provided no fresh claim is added)

(30) AIR 1932 Bom 367 (368 370)

(93) AIR 1933 Mad 153 (156)

(76) AIR 1970 Mad 487 (489)

(12) 17 Ind Cas 193 (196) 37 Bom 340 (Where

should not be allowed in such cases.)

5 (36) AIR 1936 Mad 991 (992) (Where a suit filed by an unregistered firm and on subsequent registration an application is made to amend the plaint and to treat the suit as instituted on date of application the amendment will not be granted and as the suit as originally instituted was incompetent any subsequent amendment cannot relate back to the date of institution.)

6 (95) 17 All 288 (291) (Court can return plaint for amendment even after the period of limitation for the suit.)

(14) AIR 1914 Nag 77 (78) 10 Nag L R 32 (General rule is that amendment claiming fresh relief will not be allowed after limitation period — But this rule will not apply where amendment is in interest of defendant.)

(11) 10 Ind Cas 731 (733) 7 Nag L R 33

7 (34) AIR 1934 Nag 169 (170)

#### Note 20

1 (03) 1903 Pun L R No 79 ■ 207 (203)

introducing fresh claim relates back to date of suit.)



O. 6 R. 17  
Notes 20-21

passed by the Court itself under clause (c) of Section 53 directing an amendment<sup>2</sup> Under the present Code, no appeal lies from an order granting or refusing an amendment under this rule<sup>3</sup> Nor will an Appellate Court in an appeal from the decree in the suit interfere with the discretion of the lower Court in granting or refusing amendments<sup>4</sup> Where the defendants do not take objection to the amendment, they will be deemed to have waived it and cannot raise it again at the stage of appeal<sup>5</sup>

An order refusing leave to amend a plaint is in the nature of an interlocutory order and is not appealable under the Letters Patent as a judgment<sup>6</sup> Nor is an order amending the title of a plaint by omitting the word 'summary' and transferring the case to the short cause list a judgment within Clause 15 of the Letters Patent<sup>7</sup>

Where on a plaint being amended in accordance with the order of the Court, the Court finds that the suit is beyond its pecuniary jurisdiction and returns the plaint for presentation to the proper Court the order directing amendment can be challenged in the appeal from the order returning the plaint<sup>8</sup>

**21 Revision** — See Notes to Section 115, ante generally See also the undermentioned cases<sup>1</sup>

O. 6 R. 18

Failure to amend  
after order

**R. 18.** [Cf S 53.] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

[R S C, O. 28 R 7; Cf 1877, S 53]

2 (81) 8 All 454 (455)

(64) 143 All W N 84 (88)

(01) 1901 All W N 140 (140)

3 (11) 11 Ind Cas 231 (732) 1911 Pnn Re No 96

[See *however* (28) AIR 1918 Cal 189 (189) (In this case it is assumed that an appeal will lie from an order granting an amendment)]

4 (16) AIR 1916 Cal 695 (696)

(23) AIR 1935 Lah 667 (668)

(14) AIR 1914 Cal 842 (843)

(11) 4 Ind Cas 856 (857) 1909 Pnn Re No 101

(84) AIR 1934 Lah 974 (975) (Discretion of lower Court not to be interfered with unless it was exercised arbitrarily and contrary to well established principles)

(38) AIR 1938 Lah 270 (272)

(98) AIR 1939 Nag 239 (242) I L R (1939) Nag 194 (Interference allowed where lower Court acted on a wrong view of law)

5 (17) AIR 1917 Cal 614 (615)

6 (17) AIR 1917 Mad 350 (350)

7 (25) AIR 1925 Bom 152 (160)

8 (36) AIR 1936 Mad 936 (937) (The fact that the plaintiff did not apply in revision from the order directing amendment did not estop or

preclude him from questioning the correctness of that order)

#### Note 21

1 (83) AIR 1933 Rang 49 (50) 11 Rang 96 (35) AIR 1935 All 573 (580) 57 All 439 (Order refusing amendment is 'case decided' within the meaning of Section 115)

(85) AIR 1935 All 651 (652) (The refusal to allow an amendment of the plaint is a case decided within the meaning of S 115)

(36) AIR 1936 All 686 (687) I L R (1937) All 17 (18) (No revision lies from an order refusing to allow an amendment of a pleading—Cases where the amendment comes under some other order of the Court e.g. the addition or substitution of parties or the striking off of a pleading may amount to a case decided but an order passed purely under O. 6 R. 17 does not)

(98) AIR 1936 Pat 491 (493) (High Court treated appeal as revision and set aside order allowing amendment)

(83) AIR 1935 Cal 102 (107) (Ordinarily discretion exercised by lower Court will not be reviewed unless irreparable injury and failure of justice will be caused but no hard and fast rule can be laid down)

O. 6 R. 18  
Note 1

**1. Failure to amend after order.** — Under Sections 53 and 54 of the Code of 1877, the Court could reject a plaint if the party failed to comply with the order for amendment<sup>1</sup> There is no such provision under this Code and the only consequence of the failure to amend within time would be, that he cannot amend his pleading afterwards, unless the time is extended by the Court<sup>2</sup> This rule does not prohibit a fresh suit being brought on the same cause of action when the amendment has not been made in time<sup>3</sup> Where the order of amendment is made, not under this Order, but under some other provision of law, the provision that the amendment must be made within 14 days, where no time is fixed, does not apply<sup>4</sup>

The Court has a discretion to extend the time even after the expiry of the period originally fixed<sup>5</sup> and no appeal will lie against an order admitting an amended plaint after the time fixed<sup>6</sup>

## ORDER VII.

### PLAINT

Particulars to be  
contained in plaint.

**R. 1. [S. 50.]** The plaint shall contain the following particulars:—

O. 7 R. 1

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence<sup>4</sup> of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind,<sup>5</sup> a statement to that effect;
- (e) the facts constituting the cause of action<sup>6</sup> and when it arose;<sup>7</sup>
- (f) the facts showing that the Court has jurisdiction;<sup>8</sup>
- (g) the relief which the plaintiff claims;<sup>9</sup>

#### Order 6 Rule 18 — Note 1

1. (04) 1904 Pun Re No 57, p. 168
2. (21) 60 Ind Cas 376 (377) (Lah) (The plaint cannot be dismissed)
- (13) 19 Ind Cas 472 (473) (Punjab Chief Court) (Dm)
- (30) AIR 1936 Pesh 155 (157) (Failure to amend

plaintiff to join a person as co plaintiff—Latter refusing to join as co plaintiff—Suit not to be dismissed but Court must add him as defendant )]

3. ('27) AIR 1927 Lah 83 (83)
4. (14) AIR 1914 Cal 637 (638) (High Court's direction of amendment apart from Order 6)
5. (92) 16 Bom 263 (266)  
[See (01) 4 Oudh Cas 108 (115) (Case under S. 54 of the Code of 1882)]
6. ('09) 4 Ind Cas 492 (492) (All)

O. 6 R 17  
Notes 20-21

passed by the Court itself under clause (c) of Section 53 directing an amendment<sup>2</sup> Under the present Code no appeal lies from an order granting or refusing an amendment under this rule<sup>3</sup> Nor will an Appellate Court in an appeal from the decree in the suit interfere with the discretion of the lower Court in granting or refusing amendments<sup>4</sup> Where the defendants do not take objection to the amendment they will be deemed to have waived it and cannot raise it again at the stage of appeal<sup>5</sup>

An order refusing leave to amend a plaint is in the nature of an interlocutory order and is not appealable under the Letters Patent as a judgment<sup>6</sup> Nor is an order amending the title of a plaint by omitting the word summary and transferring the case to the short cause list a judgment within Clause 15 of the Letters Patent<sup>7</sup>

Where on a plaint being amended in accordance with the order of the Court the Court finds that the suit is beyond its pecuniary jurisdiction and returns the plaint for presentation to the proper Court the order directing amendment can be challenged in the appeal from the order returning the plaint<sup>8</sup>

**El Revision** — See Notes to Section 115 *ante* generally See also the undermentioned cases<sup>1</sup>

O 6 R 18

**R. 18.** [Cf S 53] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court

[R S C, O 28 R 7, Cf 1877, S 53]

2 (61) 3 All 851 (655)  
(30) 143 All W N 89 (93)  
(101) 1401 All W N 140 (140)

3 (11) 11 Ind Cas 231 (23) 1911 Pun Re No 90  
(See however 139 AIR 1 14 Cal 188 (189) (In this case it is assumed that an appeal will lie

preclude him from questioning the correctness of that order)

Note 21

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(36) AIR 1906 All 686 (686) I L R (1937) All

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tion exercised by lower Court will not be reviewed unless irreparable injury and failure of justice will be caused but no hard and fast rule can be laid down)

**1. Failure to amend after order.** — Under Sections 53 and 54 of the Code of 1877, the Court could reject a plaint if the party failed to comply with the order for amendment<sup>1</sup>. There is no such provision under this Code and the only consequence of the failure to amend within time would be, that he cannot amend his pleading afterwards, unless the time is extended by the Court<sup>2</sup>. This rule does not prohibit a fresh suit being brought on the same cause of action when the amendment has not been made in time<sup>3</sup>. Where the order of amendment is made, not under this Order, but under some other provision of law, the provision that the amendment must be made within 14 days, where no time is fixed, does not apply<sup>4</sup>.

The Court has a discretion to extend the time even after the expiry of the period originally fixed<sup>5</sup> and no appeal will lie against an order admitting an amended plaint after the time fixed<sup>6</sup>.

**O. 6 R. 18  
Note 1**

## ORDER VII.

### PLAINT

Particulars to be  
contained in plaint.

**R. 1. [S. 50.]** The plaint shall contain the following particulars:—

**O. 7 R. 1**

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence<sup>4</sup> of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind,<sup>5</sup> a statement to that effect;
- (e) the facts constituting the cause of action<sup>6</sup> and when it arose;<sup>7</sup>
- (f) the facts showing that the Court has jurisdiction;<sup>8</sup>
- (g) the relief which the plaintiff claims;<sup>9</sup>

#### Order 6 Rule 18 — Note 1

(‘28) 111 Ind Cas 787 (780) (Lab) (Court cannot compel plaintiff to amend—If suit cannot pro

1. (‘04) 1904 Pun Re No 57, p 168
2. (‘21) 60 Ind Cas 376 (377) (Lab) (The plaint cannot be dismissed)
- (‘13) 19 Ind Cas 472 (473) (Punjab Chief Court) (Do)
- (‘36) AIR 1936 Pesh 155 (157) (Failure to amend

plaintiff to join a person as co plaintiff—Latter refusing to join as co plaintiff—Suit not to be dismissed but Court must add him as defendant ]]

3 (‘27) AIR 1927 Lah 68 (83)

4 (‘14) AIR 1914 Cal 637 (639) (High Court’s direction of amendment apart from Order 6)

5 (‘92) 16 Bom 263 (266)

[See (‘01) 4 Oudh Cas 108 (115) (Case under § 54 of the Code of 1882)]

6. (‘09) 4 Ind Cas 492 (492) (All)

to amend and pay costs as ordered—No jurisdiction to dismiss suit)

(‘11) 10 Ind Cas 503 (505) (Cal) (Failure to amend as ordered—No objection at the earliest opportunity — Objection deemed waived — Amendment application treated as part of plaint)

O. 7 R. 1  
Notes 1-2

(h) where the plaintiff has allowed a set-off or relinquished ■ portion of his claim,<sup>10</sup> the amount so allowed or relinquished; and

(i) a statement of the value<sup>11</sup> of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits

[1877, S. 50; 1859, S. 26. See S. 26 and O. 6 R. 2.]

### Synopsis

- |  |   |
|--|---|
| 1. Legislative changes                                   | 7. When cause of action arose   |
| 2. Plaintiff in general                                  | 8 "Facts showing that the Court has jurisdiction"                                     |
| 3. Scope of the Rule                                     | 9 "Relief which the plaintiff claims" See O 7 R 7                                     |
| 4 Name, description and place of residence               | 10 "Where the plaintiff has allowed a set-off or relinquished a portion of his claim" |
| ■ Party — A minor or person of unsound mind See Order 82 | 11 Valuation of suit  |
| 6 Facts constituting the cause of action                 |   |

### Other Topics (miscellaneous)

Contents of plaintiff See Note 2      The plaintiff shall contain See Note 3

#### 1. Legislative changes. —

- 1 The word shall has been substituted for "must" in the opening sentence See Note 3
- 2 In clause (c) of this rule, the word "facts" has been substituted for the words "a plain and concise statement of the circumstances," occurring in the old Section See Note 6
- 3 Clauses (d), (f) and (i) are new

**2. Plaintiff in general.** — As has been seen in Note 2 to Section 26 *ante*, a plaintiff has been held to mean 'a private memorial tendered to a Court in which the person sets forth his cause of action the exhibition of an action in writing' It corresponds to the 'statement of claim' in England and its object is to state the grounds upon which the plaintiff seeks the assistance of the Court to grant him relief<sup>1</sup>

Order 6 lays down generally what pleadings (i. e., plaintiff or written statement) should contain, and this Order lays down in particular the requirements of a plaintiff Every plaintiff, therefore, should comply with the rules contained in Orders 6 and 7, so far as they are applicable Thus

- (1) It should contain the name of the Court in which the suit is brought (O 7 R 1a)
- (2) It should contain the (a) name, (b) description, and (c) place of residence of—  
(i) the plaintiff (O 7 R 1b),  
(ii) the defendant so far as can be ascertained (O 7 R 1c)
- (3) Where the plaintiff or defendant is a minor or ■ person of unsound mind it should contain ■ statement to that effect (O 7 R 1d)

#### Order 7 Rule 1 — Note 2

1. See cases cited in Note 3 to Section 26

- (4) Where the plaintiff sues in a *representative* capacity, it should show not only that he has an existing interest in the subject matter, but that he has taken necessary steps to enable him to institute a suit, concerning it (O 7 R 4)
- (5) It should state in a *concise* form the *material facts* on which the plaintiff relies for his claim (O 6 R 2)
  - (i) It should set out the facts constituting the cause of action (O 7 R 1c)  
When necessary, it should be divided into paragraphs numbered consecutively — all dates, numbers and sums to be expressed in figures (O 6 R 2)
  - (ii) The forms given in Appendix A to the Code, or similar forms, should be used as far as possible (O 6 R 3)
  - (iii) If the plaintiff pleads misrepresentation, fraud, breach of trust, wilful default, undue influence, etc., and in all cases where particulars may be necessary, beyond those as are exemplified in the forms aforesaid, it should contain the particulars (with dates and items if necessary) (O 6 R 4)
  - (iv) If a party relies on illegality or insufficiency in law of any contract, that party should plead such illegality or insufficiency in law in his pleading, it is not sufficient simply to deny the contract (O 6 R 8)
  - (v) Whenever the contents of a document are material, it is sufficient to state the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words are material (O 6 R 9)
  - (vi) Whenever it is material to allege malice, fraudulent intention, knowledge or any condition of mind of any person it is sufficient to allege it as a fact without setting out the circumstances from which it is inferred (O 6 R 10)
- (6) If the suit is for the recovery of money, it should state the *precise* amount claimed and when the plaintiff has allowed a set off or relinquished a portion of his claim, the amount so relinquished or so allowed should be stated (O 7 R 1h), but in suits for accounts or for mesne profits, it should state the *approximate* amount sued for (O 7 R 2)
- (7) If the subject matter of the suit is immovable property, it should contain a description sufficient to identify it, i. e., boundaries or survey numbers thereof should be specified (O 7 R 3)
- (8) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded on separate and distinct grounds, he should state them as far as possible separately and distinctly (O 7 R 8)
- (9) It should state the interest of the defendant in the subject matter and his liability to answer the plaintiff's demands (O 7 R 5)
- (10) It should state when and where the cause of action arose
  - (i) It should state (if necessary) the facts showing that the Court has jurisdiction (O 7 R 1f)
  - (ii) If it is presented after the expiration of the period of limitation prescribed, it should show the grounds of exemption from the law of limitation (O 7 R 6)
- (11) It should contain a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits (O 7 R 1i)

**O. 7 R. 1**  
**Notes 2-4**

(12) It should state specifically the relief which the plaintiff claims either simply or in the alternative it is not necessary to ask for general or other relief which may always be given as the Court may think just (O 7 R 7)

(13) It should be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case (O 6 R 15)

A suit is instituted by the presentation of a plaint to the Court or to such officer as it may appoint in this behalf (O 4 R 1) but cannot be said to be *duly* instituted until it is admitted and registered as a suit (see Note 2 to Section 26) The Court may return a plaint for presentation to the proper Court at any stage (O 7 R 10) or reject it on any of the grounds mentioned in O 7 R 11 (see O 7 R 11, *infra*)

The provisions of this Order are made applicable to plaints presented under the provisions of the Bengal Tenancy Act<sup>1</sup> the Madras Estates Land Act<sup>2</sup> the Agra Tenancy Act<sup>3</sup> the Oudh Rent Act<sup>4</sup> the Orissa Tenancy Act<sup>5</sup> and the Provincial Small Cause Courts Act<sup>7</sup>

**3 Scope of the Rule** — The provisions of this rule are *imperative*<sup>1</sup> The substitution of the word shall in the place of must in the opening sentence has not effected any change in the law See also Note 2 above

**4 Name, description and place of residence** — The object of the Legislature is to secure correct particulars regarding the parties so far as they can be ascertained so that there may be no uncertainty with regard to the identity of the parties The full description of the party and the character in which he sues or is sued should be given in the plaint<sup>1</sup> The word description includes the age father's name<sup>2</sup> and other particulars that may be necessary to identify the person Thus the titles by which the defendant is generally known should also be given<sup>3</sup> As to the effect of misdescription of parties see Note 37 to Order 1 Rule 10 *supra*

The place of residence of the plaintiff should be accurately given<sup>4</sup> and that of the defendant should be given as accurately as can be ascertained it is not sufficient to make vague statements as to the defendant's place of residence such as carrying on business in Calcutta<sup>5</sup> or formerly in Calcutta now residing in Kashmir<sup>6</sup> If the plaintiff after enquiry is unable to ascertain these particulars fully he should include a paragraph in the plaint to that effect<sup>7</sup> It is not sufficient to give these particulars

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invariably state that he is suing as receiver of the estate of some person to be mentioned particularly by name who is insolvent)  
2 (1902) 21 All 171 9 (1901) 17 Ind 110 (H. H. Court)

**Note 3**

1 (25) AIR 1925 Nag 183 (184)  
(15) AIR 1915 Cal 681 (682) 42 Cal 65  
(96) 18 All 403 (406) (The word must in the old Section held to be most imperative)  
(1900) 11 Cal W N 1311 (1311)

**Note 4**

refused to amend plaint even after Court's direction to amend)  
(1900) 5 Cal W N 1311 (1311) (Christian party — Initials before actual name not sufficient — Full

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6 (79) 4 Cal L Rep 366 (371)

7. (1900) 5 Cal W N 1311 (1311)

in the cause title of the plaint, as the cause title is not covered by the verification of the particulars in the plaint. In a suit by or against a corporation, the plaintiff or defendant, as the case may be, is the corporation itself and the name, description, and place of business of such corporation only need be given. It is not necessary to give the particulars of the person who purports to sign the pleading.

It is a fundamental principle that a suit can be instituted only by the person having the cause of action or by some one on his behalf.<sup>19</sup>

**5 Party, a minor or person of unsound mind.** — See Order 32 *infra*

**6. Facts constituting the cause of action.** — The words "plain and concise statement of the circumstances" occurring in the old Section have been substituted by the word "facts" in view of the specific provisions of Order 6 Rule 3.

As to what are material facts see O 6 R 2, *supra*. As to the meaning of the words *cause of action*, see Note 14 to Section 20, *supra*.

Every suit presupposes the existence of a cause of action against the defendant for, if there is no cause of action at all, the plaint will have to be rejected under Rule 11, *infra*.

Where there is no such right in law as that claimed, there can be no cause of action in respect thereof, and a suit cannot be based thereon. See Note 41 to Section 9 and the undermentioned cases.<sup>1</sup>

- 8 (31) AIR 1931 Cal 459 (461) 59 Cal 418  
9 (33) AIR 1933 Sind 102 (102) 26 Sind LR 431  
10. (30) AIR 1935 Pat 199 (200) 14 Pat 639  
(Estate held by Court of Wards is not legal entity—Suit by manager of Court of Wards not competent when he does not act as representing proprietor of estate)

#### Note 6

- 1 (05) 8 Oudh Cas 35f (800) (No suit for injunction against erecting a building will lie for interference with plaintiff's right to light and air unless there is a substantial interference with light and air)  
(05) 11 Oudh Cas 84 (85) (Defendant having never set up proprietary or under proprietary title plaintiff has no cause of action for declaratory decree in Civil Court)  
(05) 18 Mad L Jour 156 (187) (Any person other than the payee or the holder of a negotiable instrument has no right to sue)  
(188) 1898 Pun Re No 57, p 189 (The rule that when a nearer reversioner has colluded with the alienee the next reversioner can sue would not enable the reversioner having the remotest chance of success to sue)  
(05) 37 Cal 96 (105) 31 Ind App 183 (P C) (In the absence of a completed contract no suit lies  
the  
court  
does not give new cause of action)  
(09) 11 Suth W R 331 (332) (Unsuccessful intervention in a suit for rent against raiyats can afford plaintiff no cause of action for a declaration of title against third parties)  
(09) 19 Suth W R 4 (25 26) (When map was prepared in plaintiff's presence no suit to rectify

- the error subsequently lies)  
(03) 12 Suth W R 201 (202, 206) (Government cannot sue to recover land on behalf of a zamindar)  
(08) 20 All 198 (200) (Trespasser has no cause of action to sue for crops sown by him)  
(02) 24 All 288 (291) (Decree for costs assigned to A and A refusing the cost — Decree reversed in appeal by judgment debtor — Latter has no cause of action to sue for costs)  
(05) 27 All 14 (15) (Suit for cancellation of a will does not lie during the lifetime of the testator)  
(80) 1889 Pun Re No 162, p 568 (A suit for damages arising out of a civil action launched maliciously does not lie)  
(88) 1888 Pun Re No 178 p 469 (Pattidars who are not the next reversioners have no cause of action to contest adoption by widow)

- against defendant)  
(87) 9 All 439 (440) (The vendor who has covenanted with the vendees that he has a good title cannot sue to set aside a mortgage decree which a third party has obtained on the same property)  
the estate)



O. 7 R. 1  
Notes 7-8

7. *When cause of action arose.* — It is necessary for the plaintiff to state specifically when the cause of action for the suit arose.<sup>1</sup> This is necessary for the purpose of enabling the Court or the defendant to ascertain from the plaint whether there is a cause of action and whether it is not barred by the law of limitation.<sup>2</sup> But the statement need not be made in a separate paragraph if it is clear from the other facts alleged in the plaint.<sup>3</sup>

A plaintiff is not, however, absolutely bound by the statement regarding the date of the accrual of the cause of action: it may be determined or inferred from the facts stated.<sup>4</sup>

8. *"Facts showing that the Court has jurisdiction"* — All the facts showing that the Court has jurisdiction should be set out in the plaint and if any special jurisdiction vested in the Court by law is involved all the facts which call for the exercise of that jurisdiction should be set out.<sup>1</sup> When jurisdiction of a Court to try the suit is disputed the Court must decide the same preliminary to the adjudication of the suit itself.<sup>2</sup> As to the statement of facts showing the pecuniary jurisdiction of a Court see Note 11 below. See also Note 4 to Section 6 ante and the undermentioned cases.<sup>3</sup>

(77) 26 Suth W R 82 (85) 3 Ind App 241 (PC)

be stated )

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money paid under legal compulsion to defendant by plaintiff which was not due does not lie (70) 14 Suth W R 420 (421-422) (A suit in anticipation of a threatened invasion of right will not lie)

(71) 18 Suth W R 18 (20) (Reverend has no cause of action if he does not allege waste or improper alienation by widow)

(35) AIR 1935 Pesh 182 (133) (In a suit on a promissory note payable at a specified place the plaint ought to contain a statement that the note had been presented for payment as that forms part of the cause of action — If there is no allegation of presentment in the plaint the plaintiff cannot be given an opportunity of proving presentment)

[See also (74) 6 NWP HCR 104 (120) (Defendant could not have maintained a suit to close market on his neighbour's land)]

#### Note 7

1 (32) AIR 1932 Cal 259 (261-262) 59 Cal 448 (30) AIR 1930 Mad 742 (744)

(69) 11 Suth W R 233 (239) (Suit for possession — Date of deposit to be accurately given)

(01) 4 Bom L R 58 (59-60) 46 Bom 260 (372) (Ejectment suit — Precise nature of notice to quit and the date on which it was given should be stated)

in the plaint)

4 (79) 4 Cal 529 (531)

[See also (35) AIR 1935 411 759 (760) (Mistake or inaccuracy in stating the date of the cause of action for the suit is not sufficient to justify dismissal of the suit)]

#### Note 8

1 (25) AIR 1925 Nag 163 (164)

(89) AIR 1938 Mad 497 (499) (The burden of

Court on an investigation of the case comes to the conclusion that it has jurisdiction that there was no jurisdiction in the Court merely because of the absence of an assertion in the plaint)

2 (18) AIR 1918 Mad 993 (1000-1006) 40 Mad 1 (F 1)

9. "Relief which the plaintiff claims." — See Order 7 Rule 7, *infra*

O. 7 R. 1  
Notes 9-11

10. "Where the plaintiff has allowed a set-off or relinquished a portion of his claim." — The amount set off or relinquished should be specified with precision, or at least should be stated in such a manner that the amount may be inferred from the other allegations in the plaint<sup>1</sup>

11. Valuation of suit. — The plaintiff should distinctly state in the plaint, the valuation of the suit for the purposes of court fees and of jurisdiction. As the two valuations may not be the same in several cases they have to be stated specifically<sup>1</sup>. Where the plaintiff claims reliefs arising out of the same cause of action, he can state the aggregate value of his reliefs, but if he claims reliefs in respect of two or more distinct causes of action, he should state the valuation of each cause of action separately, as the court fee is separately payable in respect of each<sup>3</sup>. Where the plaintiff claims relief in the *alternative*, he should also state his valuations in respect of the two reliefs and the court fee is payable on the value of the larger relief<sup>3</sup>.

The valuation of a suit for the purposes of jurisdiction is necessary in order to ascertain whether the suit is within the *pecuniary jurisdiction* of the Court<sup>4</sup>. A plaintiff should, however, state the true value at which the subject matter of the suit ought to be valued, it should not be arbitrary or fanciful<sup>5</sup>. See also Note 4 to Section 6 and Notes 7 to 10 to Section 15, *ante*.

The question of court fees should be determined with reference to the plaint as it is and not as it ought to have been<sup>6</sup>. Whether a case falls within any particular provision of the Court Fees Act must be determined from the *substance* and not merely from the *language* or form of the plaint<sup>7</sup>.

terion is an examination of the plaint and not an examination of the issues which have been framed after the written statement has been filed ) (32) AIR 1932 All 413 (414)  
(34) AIR 1934 Lah 803 (803) (Allegations in ) (33) AIR 1933 Rang 40 (40)  
plaint and not pleas determine jurisdiction ) (32) AIR 1932 Pat 9 (10) 11 Pat 161 (Court  
(31) AIR 1931 All 664 (664) (Whether Civil )  
Court or Revenue Court has jurisdiction depends )  
upon the allegation in plaint )  
(32) AIR 1932 All 460 (460) (Do )  
(32) AIR 1932 All 478 (478) (Do )

#### Note 10

1 [1900] 1900 All W N 214 (214)  
[See (10) Ind Cas 943 (943) (Mad) (Relinquishment of a particular sum on the basis of right to get a particular sum — If plaintiff is found entitled to get less he should not be tied down to the amount relinquished)]

#### Note 11

1 [See (37) AIR 1937 Bom 826 (883) I L R (1937) Bom 402 (Suit for declaration and possession — S. 3 of Suits Valuation Act has no application to such suit — In such suit value for ) (34) AIR 1934 Lah 563 (573) 15 Lah 531 (FB)  
(33) AIR 1933 Mad 430 (431)  
(33) AIR 1933 Mad 431 (432)  
(31) AIR 1931 All 369 (371 372) 53 All 552  
(35) AIR 1935 Cal 273 (274 275)  
(36) AIR 1936 Pat 171 (172) 15 Pat 396 (Court cannot demand court fee from a plaintiff on the ground that the question of possession will arise in the suit )

O. 7 R. 1  
Note 11

The mere fact that a suit has been under-valued or over-valued cannot affect the decree, unless the wrong valuation has prejudicially affected the merits of the case.<sup>8</sup>

O. 7 R. 2

**R. 2.** [S. 50.] Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:  
*In money suits*

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

[1877, S. 50; 1859, S. 26. See O. 20.]

## LAHORE

### Local Amendments

In the second paragraph, *after* the word "defendant" insert "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate and *after* the word "amount" where it last occurs insert "or value"

N.W.F.P.

Same as that of Lahore above

### Synopsis

- |                       |                      |
|-----------------------|----------------------|
| 1. Scope of the Rule. | 3. Accounts          |
| 2. Mesne profits.     | 4. Suit for damages. |

**1. Scope of the Rule.**—In a suit for the recovery of money, the plaint should, as a rule, state the amount claimed precisely.<sup>1</sup> But in a suit for *mesne profits* or for an amount which will be found due to the plaintiff on taking *unsettled accounts* between him and the defendant, in which the plaintiff is not, at the time of the institution of the suit, in a position to give the amount precisely, he should state it *approximately*. The amount is given tentatively, as the correct amount is ascertained only in the course of the suit (O. 20 Rr 12 16 and 17)

**2. Mesne profits.** — The expression "mesne profits" has been defined in Section 2 (12)

A plaintiff may claim in a suit *past mesne profits*, i. e., mesne profits accruing up to the date of institution of the suit, and *future mesne profits* from the date of institution up to the delivery of possession. The valuation in the plaint should, under this rule, be only with reference to the amount of the *past mesne profit* claimed.<sup>2</sup>

8. (33) AIR 1933 All 249 (252) 55 All 315 (FB).

well though he had asked only for past mesne profits.

#### Order 7 Rule 2 — Note 1

1. (70) 14 South W. R. 373 (374) (Suit for contribution.—Plaint must state the exact amount due from each of the defendants.—Else the plaint is to be rejected.)

(14) AIR 1914 Cal 658 (800) (Where plaintiff is in a position to value mesne profits accrued due

#### Note 2

1. (27) AIR 1927 Cal 162 (181) 53 Cal 992  
(30) AIR 1930 Mad 90 (36, 37). 53 Mad 839  
(Plaintiff can be given future mesne profits as

accrued due in a Plaintiff Court must be allowed to have limited his claim to the maximum pecuniary jurisdiction of that Court.)

O. 7 R. 2  
Notes 2-4

The *future mesne profits* need not be valued, since it is impossible to give even an approximate statement of the amount.<sup>3</sup> But the valuation of the *past mesne profits* given will be the valuation of the amount *sued for* under this rule<sup>3</sup> and is the valuation for the purposes of jurisdiction (see Section 6 and Section 96 Note 18, *supra*)

As to the ascertainment of mesne profits see O 20 R 12 *infra*. See also Section 11 of the Court Fees Act

**3 Accounts** — A suit for money which will be found due on taking accounts is instituted when the defendant is under a legal obligation to render accounts which the plaintiff is not in a position to ascertain.<sup>1</sup> In such cases this rule requires that the plaintiff should state *approximately* the amount which will be found due to him on taking unsettled accounts between him and the defendant.<sup>2</sup> The approximation required under sub rule (2) may be a rough and ready approximation such as the plaintiff is able to give.<sup>3</sup> The valuation given by the plaintiff is purely tentative and is the valuation for the purposes of jurisdiction (see Section 6 *supra*)

As to the ascertainment of the amount due in a suit for accounts see O 20, Rules 16 and 17 *infra* and Section 11 of the Court Fees Act

**4 Suit for damages** — It has been held that in a suit for damages based on fraud the plaintiff may give an *approximate* valuation in the plaint and offer to pay additional court fees in case a larger amount is found due *before the decree is passed*, as Section 11 of the Court Fees Act will not apply to such a case.<sup>1</sup>

### R. 3. [New] Where the subject-matter of the suit is

O. 7 R. 3

Where the subject matter of the suit is immoveable property

immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers

#### CALCUTTA

#### Local Amendment

*Add at the end the words* and where the area is mentioned such description shall further state the area according to the notation used in the record of settlement or survey, with or without at the option of the party the same area in terms of the local measures

2 (26) AIR 1926 Pat 918 (229) 5 Pat 361 (FB)

(Per Jwala Prasad J.)

(25) AIR 1915 Cal 1076 (1080 1091) 53 Cal 14

(FB) (Mesne profits *pendente lite* are not to be

considered in determining the value of the suit

for purpose of jurisdiction—(Per Walmesley J.)

(21) 15 Bom 416 (418)

(23) AIR 1923 Rang 110 (112 113) 4 Upp Bur

Rul 140

mesne profits as a condition precedent to the investigation of such profits)

#### Note 3

1 (12) 14 Ind Cas 786 (787) ■ Nag L II 36

2 (88) 12 Bom 675 (677)

3 (14) ■ Ind Cas 71 (73) (Bom)

(85) ■ Bom 22 (94)

(35) AIR 1935 Lah 689 (689)

#### Note 4

1 (07) 17 Mid L Jour 62a (62f)

(See also (1900) 11 T L R 433 London and Northern Bank Ltd v George Newman Ltd

O. 7 R. 1  
Note 11

The mere fact that a suit has been under-valued or over valued cannot affect the decree, unless the wrong valuation has prejudicially affected the merits of the case<sup>8</sup>

O. 7 R. 2

**R. 2.** [S. 50.] Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed :

In money suits.

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

[1877, S. 50; 1859, S. 26. See O. 20.]

### LAHORE

### Local Amendments

In the second paragraph, *after* the word "defendant" insert "or for moveables in the possession of the defendant or for debts of which the value he cannot, after the exercise of reasonable diligence estimate and *after* the word "amount" where it last occurs insert "or value"

N.-W. F. P

Same as that of Lahore, above

### Synopsis

- |                       |                      |
|-----------------------|----------------------|
| 1. Scope of the Rule. | 3. Accounts.         |
| 2. Mesne profits.     | 4. Suit for damages. |

**1. Scope of the Rule.**—In a suit for the recovery of money, the plaint should, as a rule, state the amount claimed precisely<sup>1</sup> But in a suit for *mesne profits* or for an amount which will be found due to the plaintiff on taking *unsettled accounts* between him and the defendant, in which the plaintiff is not, at the time of the institution of the suit, in a position to give the amount precisely, he should state it *approximately*. The amount is given tentatively, as the correct amount is ascertained only in the course of the suit (O 20 Rr 12, 16 and 17)

**2. Mesne profits.** — The expression "mesne profits" has been defined in Section 2 (12)

A plaintiff may claim in a suit *past mesne profits*, i. e. mesne profits accruing up to the date of institution of the suit, and *future mesne profits* from the date of institution up to the delivery of possession. The valuation in the plaint should, under this rule, be only with reference to the amount of the *past mesne profits* claimed<sup>1</sup>

8. ('93) AIR 1933 All 249 (252) 55 All 815 (TB)

well though he had asked only for past mesne profits }

('14) AIR 1914 Cal 558 (800) (Where plaintiff is in a position to value *mesne profits* accrued due

### Order 7 Rule 2 — Note 1

1. ('70) 11 South W R 878 (874) (Suit for contribution—Plaint must state the exact amount due from each of the defendants—Else the plaint is to be rejected )

### Note 2

1. ('27) AIR 1927 Cal 182 (184) 53 Cal 922  
( '30) AIR 1930 Mad 30 (36, 37) . 53 Mad 838  
(Plaintiff can be given future *mesne profits* as

accrued due in a Municipal Court must be deemed to have limited his claim to the maximum pecuniary jurisdiction of that Court ]]

The *future mesne profits* need not be valued, since it is impossible to give even an approximate statement of the amount.<sup>2</sup> But the valuation of the *past mesne profits* given will be the valuation of the "amount *due for*" under this rule,<sup>3</sup> and is the valuation for the purposes of jurisdiction (see Section 11 and Section 96 Note 18, *supra*)

O. 7 R. 2  
Notes 2-4

As to the ascertainment of mesne profits, see O. 20, R. 12 *infra*. See also Section 11 of the Court-fees Act

**3. Accounts.** — A suit for money which will be found due on taking accounts, is instituted when the defendant is under a legal obligation to render accounts which the plaintiff is not in a position to ascertain.<sup>4</sup> In such cases this rule requires that the plaintiff should state *approximately* the amount which will be found due to him on taking unsettled accounts between him and the defendant.<sup>5</sup> The approximation required under sub rule (2) may be a rough and ready approximation such as the plaintiff is able to give.<sup>6</sup> The valuation given by the plaintiff is purely tentative, and is the valuation for the purposes of jurisdiction (see Section 6, *supra*)

As to the ascertainment of the amount due in a suit for accounts, see O. 20, Rules 16 and 17, *infra*, and Section 11 of the Court-fees Act

**4. Suit for damages.** — It has been held that in a suit for damages based on fraud the plaintiff may give an *approximate* valuation in the plaint and offer to pay additional court-fees in case a larger amount is found due *before the decree is passed*, as Section 11 of the Court Fees Act will not apply to such a case.<sup>1</sup>

## R. 3. [New.] Where the subject-matter of the suit is

O. 7 R. 3

Where the subject-matter of the suit is immovable property.

immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

### CALCUTTA

#### Local Amendment

Add at the end the words "and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures"

2. ('26) AIR 1926 Pat 218 (229) ■ Pat 361 (PB)

mesne profits as a condition precedent to the investigation of such profits)

#### Note 3

1. ('12) 14 Ind Cas 786 (787) ■ Nag L R 36

2. ('89) 11 Bom 675 (677)

3. ('14) 22 Ind Cas 71 (78) (Bom)

('85) 9 Bom 22 (24)

(35) AIR 1935 Loh 689 (699)

#### Note 4

1. ('07) 17 Mad L Jour 625 (626)

[See also (1900) 16 T L R 433, London and Northern Bank Ltd v George Newnes Ltd.

plaintiff to pay additional court fee on future

O. 7 R. 3  
Notes 1-3

## Synopsis

- |   |  |  |
|---|--|--|
| 1 'Immoveable property                    |  | 3 Conflict between the description by boundaries and by area |
| 2 'Description sufficient to identify it' |  |  |

1 "Immoveable property" — This rule does not apply unless immovable property is the *subject matter* of the suit<sup>1</sup> See also Section 16 *supra*

2 "Description sufficient to identify it" — A plaint should contain a description of the immovable property sufficient to *identify* it<sup>1</sup> as otherwise the decree if passed will be incapable of execution (See O 20 R 9 *infra*) But a suit cannot be dismissed or a plaint rejected on the ground that the description is insufficient<sup>2</sup> the Court may call upon the plaintiff to furnish the necessary particulars<sup>3</sup> or allow the plaintiff to amend his plaint by giving such particulars<sup>4</sup>

In the case of *chur* lands which are constantly going under water and re forming it is very difficult to premise with any degree of certainty whether the claim would be for a re formation *in situ* or for contiguous accretion until full investigation based upon a survey and comparison of maps is made Hence in such a case the plaint should not be construed too strictly<sup>5</sup>

3 Conflict between the description by boundaries and by area — If in the plaint or in any deed there is an inconsistency between the description by the boundaries and by the area that which is more certain and stable and least likely to have been mistaken and which sufficiently identifies the land should prevail<sup>1</sup> The true construction is that which will as far as possible bring the several factors into harmony with one another and express most nearly the intention of the parties<sup>2</sup> But if a land is conveyed with *definite* boundaries and the *measurements* indicate a smaller area than that covered by the boundaries the rule of interpretation is that the area covered by the *boundaries* should prevail<sup>3</sup>

## O. 7 R. 4

**R. 4.** [S 50, para 4] Where the plaintiff sues in a representative character<sup>2</sup> the plaint shall show not only that he has an actual existing interest

When plaintiff sues as representative

## Order 7 Rule 3 — Note 1

- 1 (32) AIR 1932 Lah 328 (330) (Adm n stration suit is not one for possession of immovable property—O 7 R 3 has no application)

## Note 2

- 1 (1900) 5 Cal W N 121 (123)  
(72) 18 South W R 461 (462)  
(78) 2 Cal L Rep 134 (137) (In suit for injunction boundaries should be correctly described)  
(76) 2 Cal 1 (19) (Where estate bears a name boundaries need not be given)  
2 (97) 1 Cal W N 574 (576)  
(97) 1 Cal W N clxxxix (clxxxix)  
(70) 14 South W R 474 (474)

[See also (13) 11 Ind Cas 745 (746) (Cal) (Mis description is not fatal)]

[See however (74) 11 South W R 426 (420)]

[But see (05) 1 Cal L Jour 27n (29n)]

- 3 (09) 3 Ind Cas 347 (348) 5 Low Bar Rul 1  
(15) AIR 1915 Cal 597 (593 599)  
4 (74) 21 South W R 187 (187)  
5 (33) AIR 1933 Cal 199 (202)

## Note 3

- 1 (09) 4 Ind Cas 713 (719) 37 Cal 293 (If boundary is more definite the boundary prevails)  
(31) AIR 1931 Lah 349 (351) (Area specific—Area prevails)  
[See (97) 1 Cal W N clxxxix (clxxxix) (Measurements specific—Land sufficiently identified though boundary incorrect)]  
2 (09) 11 Ind Cas 123 (125) (Cal) (Though boundaries more generally govern)  
3 (24) AIR 1924 Mad 493 (493)

in the subject-matter, but that he has taken the steps, if any, necessary to enable him to institute a suit<sup>3</sup> concerning it.

[See S. 92, O. 1 R. 8, O. 30, O. 31.]

### Synopsis

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Where the plaintiff sues in a representative character."</li> <li>3. as taken the steps necessary to enable him to institute the suit.</li> <li>4. Probate and letters of administration.</li> <li>5. Hindus</li> <li>6. Mahomedans.</li> <li>7. Indian Christians.</li> </ol> | <ol style="list-style-type: none"> <li>8. Europeans, Parsees, Jews and Armenians.</li> <li>9. Succession certificate.</li> <li>10. Suit for rent.</li> <li>11. Suit for debt.</li> <li>12. Suit by or against a company. See Order 29, Rules 1 and 2</li> <li>13. Suit by or against a club. See Order 1, Rule 8 Note 3</li> <li>14. Cause title of the suit.</li> </ol> |
|--|--|

1. **Scope of the Rule.** — This rule lays down that if the plaintiff files the suit in a *representative* capacity, the plaintiff should show —

- (1) that the plaintiff has an actual existing interest in the subject-matter, and
- (2) that he has taken the steps that may be necessary to enable him to file a representative suit.

Thus, in a suit under Section 92 of the Code, the plaintiff should state that he has an interest in the trust and that he has obtained the consent in writing of the Advocate General. Similarly, in cases where the law requires probate or letters of administration to be obtained in respect of the estate of a deceased person, the plaintiff should state that the plaintiff has obtained a probate, or that he is the executor under the will, or, if the person died intestate, that he has obtained letters of administration in respect of the estate of the deceased.

The provisions of this rule should be strictly complied with.<sup>1</sup> Otherwise the plaintiff may have to be rejected on presentation.<sup>2</sup> If a decree is passed, it will not bind the estate or the persons represented by the plaintiff in the suit.

2. **"Where the plaintiff sues in a representative character."** — This rule deals with representative suits, *i. e.*, suits instituted by a person in his *representative*, as distinguished from his *individual*, character. The following are some instances of *representative* suits —

- (i) Suit by one or more persons on behalf of a community or persons having the same interest (O. 1 R. 8)
- (ii) Suit by executor or administrator representing the estate of a deceased person
- (iii) Suit under Section 92 of the Code by two or more persons having an interest in the trust
- (iv) Suit by the manager of a joint Hindu family or by the *karnavan* of a Malabar *tarwad*
- (v) Suit by a *shebait* on behalf of the idol<sup>3</sup>

(31) AIR 1931 Cal 596 (598) 58 Cal 686 (Extrinsic evidence may be let in to show real intention of the parties)

(26) AIR 1906 Pat 257 (257, 258)

(23) 1923 Oudh 114 (116, 117). 27 Oudh Gas 64

**Order 7 Rule 4 — Note 1**

1 (25) AIR 1925 Nag 183 (184)

2. (14) AIR 1914 Bom 296 (297) 39 Bom 618

**Note 2**

1 (30) AIR 1930 Pat 97 (97) (Though ordinarily *shebait* represents an idol in certain



**O. 7 R. 4**  
**Notes 5-9**

If the suit is to recover a *debt due* to the deceased, it is necessary that a probate, or letters of administration or a succession certificate should be produced, as otherwise no decree can be passed (see Section 214 of the Succession Act)

**6. Mahomedans.** — In the case of Mahomedans, it is not necessary to obtain a probate or letters of administration<sup>1</sup> See Sections 212 and 213 of the Succession Act But it is, however, necessary, if the suit is for the recovery of a *debt due to the deceased*, to produce a probate or letters of administration or succession certificate (see Section 214 of the Succession Act)<sup>2</sup> as above

**7. Indian Christians.** — "Indian Christian" has been defined to mean a native of India, who is or in good faith claims to be of unmixed Asiatic descent and who professes any form of the Christian religion<sup>1</sup> Till the passing of the Native Christian Administration of Estates Act, 1901,<sup>2</sup> the Indian Christians were governed by the Succession Act (1865) and, therefore if the deceased died intestate, letters of administration were necessary and in case the deceased left a will, a probate of the will was necessary to establish any right to his property<sup>3</sup> But the Native Christian Administration of Estates Act provided that Section 190 of the Succession Act shall not apply to the property of an Indian Christian who died intestate, and though a probate was still necessary in the case of a will, no letters of administration were necessary in the case of intestacy The law is the same since the passing of the Succession Act, 1925, wherein Section 212 provides that no letters of administration are necessary to establish any right to any part of the property of the deceased A probate, however, is necessary in the case of a will A succession certificate is necessary in a suit to recover a debt due to deceased as above (Section 214)

**8. Europeans, Parsees, Jews and Armenians.** — These persons are governed by the provisions of Section 212 (1) and Section 213 (1) of the Succession Act, and, therefore it is necessary to obtain a probate or letters of administration as the case may be to establish any right in a Court of law<sup>1</sup>

**9 Succession certificate.** — In a suit for recovery of a debt due to a deceased person the person claiming on succession to the effects of the deceased should produce a probate or letters of administration, or a succession certificate having the debt specified therein as otherwise no decree can be passed under Section 214 of the Succession Act But if the debt is a joint family debt and the plaintiff claims by survivorship, no succession certificate is necessary<sup>1</sup> As to the other cases where

**Note 6**

1. (10) 8 Ind Cas 655 (656 657) 37 Cal 839  
 2. (84) 8 Bom 241 (255)

**Note 7**

1. Section 2 (d) of the Succession Act, 1925 (XXXIX of 1925)  
 2. Act VII of 1901  
 3. Sections 190 and 187 of the Succession Act, 1865 (X of 1865)

**Note 8**

1. (94) 18 Bom 337 (342) (Letters of administration should be obtained in respect of the whole estate)  
 (27) AIR 1927 Bom 474 (476 477) 51 Bom 771  
 (But Section 212 is not applicable to suit for sale

by a mortgagee against the heirs of mortgagor)

**Note 9**

1. (95) 17 All 578 (580)  
 (95) 19 Bom 338 (339)  
 (92) 1 Bom L R 197 (199)  
 (96) 23 Cal 912 (913) (Continuation of suit by the sons)  
 (96) 9 O P L R 65 (68)  
 (91) 14 Mad 377 (379)  
 (94) 17 Mad 108 (117) (Succession certificate not

recover debt due to last holder of estate)

succession certificate is not necessary, see the undermentioned cases.<sup>2</sup> As to what is a "suit for debt" for the purposes of Section 211 of the Succession Act, see Notes 10 and 11 below.

O. 7 R. 4  
Notes 9-14

**10. Suit for rent.** — The word "debt" in Section 211 (1) of the Succession Act does not include rent, revenue or profits in respect of land used for agricultural purposes [see Section 214 (2)] and, therefore, no succession certificate is necessary to recover rent for agricultural land.<sup>1</sup> The amount of the decree for rent deposited by defendant in Court is still rent and can be withdrawn without a succession certificate by the legal representatives of deceased decree-holder.<sup>2</sup>

**11. Suit for debt.** — Under Section 214 of the Succession Act the Court cannot pass a decree against a debtor of the deceased in favour of a person claiming on succession to be entitled to the effects of the deceased, except on production of a succession certificate, etc. As to what is a suit for debt, see Note 10 above and the undermentioned cases.<sup>1</sup>

**12. Suit by or against a company.** — See Order 29 Rules 1 and 2, *infra*.

**13. Suit by or against a club.** — See Order 1 Rule 8 Note 4, *supra*.

**14. Cause title of the suit.** — See Appendix A "Description of parties in particular cases." It is not, however, necessary under this rule that the capacity in which the plaintiff sues should be stated in the cause title of the plaint, although it is

[See also ('91) 1 Mad L Jour 679 (680) (Where there is nothing to show that debt belongs to joint family, succession certificate should be produced)]

[But see ('07) 30 Mad 454 (459) (Impartible estate—Claim by survivor-hip—Suit to recover debt due to the last holder—Certificate is necessary)]

2. ('92) 16 Bom 240 (241) (To file an award no succession certificate necessary)

('96) 20 Bom 437 (439) (Curator suing under Act XIX of 1811 need not produce succession certificate)

(1858) 1858 El Bl & El 68, Jones v Thomson (Rent due after death of deceased—No succession certificate necessary)

('97) 20 Mad 162 (166, 167) 24 Ind App 73 (PC)

certificate necessary)

('93) 16 Mad 64 (66) (Suit for foreclosure—No succession certificate is necessary)

('01) 23 Bom 630 (633, 635) (Suit for sale on mortgage—No succession certificate is necessary)

('89) 12 Mad 255 (257) (Suit on mortgage brought by the adopted son of the mortgagee—Not a suit for debt—No certificate under Act 27 of 1860 is necessary for the purpose of maintaining the suit)

('01) 24 Mad 22 (24) (Suit on mortgage—Not a suit for debt—No succession certificate is necessary)

(88) 15 Cal 54 (57, 58) (Purchaser of mortgaged property is not a "debtor")

(1900) 1900 All W N 94 (95) (Suit for foreclosure)

('06) 29 Mad 77 (79) (Suit on mortgage—But if personal remedy sought, succession certificate necessary)

('08) 12 Cal W N 145 (150) (Do)

('95) 18 Mad 457 (453) (Suit for damages for

#### Note 10

1. ('99) 26 Cal 536 (539)

('07) 17 Mad L Jour 257 (257)

[See however ('91) 1 Mad L Jour 680 (682) (But in a suit on a bond though for rent, a succession certificate is necessary)]

2. ('18) 18 Ind Cas 495 (495) (Cal)

#### Note 11

1. ('08) 30 All 315 (317) (Dower whether prompt or deferred is a debt)

('91) 1891 Pun Re No 88 page 429 (Do)

('91) 22 Cal 143 (150) (Suit on mortgage—Not a suit for debt—No succession certificate necessary)

('92) 19 Cal 336 (339, 340) (Do)

('94) 16 All 259 (268) (Dissenting from 19 Cal 336—Suit for sale on mortgage—Succession

under a will is a debt)

('99) 22 Mad 139 (141, 144) (Suit for accounts—Not a suit for debt)

('05) 32 Cal 418 (420, 421) (Do)

('76) 2 Cal 45 (54). (Suit for immovable property not a suit for debt)

('09) 3 Ind Cas 492 (493, 494) 36 Cal 492 (F B). (Debt existing in the life of a creditor but which became payable only after his death is still a debt)

('93) 2 Cal W N 591 (593) (Debt fallen due since the death of the creditor—No succession certificate is necessary)



If there are more defendants than one, the plaint should disclose a cause of action against each defendant and should state the interest of each defendant in the subject matter and how each defendant is liable to meet the plaintiff's demand \*

O. 7 R. 5  
Note 1

O. 7 R. 6

**R. 6.** [S. 50, para. 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.  
[1859, S. 26.]

### Synopsis

1. Scope of the Rule. | 2. "The plaint shall show."

#### Other Topics (miscellaneous)

Exemption from limitation — Grounds of See Note 2.

Omission to show grounds of exemption — Effect See Note 1.

**1. Scope of the Rule.** — Where, but for some ground of exemption from the law of limitation, a suit would *prima facie* be barred by limitation, it is necessary for

('89) 12 Mad 90 (91) (Heirs not represented being minors—Suit binding since their father is a party and represents them though not formally appointed guardian)

('69) 12 Suth W R 41 (42, 44) (Adopted son liable for adoptive mother's debt only if he succeeds to her estate)

('81) 8 Mad 42 (46) (Liability of Hindu son limited to the extent of father's assets received)

('84) 8 Bom 220 (222, 223) (Son liable to pay father's debts even if assets are in the hands of third parties)

('89) 18 Bom 653 (654) (Though decrees against sons might be passed their liability in execution is only to the extent of the assets inherited)

('68) 10 Suth W R 210 (217) (Property alienated by Mahomedan heir for paying debts not liable to creditor of deceased)

('1865) 2 Suth W R 258 (258) (Heirs of deceased liable to the extent of assets for debts due by deceased)

('1865) 2 Suth W R 296 (297) (Heir can dispose of property for discharging the debts of the deceased)

('69) 12 Suth W R 233 (234) (Heirs of a deceased person are responsible for the debts due by him to the extent of the assets in their possession)

('84) 8 Bom 309 (310) (Legal representative not in possession of assets liable if he can become possessed of the assets)

('97) 20 Mad 446 (447) (If heirs received sufficient assets from deceased their liability is limited to assets from deceased)

('79) 4 C.J. 342 (345, 346) (Person in possession of estate represents estate till probate is obtained)

('05) 28 Mad 351 (352, 353) (Creditor in possession of assets liable as executor *de son tort*)

(85) 11 Cal 45 (51) (Decree against person in possession of assets binds the estate)

('91) 21 Cal 311 (318) (Mahomedan widow in possession of assets liable as representative)

(82) 8 Cal 370 (373, 374) (Do)

('85) 11 Cal 421 (429) (Mahomedan heir liable in respect of proportionate share of assets received)

('82) 4 All 361 (366) (Do)

(95) 19 Bom 273 (275) (Do)

('83) 9 Cal 406 (410) (Mortgagee of several properties from heir at law can proceed against purchaser of one of them only to the extent to which that property is liable)

('81) 8 Cal L Rep 447 (449) (Creditor of deceased Mahomedan cannot follow assets in hands of bona fide purchaser from heir at law)

('81) 7 Cal L Rep 460 (463) (Do)

('79) 4 Cal 402 (408) 5 Ind App 311 (P C) (Do)

('08) 20 All 352 (358, 359) (Estate of husband not liable for debts voluntarily incurred by wife to pay off husband's debts during husband's life time)

('95) 22 Cal 259 (262, 265, 266, 267) (Insolvent dying before filing schedule but after adjudication—Widow and not Official Assignee is the legal representative of the insolvent for purposes of a suit by a creditor)

('92) 16 Bom 233 (237) (Residue left by widow (Bombay school) not liable for personal debts of widow)

[See ('96) 20 Bom 359 (344, 345, 346)]

4. ('24) 41 R 1924 Nag 191 (193, 191).

O. 7 R. 6  
Notes 1-2

the plaintiff to show in the plaint such ground of exemption<sup>1</sup> If no such ground is shown in the plaint, it is liable to be rejected under Order 7 Rule 11 (d) *infra* The plaintiff will not be allowed to show the ground of exemption at the trial by putting in evidence any documents, such as acknowledgments of liability<sup>2</sup> But the Court may, save in exceptional circumstances, allow the plaintiff to be amended by making the necessary allegations<sup>3</sup> See also Note 7 to O 7 R 11, *infra*

2. "The plaint shall show." — It is sufficient that the ground of exemption is apparent on the face of the plaint It is not necessary that the plaintiff should specifically, and in so many words, claim the ground of exemption<sup>1</sup> Thus, where the fact of minority is apparent on the face of the record, it is not necessary that the ground of exemption under Section 8 of the Limitation Act should be specifically pleaded<sup>2</sup> Similarly where a plaint is presented on the re opening date after court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under Section 4 of the Limitation Act was not specifically mentioned in the plaint will not entail the dismissal of the suit, inasmuch as the Court is bound to take judicial notice of the holidays<sup>3</sup> On the same principle it has been held that where a plaint presented to a wrong Court is returned for presentation to the proper Court the endorsements on the plaint will show the applicability of Section 14 of the Limitation Act and that therefore it is not necessary to specifically allege that ground of exemption<sup>4</sup> All that the rule requires is that the plaint should show a ground of exemption from limitation where the suit is instituted after the expiration of the period of limitation But once that is shown, the rule does not preclude the plaintiff from relying upon a new ground of exemption at the trial According to the High Court of Bombay however, the new ground taken should be not inconsistent with that taken originally,<sup>5</sup> while, according to the Allahabad<sup>6</sup> Calcutta<sup>7</sup> and Lahore<sup>8</sup> High Courts and the Judicial Commissioner's Court of Nagpur,<sup>9</sup> the new ground may even be inconsistent with the original one The High Court of

## Order 7 Rule 6 — Note 1

1 (32) AIR 1932 All 461 (464) 54 All 506

(Acknowledgment relied on — Plaintiff must

(74) 21 Suth W R 47 (48)

(19) AIR 1919 Mad 332 (333)

(24) AIR 1924 Nag 80 (80)

('24) AIR 1924 Lah 702 (708)

102  
(10) 7 Ind Cas 797 (797) (Mad)  
(09) 3 Ind Cas 159 (160) 84 Bom 250

## Note 2

favour }  
2 (09) 11 Ind Cas 77 (78) (Cal)  
3 ('20) AIR 1920 Nag 200 (202) 16 Nag L R 193

31 Cal 195 }

{See also (09) 11 Ind Cas 77 (78) (Cal) }

8 (22) AIR 1922 Lah 290 (232) 2 Lah 13

9 ('21) AIR 1921 Nag 1 (1, 2) 17 Nag L R 209

Madras<sup>10</sup> has disented from the view of the Calcutta and Lahore High Courts and has held that a new ground of exemption can be urged only after amendment of the plaint so as to include the new ground. But where the plaintiff once amends his plaint by relying upon a new ground of exemption it has been held by their Lordships of the Privy Council that he will not thereafter, be allowed to rely upon the original allegation in the unamended plaint.<sup>11</sup>

O. 7 R. 6  
Note 2

A plaintiff will not be allowed to rely upon a ground of exemption from limitation for the first time in appeal.<sup>12</sup> The Appellate Court has the same powers of rejection of plaint as the trial Court under O 7 R 11 (d).<sup>13</sup> Similarly, a defendant will not be allowed to raise objections on the ground of failure to set out the grounds of exemption for the first time in appeal or revision.<sup>14</sup>

This rule applies only to cases where the suit is barred *prima facie*.<sup>15</sup> A plaintiff, therefore, is not precluded from relying upon a ground of exemption from limitation, if, on the facts found the plaintiff's claim appears to be barred.<sup>16</sup> The plaintiff has to show that his cause of action accrued within the period of limitation.<sup>17</sup>

## R. 7. [New.] Every plaint shall state specifically the relief

O. 7 R. 7

Relief to be specifically stated

which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement

[R S C, O 20 R 6]

### Synopsis

- |                           |  |
|---------------------------|--|
| 1 Relief                  | 3a Suit under Section 77 of the Registration Act |
| 2 General or other relief |  |
| 3 Alternative relief      | 4 Events happening after suit                    |

**1 Relief** — This rule and O 2 R 2 sub rule 3 should be read together, and so reading them the following general propositions may be deduced —

- (1) If the plaintiff being entitled to more than one relief in respect of the same cause of action omits to sue for any one of such reliefs he shall not afterwards sue for any relief so omitted
- (2) Every plaint shall state *specifically* the relief which the plaintiff claims either simply or in the alternative

10 (33) AIR 1933 Mad 395 (396)

(36) AIR 1936 Mad 545 (546)

11 (26) AIR 1926 P C 85 (88) 48 All 457 53 Ind App 187 (1 C)

12 (17) 17 Mad L Jour 231 (232)

(21) AIR 1921 Nag 94 (95) 59 Ind Cas 709 (710)

[See also (37) 20 Nag L Jour 43 (46) (If the plaintiff fails to make any averment of exemption from the law of limitation in the plaint he cannot be permitted in second appeal to amend his plaint)]

13 (24) AIR 1924 Nag 80 (80)

(23) AIR 1923 Nag 30 (31)

14 (17) AIR 1917 Mad 845 (845)

(19) 4 Ind Cas 923 (924) (Lah)

15 (14) AIR 1914 Lah 408 (410) 1914 Pan Rv

No 70

(19) AIR 1919 Lah 90 (91) 1 Lah 89

16 (19) AIR 1919 All 277 (278)

(22) AIR 1922 O 113 (136 137) 25 Oudh Cas

89

17 (93) AIR 1928 Lah 763 (764)

O 7 R. 7  
Note 1

(3) But a *general or other* relief need not however, be specifically asked for, but may be given by the Court as if it had been asked for

Where a question arises as to whether a plaintiff has asked for a particular relief in his plaint the *whole* of the plaint must be considered<sup>1</sup> and the *substance* and not merely the *form* of the plaint should be looked to<sup>2</sup> But this liberality of construction is subject to a limitation that the facts and documents which entitle the plaintiff to the relief claimed must be *stated or referred to* in his pleading In *Mahomed Zahoor Ali Khan v Mt Thakooranee Rutla Koer*,<sup>3</sup> their Lordships of the Privy Council observed as follows

Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit yet this liberality of construction must have some limit A plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings

In *Sri Mahant Govind Rao v Sita Ram Kesho*,<sup>4</sup> their Lordships of the Privy Council observed that the general rule that a plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings does not apply where the substantial matters which constitute the title of all the parties are touched in the *issues* and have been fully *put in evidence* in the case Relief can be granted in such cases on the basis of such matters<sup>5</sup>

It follows from what has been said above that no relief can be granted upon facts and documents not disclosed in the pleadings nor dealt with by the issues or the evidence in the case<sup>6</sup> Thus where the plaintiff asks for a particular relief on a specific

## Order 7 Rule 7 — Note 1

1 (31) AIR 1931 Nag 198 (200) 27 Nag L R 299

2 (31) AIR 1931 Mad 94 (95)

(11) 11 Ind Cas 882 (884) (Cal) (Plaint in form for confirmation of possession but in substance for recovery of possession—Latter relief can be given)

(26) AIR 1926 Lah 417 (418) (Plaint badly drafted and hence the relief sought not clearly brought out—If evidence is let in on right

3 (64) 11 Moo Ind App 468 (474) (P C)

4 (93) 21 All 53 (63) 25 Ind App 195 (P C)

[See also (87) 14 Cal 597 (597)]

(20) AIR 1926 Cal 1003 (1005)

(10) 10 Ind Cas 100 (102) (P C)

alleged  
giving  
without

objection by defendant — Defendant cannot

5 [See (36) AIR 1936 Pat 147 (149)] (If a Court sees that the plaintiff is entitled to the relief which he claims although on other grounds than those put forward in his claim the Court would grant that relief if the defendant is not taken by surprise)

(37) AIR 1937 Mad 223 (226) (Suit on promise)

6 (1663) 11 Mad II C R 471 (477)

(69) 2 Ind Cas 492 (493) (Cal) (Rel of restricted to property in plaint)

(16) AIR 1915 Cal 839 (841) 43 Cal 103 (Plaintiff cannot claim relief on defendant's allegations abandoning his case)

(70) 2 N W P H O R 407 (408)

(25) AIR 1925 All 59 (60) (Suit on leave—Leave not proved—Court not to give decree on plaintiff's title)

(10) 8 Ind Cas 962 (965) (Low Bur) (Suit on one cause of action not to be decreed on another cause of action)

(15) AIR 1915 Mad 74 (75)

(10) 5 Ind Cas 761 (765 766) (Mad)

(36) AIR 1936 Pat 230 (231) (Suit by landlord for ejectment—Defendants recorded as ryots—Plaintiff challenging entry suing for declaration of his rights to property and for ejecting defendants—Decree by Court should be confined to relief asked for—It should not grant declaration that defendants are tenants in respect of land in dispute)

(39) AIR 1939 Lah 296 (297) (SB) (Plaintiff not proving facts constituting his cause of action—

ground he cannot be granted the same relief on a different ground which is not at all disclosed in the plaint.<sup>7</sup> A plaintiff suing for a declaration of title to a certain property under a sale deed executed in his favour cannot succeed on the ground of *adversus possession* if the facts in support of that ground are not disclosed in the plaint.<sup>8</sup> But where a ground of relief is disclosed in the plaint, the fact that the plaintiff asked for the relief on a different ground will not disentitle him to relief on the ground disclosed in the pleading.<sup>9</sup>

Where a plaintiff claims a larger relief than he is entitled to the suit should not be dismissed on that ground but the plaintiff should be given the relief he is entitled to<sup>10</sup> unless the ground on which the lesser relief can be granted is *inconsistent* with the case of the plaintiff as set out in his pleadings or would lead to a determination of

Suit should not be decreed on proof of different facts which defendant had no opportunity to controvert }

(90) 14 Bom 218 (220 221) }

10 (18) AIR 1918 Mad 800 (307)

(06) 28 All 482 (487) 33 Ind App 81 (PC)

(80) 4 Bom 534 (538 539)

(16) AIR 1916 Cal 547 (548) (Claim for Rs 40—Only Rs 30 found due—Decree should be for Rs 30 and suit should not be dismissed )

(67) 7 Suth W R 92 (93)

(83) 11 Mad 91 (97)

(13) 19 Ind Cas 818 (848) (Mad) (Decree for admitted amount passed though plaintiff claimed larger figure )

(30) AIR 1930 All 225 (244) 52 All 619 (F B)

(13) 21 Ind Cas 724 (729) (Mad) (Plaintiff claiming whole of property—A share in it can be decreed )

(17) AIR 1917 Mad 884 (884 885) (Exaggeration of plaintiff's claim—no ground for dismissal of the suit )

(17) AIR 1917 Nag 31 (32)

(19) AIR 1919 Lah 339 (341) 1919 Pun Re No 18 (Plaintiff claiming whole of property under custom—Custom not proved—Decree for half of the property under Mahomedan law awarded )

(23) AIR 19 3 Sind 5 (8) 16 Sind L R 112 (FB)

(15) AIR 1915 All 116 (117 118) (Plaintiff sued for possession—Possession subject to conditions of service de roed )

(31) AIR 1931 Bom 473 (476)

(86) AIR 1936 Mad 252 (255)

(86) AIR 1936 Lah 673 (675) (Both parties over stating respective claims is not sufficient to defeat plaintiff's claim )

(38) AIR 1939 Mad 270 (271) (Property dedi-

(34) AIR 1934 Rang 189 (144) (Body of plaint not mentioning the relief for mesne profits—Court fee not paid—Mesne profits not estimated—Only mention in prayer—Mesne profits cannot be granted )

{ See also (37) AIR 1932 All 353 (355)

(85) AIR 1935 Cal 234 (238) (Plaintiff's whole case rejected—Held that Court was not justified in granting relief on equitable grounds )

7 (68) 10 Suth W R 189 (189) (Pre-emption on basis of plaintiff being a coparcener with the vendor—Decree on the ground of vicinage not to be given )

(27) AIR 1927 Lah 86 (86) (Where plaintiff claimed easement by prescription—no relief can be given on basis of a natural right )

(20) AIR 1920 Pat 195 (196) (Do )

(69) 8 Beng L R App 142 (142) (Suit for pre-emption on ground of partnership—Plaintiff cannot get relief on the ground of vicinage )

(70) 2 N W P H C R 407 (409) (Title claimed under a will—Decree not to be given as on inheritance )

(85) AIR 1935 Pat 105 (109) (Suit for compensation against municipality on ground of unlawful removal of certain materials—Plaintiff on failure of that ground claiming compensation on ground that statute itself allowed compensation for removal of structures—Relief cannot be granted )

8 (09) 81 Mad 531 (531 532)

(33) AIR 1933 Lah 75 (77) 13 Lah 677 (Adversus possession should be pleaded )

9 (18) AIR 1918 Cal 807 (803)

(34) AIR 1934 All 990 (993)

(74) 21 Suth W R 121 (122)

(89) 8 Cal 96 (930 931) (Suit for rent on

community )

(37) AIR 1937 Pesh 81 (82)



**O. 7 R. 7**  
**Note 1**

(3) But a *general or other* relief need not, however, be specifically asked for, but may be given by the Court as if it had been asked for

Where a question arises as to whether a plaintiff has asked for a particular relief in his plaint, the *whole* of the plaint must be considered,<sup>1</sup> and the *substance* and not merely the *form* of the plaint should be looked to.<sup>2</sup> But this liberality of construction is subject to a limitation that the facts and documents which entitle the plaintiff to the relief claimed must be *stated or referred to* in his pleading. In *Mahomed Zahoor Ali Khan v. Ali Thakooranee Rutta Koer*,<sup>3</sup> their Lordships of the Privy Council observed as follows

"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings."

In *Sri Mahant Govind Rao v. Sita Ram Kesho*,<sup>4</sup> their Lordships of the Privy Council observed that the general rule that a plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings, does not apply where the substantial matters which constitute the title of all the parties are touched in the issues and have been fully put in evidence in the case. Relief can be granted in such cases on the basis of such matters.<sup>5</sup>

It follows from what has been said above that no relief can be granted upon facts and documents not disclosed in the pleadings, nor dealt with by the issues or the evidence in the case.<sup>6</sup> Thus, where the plaintiff asks for a particular relief on a specific

**Order 7 Rule 7 — Note 1**

1. ('81) AIR 1931 Nag 198 (200) 27 Nag L R 209
2. ('81) AIR 1931 Mad 94 (95)  
(11) 11 Ind Cas 882 (884) (Cal) (Plaint in form for confirmation of possession but in substance for recovery of possession—Latter relief can be given)
- (26) AIR 1926 Lah 417 (418) (Plaint badly drafted and hence the relief sought not clearly brought out—If evidence is let in on right

Proper relief should be granted)

3. ('68) 11 Moo Ind App 468 (474) (P C)
4. ('98) 21 All 33 (59) 25 Ind App 195 (P C)  
(See also ('87) 14 Cal 592 (597)  
(26) AIR 1926 Cal 1003 (1005)

5. [See ('36) AIR 1936 Pat 147 (149) (If a Court sees that the plaintiff is entitled to the relief which he claims, although on other grounds than those put forward in his claim, the Court would grant that relief if the defendant is not taken by surprise)  
(37) AIR 1937 Mad 223 (226) (Suit on promissory note—Cash consideration alleged by plaintiff—Consideration in some other form proved—No surprise to defendant—Suit may be decreed)]
6. (1863) 1 Mad H C R 471 (477)  
(109) 2 Ind Cas 492 (493) (Cal) (Relief restricted to property in plaint)  
(15) AIR 1915 Cal 339 (341) 43 Cal 103 (Plaintiff cannot claim relief on defendant's allegations abandoning his case)  
(70) 2 N W P H C 407 (408)  
(25) AIR 1925 All 59 (59) (Suit on lease—Lease not proved—Court not to give decree on plaintiff's title)  
(10) 8 Ind Cas 962 (965) (Low Bur) (Suit on one cause of action not to be decreed on another cause of action)

of his rights to property and for ejecting defendants—Decree by Court should be confined to relief asked for—It should not grant declaration that defendants are tenants in respect of land in dispute)

- (39) AIR 1939 Lah 296 (299) (SB) (Plaintiff not proving facts constituting his cause of action—

due to the plaintiff, even though the latter has not claimed it.<sup>2</sup> The Court may in a suit for exclusive possession pass a decree for joint possession.<sup>3</sup> Similarly in a suit for sale of mortgaged property the Court may pass a personal decree against the mortgagor defendant provided the claim under the personal covenant is not barred by limitation.<sup>4</sup> Again where the Court cannot decree partition because all the coparceners are not parties it can grant the plaintiffs a declaration as to their title.<sup>5</sup>

But the power to grant such relief is controlled by the following considerations—

(1) The relief granted should be based on facts stated or referred to in the plaint and should not be inconsistent with the case set up by the plaintiff<sup>6</sup> or with the relief claimed by him.<sup>7</sup> Thus the Court cannot pass a decree for possession of property in a suit for confirmation of possession inasmuch as the relief of possession is not consistent with the case set up by the plaintiff or with the relief claimed by him.<sup>8</sup> Similarly, in a suit for injunction on the basis of title the Court cannot declare that the plaintiff is entitled to a right of easement jointly with the defendant.<sup>9</sup> For other illustrations see the undermentioned cases.<sup>10</sup>

- 2 (21) AIR 1921 Lah 125 (126) 2 Loh 256  
3 (26) AIR 1926 Lah 567 (568)  
(00) 2 Ind Cas 492 (493) (Cil)  
(00) 8 Ind Cas 54 (54) 5 Nag L R 105  
(30) AIR 1930 Mad 567 (569)  
(14) AIR 1914 Mad 128 (190) 39 Mad 1036  
(Suit for ejectment—Decree for joint possession passed)  
(18) 21 Ind Cas 724 (729 738) (Mad) (In suit for ejectment a share of the property can be decreed to the plaintiff)  
4 (95) AIR 1925 P C 280 (288) 52 Ind App 418  
5 Pat 135 (P C)  
(02) 24 All 456 (45)  
(82) 4 All 281 (288)  
(06) 99 Mad 491 (495)  
[But see (29) AIR 1929 Oudh 303 (304)]  
5 (31) AIR 1931 Sind 74 (75)  
6 (1908) 13 Ves 114 (120) *Hearn v Mill*  
(Referred to in AIR 1923 Pat 836)  
(72) 11 Moo Ind App 478 (478 474) (P C)  
(1878) 10 Ch D 502 (508) *Gargill v Bower*  
(05) 27 All 325 (331) 87 Ind App 123 (P C)  
(Appropriate relief was granted)  
(21) AIR 1921 Pat 14 (17) 6 Pat L Jour 190  
(74) 22 Suth W R 248 (254)  
(17) AIR 1917 Cal 367 (368) (Alternative prayer)

- (70) 11 Beng L R 682 (690) (Inconsistent relief cannot be given under the general prayer)  
(02) 21 Cal 116 (120 121) (Mere insertion of the general prayer clause in the plaint is not sufficient. There must be some other evidence)  
(67) 7 Suth W R 145 (146) (*Jagadar's right* loaded—A subordinate right of occupancy not to be granted)  
(29) AIR 1929 Lah 126 (127) (Relief to be granted should not go beyond the scope of the suit or the facts proved)  
(33) AIR 1933 Lah 267 (268)  
(36) AIR 1936 Cal 465 (468)  
(33) AIR 1938 Mad 865 (878)

7 (97) 7 Mad L Jour 50 (51) (Suit by usufructuary mortgagee for possession—Decree for

appointment of a curator and other reliefs—Other reliefs could only be read in connection with the main reliefs prayed)

- 8 (21) 63 Ind Cas 11 (3) (Pat)  
9 (92) 15 Mad 489 (490)  
10 (24) AIR 1924 Lah 713 (716) 5 Lah 509  
(Suit for specific performance—Damages also awarded under general relief)  
(04) 28 Bom 153 (161 162 163) (Suit for sale—Redemption in favour of prior mortgagee passed)  
(11) 14 Ind Cas 845 (849) (Cal) (Do)  
(10) 8 Ind Cas 64 (64) (Mad) (Suit for cancellation of sale deed—Decree for unpaid purchase money passed)  
(17) AIR 1917 Low Bur 11 (4) (Suit for share of

- (73) 21 Suth W R 8 (10)  
(23) AIR 19 3 Pat 386 (390)  
(33) AIR 1933 Nag 115 (116) 29 Nag L R 100  
(Plaintiff claiming property as owner cannot succeed as trustee)  
(99) 15 Mad 489 (490) (Plaintiff a title found against—Joint right of easement in favour of plaintiff and defendant not to be decreed)  
(14) 93 Ind Cas 332 (335) (P C) (Relief on a wholly different basis not to be given)

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Note 2

(2) The relief granted should be based on the same cause of action as the relief claimed in the suit <sup>11</sup>

(3) The relief granted to the plaintiff should not be of an entirely different description from the relief claimed in the plaint. The plaintiff "cannot desert the specific relief prayed and under the general prayer ask specific relief of another description unless the facts and circumstances charged by the bill will consistently with the rules of the Court, maintain that relief" <sup>12</sup> Thus an injunction will not ordinarily be granted under the power to grant general relief <sup>13</sup>. It must be expressly prayed, because the defendant might by his answer make a different case under the general prayer from what he would if an injunction were specifically prayed <sup>14</sup>. The test, therefore, in such cases is to see whether the defendant will not be taken by surprise or be embarrassed by such relief being granted <sup>15</sup>. There can be no surprise if the relief granted is consistent with that claimed and with the case raised in the pleadings <sup>16</sup> or if the parties knew the case which had to be tried <sup>17</sup>. Thus a declaratory decree may be passed in a suit for possession of property <sup>18</sup> or a decree for joint possession can be passed in a suit for partition by metes and bounds where the property happens to be impartible, <sup>19</sup> provided there is no surprise under the circumstances of the case to the defendants. Similarly damages may be awarded in addition to a decree for specific performance <sup>20</sup> or an account directed to be taken in a suit for money <sup>21</sup>. But the Court cannot pass a decree for a general taking of accounts of a partnership in a suit to recover plaintiff's share alone in one item of the partnership assets <sup>22</sup> nor can it in a personal

11 (19) 3 Ind Cas 408 (414 415) (Cal) (Relief conformable to the case made in the plaint can be given)

(19) 27 All 174 (176)

(12) 13 Ind Cas 650 (651) (Lah) (When a plaintiff sues to redeem a certain mortgage that particular mortgage is his cause of action — To shift the attack to later mortgage is to change the suit into one based on different cause of action)

(17) AIR 1917 Cal 867 (868) (General prayer does not cover a relief based on different cause of action)

(34) AIR 1939 I L R 71 (1) I L R (1935) Lah 511 (Suit for compensation on express agreement — No relief under Section 10 Contract Act asked — Court cannot decree suit on principles of Section 10)

12 (1806) 13 Ves 114 *Hiera v Mill* (Referred to in AIR 1923 Pat 386 — Per Lord Erskine L C)

(1837) 10 Moo Ind App 253 (389 390) (P C) (Relief of a different description can be given if such a relief can be sustained by the allegations in the plaint)

(16) AIR 1916 Cal 829 (833 837) 43 Cal 743 (FB)

(14) AIR 1914 Lah 304 (311)

(37) AIR 1937 Outh 484 (487) 13 Luck 534 (Plaintiff claiming decrees for money found due from defendants on taking accounts — Decree declaring plaintiff's right to a share of the money with the defendants cannot be passed — Further decree cannot be passed against defendants against whom the plaintiff did not originally claim any relief)

13 7 Hare 89 (93 99 100) *Castellan v Cooke*

(81) 8 Cal 485 (489 490)

(See also (19) AIR 1920 All 480 (481 482)

(Injunction is only an alternative within the

1

15 (16) AIR 1916 Cal 829 (837 838) 43 Cal 743 (FB)

(19) 3 Ind Cas 408 (414 415) (Cal)

(28) AIR 1928 Bom 484 (486) 52 Bom 875

(26) AIR 1926 Lah 417 (418) (Case should not

be allowed to be defeated owing to technicality)

(19) AIR 1919 Sind 98 (99) 18 Sind L R 150

(Prayer for demarcation and possession includes ejectment — Ejectment can be granted though relief not specifically asked for)

(23) AIR 1923 Lat 395 (396)

(36) AIR 1936 Cal 465 (468)

16 (14) AIR 1916 Cal 829 (837 838) 43 Cal

743 (FB)

(36) AIR 1936 Cal 465 (468)

17 (26) AIR 1926 Lah 417 (418)

18 (23) AIR 1923 Lah 422 (423)

(24) AIR 1924 Lah 324 (325)

(29) AIR 1919 All 555 (555) (Suit for possession

— Declaration that transfer by widow to defendant was void beyond widow's life time granted under general prayer)

(16) AIR 1916 Pat 91 (95) (Suit for possession — Declaratory decree that plaintiff is entitled to possession after expiry of term passed)

19 (11) AIR 1921 All 106 (107) 43 All 518

20 (21) AIR 1914 Lah 113 (116) 11 Lah 509

21 (19) AIR 1919 Cal 296 (305)

22 (19) AIR 1919 Mad 146 (148)

claim, pass a decree for sale of property in default of the payment of the sum decreed<sup>23</sup> Where a reversioner sues a Hindu widow for an *injunction* restraining her from committing waste and in such a suit prays for the *appointment of a receiver*, he is not entitled to a *declaration* of his reversionary right if he fails to establish his right to the reliefs claimed<sup>24</sup> It has been held by the Bombay High Court that in a suit for dissolution of marriage or in the alternative for a declaration that the marriage is nullity, it is not open to the Court to pass a decree for judicial separation, such relief not being 'general or other relief' within the meaning of this rule<sup>25</sup>

A Court cannot, under the power to grant further relief, pass a decree in favour of a *pro forma* plaintiff if it is found that the real plaintiff is not entitled to the relief claimed<sup>26</sup>

An equitable relief under this rule may be granted even by the Appellate Court,<sup>27</sup> though it will be slow to interfere with the discretion exercised by the trial Court in granting appropriate relief under this rule<sup>28</sup>

**3. Alternative relief.** — "A person may rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them"<sup>1</sup> Thus a plaintiff may claim specific performance of a contract or, in the alternative, cancellation of the contract and damages<sup>2</sup> Where *A* and *B* are tenants of the same landlord, in a suit for *khas* possession by *A* against *B* and the landlord, refund of *salams* or rent paid to the landlord can be granted if the right to *khas* possession is found against<sup>3</sup> Similarly a plaintiff may in a suit on a negotiable instrument claim in the alternative a decree on the original consideration<sup>4</sup> So also in a suit based on tenancy the plaintiff can claim damages for use and occupation in the alternative<sup>5</sup> Again a pre-emptor may allege that the vendor has no title to part of the property and may alternatively offer to pre-empt the whole if the Court finds that the vendor had title to sell the whole<sup>6</sup> An injunction it has been held is an alternative relief within the discretion of the Court and not an independent relief under Section 35(a) of the Easements Act<sup>7</sup> But in all such cases plaintiff has to *set out the facts* relied on by him in his alternative claim distinctly and separately<sup>8</sup> He cannot be allowed to pick out such of the allegations as will support any alternative case put forward by him<sup>9</sup> If the facts are not stated in the plaint the plaintiff cannot claim

23 (26) AIR 1925 Oudh 550 (552)

24 (16) AIR 1916 P C 117 (119) 39 Mad 634  
48 Ind App 207 (PC)

25 (38) AIR 1938 Bom 65 (67)

26 (03) 31 Cal 433 (440)

27 (25) AIR 1925 Cal 434 (485)

28 (26) AIR 1926 Lah 417 (418)

(67) 7 Suth W R 180 (181)

#### Note 3

1 (1887) 35 Ch D 497 (499) Owen v Morgan  
(Per Lindley L J)

(79) 9 Bom H C R 1 (6) (Plaintiff may from the beginning put forward an alternative case)

[See (1818) 7 Ch D 473 (489) Davy v Garrett]

2 (24) AIR 1924 Bom 119 (127) 48 Bom 259  
(Section 37 of the Specific Relief Act)

3 (25) AIR 1925 Cal 193 (194) (Suit for *khas* possession — Alternative claim for refund of *salams*)

4 (18) AIR 1918 P C 146 (146) 46 Cal 663 46  
Ind App 33 (PC)

(24) AIR 1924 Mad 590 (521) (Claim for money

due based on the original dealings may be combined with a claim for the same money as due under a *pro note*)

(12) 14 Ind Cas 399 (401) 8 Nag L R 7

(24) AIR 1924 Lah 144 (145) 4 Lah 193

(30) AIR 1930 Bom 66 (63) (As to when a decree on the original consideration cannot be passed see the observations made in this case)

[See however (33) AIR 1933 All 109 (109)

(Where the loan is not independent of the promissory note no decree can be given even on the receipt given for money paid)]

5 (11) 11 Ind Cas 863 (864) (Low Bar)

(32) AIR 1932 Cal 41 (41)

(24) AIR 1924 Oudh 9 (98)

(26) AIR 1926 Mad 1071 (1072)

[See also (33) AIR 1933 Lah 15 (17) 13 Lah 561 (Suit on contract—Compensation can be granted)]

O. 7 R. 7  
Notes 3-4

the alternative relief without amending the plaint<sup>10</sup> In a suit by a son to set aside a transfer by his mother the plaintiff specifically alleged that his mother was of unsound mind and stated further that she was under the control of the donee. The Privy Council was inclined to the view that the claim based on undue influence cannot be entertained as it was not specifically pleaded<sup>11</sup> So also in a suit on a hundi the Privy Council declined to pass a decree on the original consideration as such an alternative relief had not been prayed for<sup>12</sup>

But where in a suit all the facts giving rise to the alternative claim are fully stated in the plaint the fact that the plaintiff has not formally asked for the relief on the alternative claim is no bar to the granting of the relief on that basis<sup>13</sup>

The plaintiff might rely upon different allegations in the alternative claim even though they may be inconsistent with each other. See Order 6 Rule 2 Note 5

A prayer for alternative relief cannot be converted into one for additional relief<sup>14</sup> A plaintiff praying for a relief and also for a lesser relief in the alternative, cannot be deemed to have waived his right to the relief originally claimed<sup>15</sup> Where the plaintiff asks for one of two alternative reliefs and is granted one he cannot, in appeal, contend that he should be given the other relief<sup>16</sup>

**3a Suit under Section 77 of the Registration Act** — In a suit under Section 77 of the Registration Act 1908 no other claim such as a claim for possession and mesne profits can be coupled with the prayer to enforce registration of the document. The reason is that the purpose of such a suit is strictly limited to a special period of limitation is prescribed for it and the court fee leviable is separately provided for. The allowing of another claim to be included in such a suit will completely alter its scope and character<sup>1</sup>

**3 Events happening after suit** — The ordinary rule is that the rights of parties must be determined as at the date of the action and not on the basis of rights which accrued to them after the institution of the suit<sup>2</sup> Thus where the plaintiff has no cause of action at all to institute the suit he will not ordinarily be allowed to take

10 See L. 1770000 7 15 (14) AIR 1914 Lah 701 (206) 1915 Pun Re  
No 4  
16 (24) AIR 1904 Cal 415 (44C)

11  
[

2 7 Note 3a

12  
46 Ind App 33 (P C)

13 (S) AIR 1932 Nag 23 (26 27) 27 Nag L R  
37

(31) AIR 1931 Rang 133 (143) 9 Rang 56 (suit on promissory note insufficiently stamped—plaintiff is liable to pay stamp duty)

(Mort  
altera

1 on—Mortgagee can recover upon the original consideration }

(89) 4 All 245 (247 248)

14 (24) AIR 1924 All 271 (272)

13a vs  
(33) AIR 1933 Cal 196 (197) (Suit for registration of a usufructuary mortgage bond—Certain other alternative reliefs were also prayed for)

Note 4

1 (05) 7 Cal L Jour 260 (264) (Suit for recovery of possession—plaintiff succeeded only on title as it stood on the date of the institution of the suit)

(30) AIR 1930 Nag 173 (16 17) 26 Nag L R 203 (Suit for possession on redemption—plaintiff bore onus until it was proved that he was only during suit—Not like a title account)

(21) AIR 1921 Pat 439 (439) 3 Pat 224 (Suit on basis of relinquishment by A—Relinquishment made only during suit)

(72) 15 South W R 106 (106)

advantage of a cause of action arising subsequent to the suit and claim relief on that basis.<sup>2</sup> Nor, where a plaintiff has a cause of action on the date of the suit, will relief be ordinarily refused to him on that basis by reason of subsequent events.<sup>3</sup>

But where it is shown that the original relief claimed has by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, the Courts may depart from the general rule and mould the relief on the basis of the altered circumstances.<sup>4</sup> Thus, where

(28) AIR 1929 Mad 245 (246) (Suit decreed for

(21) AIR 1921 Mad 909 (310)

(15) AIR 1915 Cal 103 (104, 105)

(23) AIR 1923 Oudh 242 (243)

(19) AIR 1921 Pat 103 (104, 105)

not maintainable)

plaintiff seeks to introduce a new case, he can do so only by an amendment of the plaint in which case the defendant must be given an opportunity of raising an appropriate defence)

(36) AIR 1930 Oudh 280 (289) 12 Luck 185

2. (93) 21 Mad 288 (290) (Suit by landlord to eject trespassers pending lease—Subsequent expiry of lease—Plaintiff cannot get relief on that basis)

(98) 15 All 809 (403) (Death of person subsequent to suit giving title to plaintiff)

(10) 8 Ind Cas 576 (577) (Lab) (Suit by mortgagee for possession before expiry of period fixed for payment—Subsequent expiry of period will not entitle plaintiff to decree)

(26) AIR 1926 Mad 584 (597) (Suit for redemption premature—Period expired during pendency of litigation—Suit dismissed)

(86) AIR 1936 Mad 504 (506)

[See also (86) AIR 1936 Oudh 250 (253) 12 Luck 101 (The title of plaintiff pre-emptor must be subsisting not only at the date of sale deed but also at the date of the institution of the pre-emption suit. His acquiring title during pendency of the pre-emption suit is immaterial—AIR 1930 Oudh 274 and AIR 1931 Oudh 281, Relied on)]

4. (107) 11 Cal 1 Jour 74 (76)

(28) AIR 1928 Pat 896 (397, 398) (Suit by landlord against trespasser while lease was running, for declaration and formal possession through tenant—Lease expiring—Decree for possession can be given)

(28) AIR 1928 Bom 427 (430) 52 Bom 689 (In

died pending suit, decrees can be given on basis of W's death)

(17) AIR 1917 Cal 716 (719) 44 Cal 47

(29) AIR 1929 All 841 (843, 844) (Suit is to be tried as on the date of cause of action—Subsequent events can be considered only in exceptional cases such as where the original relief has

(17) AIR 1917 Cal 822 (823) (Suit for khas possession against lessee on the ground of relinquishment—Relinquishment not proved but *pendente lite* lease expired—Decree for khas possession can be given)

(83) AIR 1933 Cal 594 (595) 10 Cal 635

(29) 1929 Mad W N 165 (175)

(24) AIR 1924 Nag 201 (207) (Relief refused on

at date of institution of suit—Cause of action maturing afterwards—Suit not to be dismissed)]

(29) AIR 1929 Bom 337 (338)

(18) AIR 1918 Mad 272 (274) (Cause of action arising subsequent to the suit may be included by amendment)

(25) AIR 1925 Nag 251 (257)

(30) AIR 1930 All 856 (857) (After preliminary decree on a mortgage the mortgagors were by Government Notification declared to be agriculturists whose property was not liable for sale—

**O 7 R 7**  
**Note 4**

pending a suit for a declaration of title the defendant takes possession of the property in dispute the plaintiff may amend the plaint by adding a prayer for possession instead of bringing another suit<sup>6</sup> Similarly if pending a suit for partition by A against his brothers B and C B dies A can amend his plaint and claim a half share instead of one third<sup>6</sup> Again where in a suit for money the real cause of action arose only after the institution of the suit it was held in the cases noted below<sup>7</sup> that the Court should not reject the plaint and drive the plaintiff to file a fresh suit but should pass a decree on the basis of such subsequent cause of action It is not only in the power but sometimes the duty of the Court to take notice of subsequent events where if it is not so done the Court might decide matters no longer in controversy or deliver judgment which could not be carried into effect or grant a relief which is inappropriate and ineffectual<sup>8</sup>

But the discretionary power to depart from the general rule and to take notice of subsequent events will not be exercised where it would have the effect of taking away the jurisdiction of the Court or there is great delay in making the application, or if a fresh enquiry into other facts becomes necessary<sup>9</sup> It will not also be exercised where the subsequent cause of action is alleged to arise by virtue of something done in the suit itself<sup>10</sup> Thus in a suit for possession against a tenant on the ground of forfeiture by denial of title the plaintiff on failing to prove such denial before suit

It was held in the final decree could not direct the sale of their property)

(19) AIR 1931 Lah 280 (213) 1919 Pun Re No 127 (Minor Mahomedan girl sued before puberty to exercise her option of puberty—liberty attained during the pendency of the suit—Option can be exercised)

(37) AIR 1937 Oudh 87 (87) 12 Luck 435 (Suit on contract—Contract found void—Court can grant relief under S 65 of the Contract Act)

(30) AIR 1926 Oudh 260 (289) 12 Luck 185 (Do)

(45) AIR 1935 Oudh 22 (23) 10 Luck 270

(44) AIR 1934 M 293 (29) (Where the content and extent of a certain right is an essential requirement for a certain relief asked for a suit which has been lost before the relief can be granted the Court cannot but take notice of the fact of error and amend the decree to give the relief which parties would be entitled to before the amendment of the decree)

(87) AIR 1937 Mad 60 (60) (Longrun case of suit brought to knowledge of Court—Court is bound to raise and try the question)

(See also (33) AIR 1933 All 217 (218) (Acra Pre-emption Act as amended in 1933 S 13—The date of the decree is the crucial date and any rule or change in law that came into existence before that date would govern the suit)

(81) 6 Bom 139 (142 143) (Suit on purchaser's suit for redemption of a mortgage—Sale certificate not obtained on date of suit—Produce on

(40) AIR 1922 Oudh 265 (267 268)

6 (33) AIR 1934 950 (353)

(15) AIR 1915 Sind 25 (97) 8 Sind L 61 (Claim as heirs of A—During the pendency of the suit a defendant daughter of A dies—Claim as heirs of A's daughter could be allowed by way of amendment)

(26) AIR 1926 Mad 6 (12) (Suit by one co-widow against another co-widow and her alienor for possession after partition of her one half share—Defendant co-widow died pending appeal—Plaintiff can pray for possession of whole estate)

(21) AIR 1921 Bom 455 (456) 45 Bom 993 (Alienation from a minor coparcener sued for partition—Pending suit minor attained majority and executed a new conveyance—Plaintiff entitled to succeed)

to in

terre

9 (26) AIR 1926 Mad 6 (12)

10 (91) 15 Bom 407 (412 414)

(18) AIR 1918 Oudh 118 (119) (Plea in written statement cannot furnish cause of action to plaintiff)

(22) AIR 1922 Lah 437 (439) (Do)

(92) 29 Cal 203 (204) (Tenancy terminated during suit—Notice to quit alleged in plaint)

1 of  
add

cannot take advantage of a denial in the written statement of the defendant<sup>11</sup> The Court will not also exercise such discretionary power if the subsequent cause of action is entirely different and distinct from the cause of action as originally alleged<sup>12</sup>

O. 7 R. 7  
Note 4

A decree which is good and valid at the date it was passed cannot by reason of a subsequent event become bad<sup>13</sup>

But where subsequent to the date of judgment of the first Court events happen which entitle the plaintiff to a change in the relief can the Appellate Court take notice of such events and mould the relief accordingly? In *Mt Anand Moyee Choudhooayan v Sheeb Chunder Roy*<sup>14</sup> their Lordships of the Privy Council observed as follows

The first and most important question is whether the decision of the Principal Suther Ameen was *when pronounced* a correct decision of the issues *then pending* before him between the then parties to the suit No subsequent event or devolution of interest can affect this question because to give effect to these should justice require it would be the office not of an appeal but of some supplemental proceeding

It was however held in the undermentioned cases<sup>15</sup> that there were exceptions to that general rule and that in such exceptional cases the Appellate Court may take notice of events happening after the date of the judgment of the first Court The introduction of the new rule O 41 R 33 on the lines of the English Rules of the Supreme Court enabling the Appellate Court not only to pass any order which ought to have been passed or made but to pass such *further or other decree or order* as the case may require makes it now perfectly clear that on appeal such a judgment may be given as ought to be given if the case came at that time before the Court of first instance<sup>16</sup>

## R. 8. [New] Where the plaintiff seeks relief in respect

O. 7 R. 8

Relief founded on of several distinct claims or causes of action  
separate grounds founded upon separate and distinct grounds, they  
shall be stated as far as may be separately and distinctly

[R S C, O 20 R 7 See O 1 Rr 1 to 7 and O 2 Rr. 1 to 6]

(08) 81 Cal 433 (440)  
11 (19) AIR 1919 P C 1 (4) 42 Mad 589 46

Ind App 109 (P O)

(92) 15 Mad 123 (124)

(09) 2 Ind Cas 656 (657 658) 36 Cal 927

(05) 2 Cal L Jour 899 (895 896)

(01) 28 Cal 223 (227)

(01) 28 Cal 135 (138)

(31) 184 Ind Cas 1038 (1039) (Lab)

(86) 111 Cal 96 (98 99)

(96) 20 Bom 759 (764)

[See also (35) AIR 1935 Cal 255 (256) (Recital of payment in written statement cannot be relied on as saving limitation for suit under S 20 of the Limitation Act)]

[But see (84) 8 Bom 228 (230) (Setting up a

Mad 489  
(R D) (Change of law subsequent to original Court's decree)

(28) AIR 1928 Cal 436 (437)

(1882) 9 O B D 672 (676 678) Quilter v Mapleson (Referred to in AIR 1914 Mad 561)

(24) AIR 1924 Nag 904 (907)

(25) AIR 1925 All 361 (361) 47 All 324

(30) AIR 1930 Bom 554 (557) 54 Bom 502  
(Even in second appeal the Court should take into consideration the events that have happened since filing of first appeal and grant relief accordingly)

(09) 1 Ind Cas 670 (675) (Cal)

(18) AIR 1918 Mad 1239 (1301) 40 Mad 618  
(Change of law subsequent to original Court's decree)

(17) AIR 1917 Mad 198 (200)



O. 7 R. 6  
Note 1

1. Relief founded on separate grounds. — The object of this rule is to prevent the trial being embarrassed by the want of clearness in the allegations in the plaint. Plaintiff may, as has been seen in Rule 2 *ante* in a proper case, rely upon one set of material facts for his relief and also on another and even inconsistent set of material facts for relief in the alternative but where such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts each alternative relief is claimed<sup>1</sup>

See Order 6 Rule 2 Note 5 and Order 7 Rule 7 Note 1

## O. 7 R. 9

**R. 9. [S 58]** (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and,

Procedure on admitting  
plaint

if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements

Concise statements

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct

[1877, S 58 See O 7 Rr 4 and 5]

## Local Amendments

## ALLAHABAD

(a) For the semicolon after 'it' in clause (1) substitute a full stop and delete the rest of this clause as well as clauses (2) and (3) and

(b) Re number clause (4) as clause (2) deleting the words 'or statements' therein

[See (23) AIR 1903 Lah 24 (25)]

[But see (23) AIR 1929 All 699 (701) (Subsequent events being brought to the knowledge of the Appellate Court it was held that the attention of the lower Court should be drawn to them)]

## Order 7 Rule 8 — Note 1

1 (1878) 7 Ch D 473 (480) Davy v Garrett

[Per Thesiger L J]

(20) AIR 19 0 Cal 93 (95)

(1897) 95 Ch D 492 (493) Re Morgan

[See also (23) AIR 19 2 Nag 347 (347)]

**CALCUTTA**

*Cancel clause (1) and substitute therefor the following*

(1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it

(1A) The plaintiff shall present with his plaint

(i) as many copies on plain paper of the plaint as there are defendants unless the Court by reason of the length of the plaint or the number of the defendants or for any other sufficient reason permits him to present a like number of concise statements of the nature of the claim made or of the relief claimed in the suit in which case he shall present such statements

(ii) draft forms of summons and fees for the service thereof

**MADRAS**

*After the word and occurring in clause (1) delete the comma and the five words following viz if the plaint is admitted and insert the expression along with the plaint after the words shall present*

**NAGPUR**

*Substitute the following for Rule 9*

'9 (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it

(2) The chief ministerial officer of the Court shall sign such list and the copies of the plaint presented under Rule 1 of Order 4 if on examination he finds them to be correct

**ODDH**

In sub rule (1) for the words and if the plaint is admitted shall present substitute the words and shall at the same time present Also delete the words unless the Court present such statements as well as sub rules (2) and (3) and re number sub rule (4) as sub rule (2) deleting the words or statements

**RANGOON**

In sub rule (1) add the words on the day on which the plaint is admitted after the word present

**SIND**

*Substitute the following for sub rule (1)*

9 (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it and shall present along with the plaint as many copies of it on plain paper as there are defendants on application made the Court may by reason of the length of the plaint or the number of the defendants or for any other sufficient reason accept instead a like number of concise statements of the nature of the claim made or of the relief claimed in the suit presented along with the plaint

**1 Procedure on admitting plaint** — This rule relates to the procedure adopted when a plaint is admitted. It provides for presentation into Court of concise statements instead of copies of plaints for service on the defendants in the cases mentioned in the rule. These statements should contain the nature of the claim made or of the relief claimed and the capacity in which the party sues or is sued (sub rule 2). As to the representative capacity of plaintiff see O 7 R 4 and as to the representative capacity of defendants see O 7 R 5

O. 7 R. 10

**R. 10. [S. 57.]** (1) The plaint shall at any stage of the suit<sup>2</sup> be returned to be presented to the Court in which the suit should have been instituted.<sup>7</sup>

Return of plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure on returning plaint.

[1877, S. 57; 1859, S. 30.]

<sup>a</sup> This rule has been applied to suits for the recovery of rent under the Chota Nagpur Tenancy Act, 1908 (Ben VI of 1908), S. 265

### Synopsis

- |   |   |
|---|---|
| 1. Scope of the Rule.   | 7. Court in which the suit should have been instituted. |
| 2. "At any stage of the suit"                                       | 8. Court-fee.   |
| 3. Return of plaint by Appellate Court.                             | 9. Limitation.  |
| 4. Return of plaint by Small Cause Court                            | 10. Chartered High Courts.                              |
| 5. Return of plaint by Civil Court to Revenue Court and vice versa. | 11. Appeal.   |
| 6. Return of applications   | 12. Revision.   |

### Other Topics (miscellaneous)

In what cases plaint may be returned See Note 1  
Rule mandatory See Note 2  
Want of jurisdiction See Note 1

**1. Scope of the Rule.** — It is enacted in Section 15 ante, that every suit shall be instituted in the Court of the *lowest grade competent* to try it. Where a suit is instituted in a wrong Court, *i. e.*, in a Court which is either not competent to try it, or which though competent, is not the Court of the *lowest grade* competent to try it, the plaint should be *returned*, under the provisions of this rule, to be presented to the proper Court. The reason is this: where the Court has no jurisdiction over the suit, a judgment given by it will be a determination *coram non iudice* and it would be a futile proceeding for the judge to go on with an investigation which would have no jurat effect.<sup>1</sup> Where the Court has jurisdiction, but is not the Court of the *lowest grade* competent to try it, it would, if such suits are entertained and tried, be overcrowding Courts of higher grade with suits, which it is the object of the Legislature to prevent.<sup>2</sup>

Where however in such a case the evidence has been gone into and concluded and the objection is raised at the time of arguments, the Court should, instead of returning the plaint, proceed to decide the case.<sup>3</sup>

Where the Court comes to the conclusion that the suit should have been instituted in another Court, the only thing that it can do is to *return* the plaint for presentation to that Court and not to dismiss the suit.<sup>4</sup> But it has been held that <sup>a</sup>

### Order 7 Rule 10 — Note 1

1. ('84) 6 Bom 313 (317) (FB) (Even after a trial is concluded the Court can return a plaint for presentation to the proper Court.)

2. See Section 15 Note 1.

3. ('34) AIR 1934 Cal 524 (525)

(1903) 11 Bom 100 (100)

('68) 5 Bom II G R 212 (213)  
(32) AIR 1932 All 413 (414)  
(32) 11 Cal L Rep 300 (302)  
(19) 10 Suth W R 335 (337)  
(16) 5 Suth W R Act 3, 67 (67).

British Indian Court has no jurisdiction to return a plaint for presentation to a Court outside British India \*

O. 7 R. 10  
Note 1

The provisions of this rule are wide enough to cover all cases where the Court is unable to entertain the suit for want of jurisdiction whatever may be the nature of the objection to its jurisdiction \*. The shape in which the suit is originally instituted is the test of jurisdiction. Therefore, where it is found in the course of the hearing as the result of admissions made by the parties or of the evidence led by them, that the relief which the plaintiff was really entitled to was not cognizable by that Court the rule does not apply. 7

### Illustrations

1. If filed a plaint in a Sub-Court praying for a declaration that a certain tax was illegal and also for damages for illegal entry into his house. The Judge amended the plaint by striking out the reliefs other than that for damages and then holding that the claim for damages would lie only in the Small Cause Court returned the plaint for presentation to that Court. It was held that the order was not justified. *Motabhai Motilal v. The Surat City Municipality* 1 L. R. 20 Bombay 675

2. S sued R his co-owner in the Sub-Court claiming Rs. 1,152 13 0 as his share of profits for certain years. The suit was dismissed and S appealed in respect of Rs. 450 only. The Appellate Court remanded the case for re-trial in respect of that claim. The Subordinate Judge who had pecuniary

(1864) 1864 Suth W R 65 (65)

(75) 23 Suth W R 263 (263)

(180) 11 Suth W R 177 (180) (If Court has no jurisdiction plaint must be rejected — Decision under S. 31 of Act 8 of 1859)

(81) 7 Cal 157 (163)

(80) AIR 1930 Lah 195 (196 197) (Should not send it to District Judge for transfer under S. 24)

(26) AIR 1926 Mad 140 (141)

(18) AIR 1918 Mad 590 (591)

(10) 11 Ind Cas 702 (702) (Mad)

(84) 7 Mad 171 (174)

(85) 8 Mad 62 (63)

(86) 8 Mad 208 (218) (Where the amount of the

jurisdiction)

(33) AIR 1933 Lah 851 (851) (Case of an incompetency petition)

(35) 153 Ind Cas 53 (54) (Lah) (Value of suit exceeding jurisdiction—Order directing presentation to proper Court is proper)

[See however (16) AIR 1916 Oudh 229 (290) 18 Oudh Cas 364 (But if the valuation of the

suit is not fraudulent and is admitted by defendant plaint should not be returned although it is found that the market value exceeds pecuniary jurisdiction)]

[But see 2 Hay 386]

(11) 9 Ind Cas 824 (824) (All)

(27) AIR 1927 Pat 254 (255) 6 Pat 358

(25) AIR 1925 Oudh 735 (736) (Should not decide the suit on the merits)

(1892 96) 1892 96 Upp Bur Rul 338

(09) 4 Ind Cas 814 (815) (Upp Bur) (Transfer by High Court to another Court beyond its jurisdiction not proper — The plaint must be returned for presentation on to the proper Court)

[See also (26) AIR 1926 Pat 28 (29) (Where transfer of some of the defendants as plaintiffs raises the value of the suit after transfer the plaint should be returned for presentation to

7 (96) 20 Bom 675 (676 677)

(33) AIR 1933 Sind 296 (296)

(32) AIR 1932 S nd 67 (68 69)

(30) AIR 1930 S nd 252 (253) 25 Sind L R 63

(22) AIR 1922 Bom 152 (154) 46 Bom 229

(28) AIR 1928 Lah 484 (486)

(24) AIR 1924 Pat 267 (268) 2 Pat 746 (Suit to eject trespassers—Defendants found to be not trespassers but non occupancy rights—Suit must be dismissed — Plaint cannot be returned for

O. 7 R. 10  
Note 1

It has been held that this rule is sufficiently wide to cover a case in which by operation of legislation the situation arises even after a suit has been instituted, that it should have been instituted in another Court.<sup>8</sup>

A Court has no jurisdiction to act under this rule after it has passed a decree in the suit.<sup>9</sup> Nor can it do so unless it comes to a definite finding that the suit should have been instituted in another Court.<sup>10</sup> Thus a Court has no power to return the plaint for presentation to the proper Court merely on the ground that it would be more advantageous to the defendant to have the suit tried in that Court.<sup>11</sup>

Where a Court returns a plaint for presentation to the proper Court on the ground that it was beyond its jurisdiction the plaintiff is entitled to relinquish a portion of the claim so as to bring the suit within the pecuniary jurisdiction of the former Court and to re-present the plaint in the same Court.<sup>12</sup>

Suppose now that two reliefs are claimed in a plaint one of which the Court is not competent to grant. Can the Court return the plaint as regards the relief which it is not competent to grant? There is a conflict of opinion on this point. According to one view it is competent for the Court to return the plaint in respect of the cause of action which is not within its jurisdiction and proceed with the suit in respect of the cause of action within its jurisdiction on a certified copy of the plaint.<sup>13</sup> A contrary view has been taken in the undermentioned cases<sup>14</sup> which hold that the Court should retain the plaint striking out therefrom such portions as are not within its jurisdiction and in respect of which the plaintiff could file another suit.

It is open to a Court to ignore a relief as being based on no cause of action and then to return the plaint under this rule if it finds that the rest of the claim is within the jurisdiction of an inferior Court.<sup>15</sup> The Court can also return a plaint when it finds that the plaint has been overvalued.<sup>16</sup>

(29) AIR 1929 All 607 (607)

(29) AIR 1929 Lah 107 (109-110) (Suit for accounts within the jurisdiction of the Court—On taking of accounts the amount exceeded Court's jurisdiction—Yet preliminary decree not void)

(17) AIR 1917 Pat 334 (334) 2 Pat L Jour 824

Court  
is not  
competent  
to act  
in suit

17

18 O. 7 R. 10 (a) (b)

tion found to be barred on finding arrived at by Court—Dismissal of suit is proper)

(39) AIR 1938 All 39 (41) (Affirmed as to)

(38) AIR 1938 Oudh 224 (225) 14 Luck 218

14. (26) AIR 1928 Bom 293 (283-284)

(17) AIR 1917 Oudh 49 (50)

(12) 16 Ind Cas 752 (752) (Lah) (Relief beyond the jurisdiction of the Court should be treated as surplusage)

15 (20) AIR 1920 Oudh 21 (23)

16 (85) 8 Mad 334 (337)

(34) AIR 1938 Nag 149 (150) 1 L R (1939) Nag 300 (In case of overvaluation patent on face of the plaint it is the duty of Court to return the plaint under this rule)

(35) AIR 1935 All 157 (160) (Court finding in course of preliminary inquiry that value of relief has been overvalued—Court's duty is to return plaint for presentation in proper Court—It is

A Court which has once returned the plaint for presentation to another Court has no jurisdiction to re-entertain it, although the latter Court has returned it for presentation to the former Court, unless the order of the former Court is set aside by a superior Court.<sup>17</sup>

O. 7 R. 10  
Notes 1-2

Where a Munsif's Court returns a plaint for presentation to the proper Court and in appeal against that order the District Court holds that the Munsif's Court has jurisdiction to entertain the plaint, the Munsif's Court is bound by such order.<sup>18</sup> But where a Munsif returns a plaint for presentation to the Revenue Court and the Revenue Court returns it as being not cognizable by it, and the District Judge in an appeal from the order of the Revenue Court holds that it is a suit cognizable by the Civil Court, the Munsif is not bound by the order of the District Judge. He may make such order on the plaint as he thinks proper when it is re-presented to him.<sup>19</sup>

Where a plaint is returned under this rule the *takalatnama* should also be returned as it enures for the suit in the Court in which it is subsequently presented.<sup>20</sup> The plaint that should be returned under this rule is the plaint which is the basis of the suit at the time when its return is ordered and so, where at such time an application for amendment of the plaint is pending the plaint that should be returned under this rule is the original plaint and not the proposed amended plaint.<sup>21</sup>

This rule is made applicable to proceedings under the Chota Nagpur Tenancy Act.<sup>22</sup>

**2. At any stage of the suit** — The direction in this rule is imperative<sup>1</sup> and as soon as the Court arrives at a conclusion at any stage of the suit that it should have been instituted in some other Court the plaint should at once be returned.<sup>2</sup> The words 'at any stage of the suit' have been newly added and give effect to the Full Bench decision in *I L R 8 Bombay 313*.

A Court which has no jurisdiction over a suit cannot pass any judicial order in such a suit except the orders which the statute empowers it to pass<sup>3</sup> and all the

not necessary that defendant should state that relief has been overvalued to oust jurisdiction of one Court.)

17. (29) AIR 1922 Pat 868 (860)

18. (15) AIR 1915 Mad 613 (618 614)

19. (26) AIR 1926 Mad 865 (865)

20. (23) AIR 1923 Nag 182 (187) 19 Nag L R 36

21. (35) AIR 1935 Rang 310 (314)

22. Bengal Act VI of 1908 s. 265 (3) (M)

#### Note 2

O. 7 R. 10 is mandatory.

(87) 10 Mad 211 (212)

(30) AIR 1930 Lah 195 (196)

(35) AIR 1935 All 157 (160)

2. (81) 8 Bom 313 (318) (FB) (Overruling 7

Bom 487)

(82) 8 Cal 831 (836) (After hearing evidence)

(19) AIR 1919 All 1071 (1075) 41 Mad 701

(Court has no power to allow withdrawal under

O. 23 R. 1)

(79) 2 All 357 (358)

(70) 13 Suth W R 358 (359) (Even in appeal to the High Court plaint may be returned.)

(69) 11 Suth W R 177 (178) (Return may be made at any time before judgment.)

(19) AIR 1919 Lah 26 (27) 1 Lah 203

(07) 1907 Pun W R No. 16 (Returned after trial of an issue.)

(10) 10 Ind Cas 980 (980) 4 Sind L R 264 (Returned at a late stage.)

(69) 1869 Pun Re No. 88 (Plaint registered does not become unreturnable.)

(38) AIR 1938 All 76 (78) (Order returning plaint at stage of preliminary arguments when the suit

[But see (67) 8 Suth W R 46 (48) (Suit found to be undervalued at the time of hearing must be dismissed.)]

3. (19) AIR 1919 Mad 1041 (1045) 41 Mad 701

(28) AIR 1924 Mad 341 (344 355) (Plaint can not be amended so as to give jurisdiction.)

O. 7 R. 10  
Note 9

**9 Limitation** — Where a suit has been instituted in a Court having no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction the second suit cannot be regarded as a continuation of the first even though the subject matter and the parties to the suit are identical<sup>1</sup> Therefore for purposes of limitation the date of the institution of the suit is the date on which the plaint is presented to the Court in which it ought to have been instituted<sup>2</sup> If at the time of the presentation of the plaint in the proper Court the law of limitation has been altered it is the law as so altered that will apply to the case<sup>3</sup>

But the plaintiff can in such cases avail himself of the provisions of Section 14 of the Limitation Act and claim the exclusion of the time during which the prior proceeding was prosecuted provided that such proceeding was prosecuted in good faith<sup>4</sup> A filed a suit in Court X on 23rd October 1924 and the same was returned for presentation to the proper Court on 16th March 1925 On 11th March 1925 however A had filed an appeal against the order returning the plaint but pending the appeal he re-presented the suit to the proper Court on 28th April 1925 The latter Court dismissed the suit under O 9 R 2 of the Code on 13th August 1925 The appeal was dismissed on 29th July 1926 On the same day, A presented a fresh plaint on the same cause of action to the proper Court and claimed the exclusion of the period from 16th March 1925 to 29th July 1926 It was held that when he re-presented the plaint on 28th April 1925 A must be deemed to have accepted the order of return as correct that the prosecution of the appeal against the order of return could not thereafter be said to have been in good faith and that therefore the period from 28th April 1925 to 29th July 1926 could not be excluded in computing the period of limitation for the suit<sup>5</sup>

The period that can be deducted under Section 14 of the Limitation Act is only the period from the date of the filing of the plaint to the date on which it was finally returned by the Court for re-presentation<sup>6</sup> No period preceding the original presentation of the plaint can be deducted under that Section<sup>7</sup> But, if after deducting

crediting the plaintiff with the court fee originally paid)

of original presentation is the date of institution 1) — — — — —

**Note 9**  
1 (1909) AIR 1929 P C 103 (107) 56 Ind App 129 56 C 160 56 D 5

n 548

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tation again to District Court—Suit is a continuation of the original one 1]

[But see (15) AIR 1915 All 344 (344)]

2 (14) AIR 1914 Cal 858 (860)

(30) AIR 1930 Lah 394 (395)

(78) AIR 1928 Lah 484 (486)

(13) 36 Cal 482 (483)

(21) AIR 1921 Mad 654 (655) 44 Mad 817

(30) AIR 1930 Mad 704 (708)

[See also (13) 20 Ind Cas 767 (767) (Mad)

side in determining valuation of suit can be deducted under Section 14)  
(22) AIR 1922 Pat 369 (369)  
(31) AIR 1931 Mad 632 (634) (Plaint first returned for amendment — After amendment it was returned for re-presentation to the proper Court — For limitation the period taken in making the amendment was also excluded in favour of the plaintiff — High Court refused to interfere — Obiter)

endorsed under sub rule 2)

(37) AIR 1937 Lah 464 (465)

[But see (93) 3 Mad L Jour 190 (191) (Discontinued from AIR 1926 Mad 178)]

7 See Illustration 2 and the following cases

(23) AIR 1923 Mad 114 (112)

date 1]

[But see (71) 16 South W R 47 (48) (The date

the period allowed under that Section the limitation expires on a day on which the Court is closed the plaint can be presented on the 10 opening day <sup>8</sup>

O. 7 R. 10  
Notes 9-10

### Illustrations

1 A presented a plaint in Court 1 and the same was ordered to be returned on the 25th March for presentation to the proper Court but the Office returned it only on the 10th of April. It was held that A was entitled to count in his favour the days up to the 10th of April when the plaint was finally returned <sup>9</sup>

2 The last day of limitation for a suit expired on 5 9 1927 on which date the Court was closed for the vacation and the plaintiff presented the plaint in Court 1 on 7 10 1927 which was the re-opening day. It was returned for presentation to the proper Court on 8 10 1927. It was held that the period between 5 9 1927 and 7 10 1927 could not be excluded under Section 14 of the Limitation Act <sup>10</sup>

3 A presented a plaint in a wrong Court and the same was finally returned on 20 11 1924 for presentation to the proper Court. The next 3 days were holidays for the Court in which the plaint was to be presented and the plaintiff re-presented the same on 24 3 1924. It was held that the re-presentation was proper <sup>11</sup>

It has been held by the Madras High Court that where a plaint is returned under this rule as being beyond the pecuniary jurisdiction of the Court and the plaintiff, after amending the plaint so as to bring the claim within the jurisdiction of the Court, re-presents the plaint in the same Court, the plaint can be treated as a continuation of the former suit without any necessity of falling back on the provisions of Section 14 of the Limitation Act <sup>12</sup>

A plaint cannot be returned under this rule merely because the plaintiff has not mentioned in it the list of documents on which he relies. Hence if a plaint is returned for this defect and is then re-presented the date of the institution of the suit for purposes of limitation is the date of the original presentation of the plaint <sup>13</sup>

There is a difference of opinion on the question whether the Court returning a plaint under this rule can allow the plaintiff a period within which he might re-present it in the proper Court. In an earlier case of the Calcutta High Court <sup>14</sup> it was held that the Court had a discretion to grant a reasonable time within which the plaintiff might present the plaint to the proper Court. But the same High Court has, in a later decision <sup>15</sup> held that the order granting time is a nullity and will not save the suit from the bar of limitation. This view has also been followed by the Patna High Court <sup>16</sup>. In the undermentioned case <sup>17</sup> where the Court had granted such time the High Court of Lahore did not say that the order was wrong but decided the case on other grounds.

**10. Chartered High Courts** — Order 49 Rule 3 sub rule 1 provides that this rule is not applicable to Chartered High Courts. As to the practice of the High Court of Bombay on its original side see the undermentioned cases <sup>1</sup>. The High Court can however under its inherent powers direct in a suit which it has dismissed for want of jurisdiction that the plaint should be returned to the plaintiff so that he may file it in the proper Court and thus avoid the payment of court fee twice over <sup>2</sup>

[But see (21) AIR 1921 Bom 379 (380) 45 Bom 443]

8 See Illustration-3

9 (33) AIR 1933 Lah 611 (611)

10 (29) AIR 1929 Lah 425 (426) 11 Lah 12

[See also (37) 1937 Lah 463 (465)]

11 (29) AIR 1929 Cal 315 (317 318)

12 (34) AIR 1935 Mad 897 (899)

13 (30) AIR 1930 Lah 480 (480)

14 (10) 6 Ind C 567 (637) (Cal)

15 (17) AIR 1917 Cal 794 (795)

16 (37) AIR 1937 1st 495 (496)

17 (29) AIR 1929 Lah 425 (426) 11 Lah 12

### Note 10

1 (84) 8 Bom 313 (317) (F B) (Practice is to return plaint even in the course of the trial)

(84) 8 Bom 380 (397) (The practice of the original side is to retain the plaint unless it has been returned on presentation)

2 (34) AIR 1934 Rang 342 (348)



O. 7 R. 10  
Note 11

**11. Appeal** — An order under this rule, returning a plaint to be presented to the proper Court is appealable under O 43 R 1 (a) whether the order is made by the Court of the first instance<sup>1</sup> or by the Court of first appeal in the exercise of its powers under Section 107 *ante*<sup>2</sup> But where such an order is reversed or confirmed in appeal a *second appeal* is barred by the provisions of Section 104 sub section (2)<sup>3</sup> The appellate order reversing that of the Court of first instance cannot also be construed as an order of remand under O 41 R 23 so as to be appealable under O 43 R 1 (n) inasmuch as the order is not one passed on appeal from a decree<sup>4</sup> But the aggrieved party can under Section 105 dispute the correctness of the order in an appeal from the decree if he is otherwise entitled to do so<sup>5</sup>

Where a Small Cause Court returns a plaint under Section 23 of the Provincial Small Cause Courts Act to be presented to an ordinary Civil Court in order to decide a question of title to immovable property, the Civil Court has no jurisdiction to return again the plaint under this rule as the reference to the Civil Court by the Small Cause Court was under a special provision of law empowering the Small Cause Court to make such reference<sup>6</sup> Section 193 of the Madras Estates Land Act excludes the operation of Order 43 to proceedings under that Act and consequently where, in an appeal to the District Court from a decree in a suit under that Act the District Court holding that the Revenue Court had no jurisdiction directed the plaint to be presented to the proper Court it was held that no appeal lay against the order of the District Court to the High Court<sup>7</sup>

It has been held by the High Courts of Madras and Lahore and the Judicial Commissioner's Court of Nagpur that a plaintiff whose plaint is returned for presentation to the proper Court and who accordingly presents the plaint to the proper Court does not forfeit his right of appeal against the order of return simply on the ground that he chose to file his plaint in the latter Court<sup>8</sup> But the High Court of Calcutta and the

**Note 11**

1 (79) 2 All 357 (358)  
(82) 4 All 478 (480)

583 (b) corresponding to O 43 R 1 (a) applies only to order of Court of first instance ]]

3 (11) 9 Ind Cas 606 (667) 38 All 470  
(30) 125 Ind Cas 581 (581) (All)  
(81) 3 All 655 (856)

appeal is filed the correctness of the order can not be challenged in Court in which it is so filed not in appeal therefrom ]]

2 (38) 25 All 174 (176) (F B) (Appeal lies to Over

(Order

to the

(26) AIR 1926 Lah 141 (141)  
(38) AIR 1933 Oudh 224 (224) 14 Luck 218  
(35) AIR 1935 Mad 574 (575)

[But see (78) 1 All 620 (622) (Decision under the Code of 1877 holding the order of the first Court to be a decree—It is no longer law under this Code )]

4 (35) AIR 1935 Mad 574 (575)  
5 (26) AIR 1926 Mad 900 (901 907)

6 (18) 18 Ind Cas 375 (325) (Cal)  
(26) AIR 1926 Cal 83 (84) (If the Civil Court returns plaint it is not under O 7 R 10)

7 (18) AIR 1918 Mad 191 (193) 41 Mad 554  
8 (19) AIR 1919 Mad 1062 (1063) 41 Mad 721  
(30) AIR 1930 Nag 207 (209) 26 Nag L R 300  
(33) AIR 1939 Lah 18 (19)

Judicial Commissioners Court of Oudh have taken a contrary view<sup>9</sup> The High Court of Calcutta has, however, in a later case held that the plaintiff will not forfeit his right of appeal if he specifically *reserves* his right to do so<sup>10</sup> In the undermentioned case<sup>11</sup> a plaint was returned for presentation to the proper Court In the latter Court the plaint was rejected for non payment of deficit court fees Thereafter an appeal was filed against the order returning the plaint In appeal, the case was remanded for trial to the first Court in ignorance of the rejection of the plaint by the other Court It was held that there was no plaint to try and the remand was ineffectual

An Appellate Court which reverses an order returning a plaint under this rule has no jurisdiction to *remand* the case to the lower Court for fresh disposal the proper procedure is to annul the order of the trial Court and direct it to dispose of the suit according to law<sup>12</sup>

Where a memorandum of appeal is returned for presentation to the proper Court is the order of return appealable? The High Courts of Calcutta, Allahabad and Lahore<sup>13</sup> have held that the word "plaint" in this rule does not include a memorandum of appeal and that, therefore, no appeal lies from such an order The High Court of Madras and the Chief Court of Lower Burma have, on the other hand, held that an appeal does lie in such cases<sup>14</sup>

It has been held that where a plaintiff does not appeal against an order returning the plaint under this rule and submits to the decision of the Court on the point of jurisdiction, the question cannot be re-agitated in a subsequent suit between the same parties<sup>15</sup>

**12. Revision.** — Where a Munsif's Court returned the plaint for presentation to the Small Cause Court and the latter Court returned the plaint for presentation to the Munsif's Court and the Munsif's Court refused to go back on its original order and receive the plaint the High Court in revision against the second order of the Munsif directed the Small Cause Court to try the case<sup>1</sup> As to whether an order of the *Appellate Court* confirming or reversing an order of the Court of first instance returning a plaint under this rule is revisable see Note 15 to Section 115 and the undermentioned cases<sup>2</sup>

(7) 5 Cal L Jour 580 (582)	(18) AIR 1918 All 96 (96) 40 All 659
(08) 11 Oudh Cas 98 (100)	(28) AIR 1928 Lah 635 (635) (Seems to have been assumed that no appeal lay)
(10) (19) AIR 1919 Cal 447 (448)	11 (91) 14 Mad 462 (161)
(11) (29) AIR 1929 Bom 209 (201)	(1900) 1 Low Bur Rul III (33)
(12) (25) AIR 1925 Oudh 393 (394) 29 Oudh Cas 91	15 (36) AIR 1936 Oudh 222 (223)
(09) 4 Ind Cas 780 (781) 12 Oudh Cas 388 (The Appellate Court cannot itself proceed to hear the merits)	<b>Note 12</b>
	1 (92) AIR 1922 Pat 368 (369)

turned for presentation to proper Court Appeal against this order was dismissed by District Judge—*Held* a revision to the High Court was not competent  
[See also (17) AIR 1917 Oudh 49 (50)]

O. 7 R. 11

**Rejection of plaintiff.** **R. 11.** [Ss. 53 & 54.] The plaintiff shall be rejected in the following cases:—

(a) where it does not disclose a cause of action<sup>3</sup>:

(b) where the relief claimed is undervalued,<sup>4</sup> and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(c) where the relief claimed is properly valued, but the plaintiff is written upon paper insufficiently stamped,<sup>5</sup> and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

(d) where the suit appears from the statement in the plaint to be barred by any law.<sup>7</sup>

[1877, Ss. 53, 54; 1859, Ss. 29, 31, 32.]

#### CALCUTTA

#### Local Amendment

Add the following as clause (a)

"(a) Where any of the provisions of Rule 9 (1A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so"

#### Synopsis

1. Legislative changes.
2. Scope of the Rule.
3. "Where it does not disclose a cause of action."
4. "Where the relief claimed is undervalued"
- Where the plaint is insufficiently stamped
- Memorandum of appeal insufficiently stamped

7. Where the suit appears to be barred by any law — Clause (d).
8. Rejection of plaint on other grounds
9. Rejection of plaint in part.
10. At what stage plaint can be rejected
11. Appeal.
12. Revision.
13. Review.

#### Other Topics (miscellaneous)

Applicability of this rule to Chartered High Courts See Note 2  
Court a duty to examine plaint See Note 3

Extension of time See Note 5  
Rule how far mandatory See Notes 5 and 10  
Within a time to be fixed by the Court See Note 5

#### 1. Legislative changes. —

1 Clause (a) corresponds to clause (a) of Section 53 of the old Code which provided that 'the plaint may, at the discretion of the Court, at, or any time before the settlement of issues be rejected'. See Note 10 and the undermentioned cases decided under the old Code<sup>1</sup>

2 The words "positive rule of" before "law" in clause (d) have been omitted

3 Clause (d) of Section 54 of the old Code has been omitted, as this Code does not anywhere provide for return of pleadings for amendment

#### Order 7 Rule 11 — Note 1

1. ('81) 7 Cal 313 (315) (*Held* too late to reject a plaint in appeal for want of cause of action as the proceedings in the lower Court showed that plaintiff was entitled to relief)

(05) 2 Cal L Jour 534 (537) (Do)

**2 Scope of the Rule.** — This rule enacts that the plaint shall be rejected in the four classes of cases mentioned in clauses (a) to (d). But the instances given cannot be regarded as exhaustive of all the cases in which a Court can reject a plaint or as limiting the inherent powers of the Court in respect thereof.<sup>1</sup> Thus a Court has jurisdiction, in a proper case, to reject the plaint filed by the next friend of a minor on the ground that it is not in the interests of the minor that the suit should be proceeded with.<sup>2</sup> So also where it is alleged that a suit was instituted without the signature and authority of the plaintiff, the Court will frame a preliminary issue on the point and reject the plaint if it finds the issue against the plaintiff.<sup>3</sup> An Appellate Court has the same powers of rejecting a plaint as the Court of first instance.<sup>4</sup>

In disposing of a suit under this rule, the Court ought not to dismiss the suit but should *reject* the plaint.<sup>5</sup> The effect of rejection as distinguished from a dismissal is that in the former case, the plaintiff would not under Rule 13 *infra*, be precluded from filing a fresh plaint in respect of the same cause of action if he so desires.

A plaintiff is not entitled to have the dismissal of a suit for default set aside under O 11 R 9 on the ground that the plaint should have been rejected.<sup>6</sup>

This rule does not apply to Chartered High Courts in the exercise of their ordinary, or extraordinary original civil jurisdiction (see O 49 R 3 *infra*). The High Court of Allahabad has in the undermentioned case<sup>7</sup> held that this rule is inapplicable to their appellate jurisdiction also notwithstanding the provisions of Section 107 of the Code.

**3. "Where it does not disclose a cause of action."** — When a plaint is filed it is the duty of the Court to see that the plaint contains the necessary allegations which must be proved before a decree could be given and if there are not the necessary allegations to reject the plaint.<sup>1</sup> To enable a Court to reject a plaint on this ground it

#### Note 2

- 1 (24) AIR 1924 Oudh 413 (414) (See also cases cited in S 2 (2) N 18 Foot note 3)
- 2 (15) AIR 1915 Mad 483 (484) (Order 82 is not exhaustive and does not deal with the case of a suit filed contrary to the interests of a minor)
- 3 (10) 7 Ind Cas 600 (600) (Sind)
- 4 (85) 1885 All W N 294 (294)
- (24) AIR 1924 Nag 80 (80)

no cause of action)

- (69) 11 Suth W N 223 (223) (Mis-statement of cause of action may be allowed to be amended)
- (98) 8 Mad L Jour 187 (189) (Court fee not paid on the alternative prayer — Dismissal is not proper)
- (See (38) AIR 1938 All 497 (500) (The rejection of the plaint under O 7 R 11 is a matter prior to the issue of notice to a defendant and after

apply where Appellate Court acts under S 12 of the Court fees Act — S 10 of the Court fees Act will apply.)

- 6 (24) AIR 1924 Pat 271 (272) 2 Pat 784
- 7 (90) 12 All 129 (152) (FB) (In this case clauses (a) and (b) of S 54 of the Code of 1877 only were considered)

#### Note 3

- 1 (28) AIR 1923 Cal 425 (425) 55 Cal 590 (Case against numerous defendants—Court must examine the plaint before issuing the summonses to see if the plaint reveals a cause of action — If no cause of action is revealed plaint must either be rejected or returned for amendment)
- (23) AIR 1923 Lah 290 (291) (Plaint disclosing no cause of action — Suit dies and no question of jurisdiction arises)
- (17) AIR 1917 Low Bur 28 (29 30) 9 Low Bur Rul 37 (Before admitting a plaint for mere declaration as to property Court must see that allegations as to plaintiff being in possession of the property are made)
- (92 96) 2 Upp Bur Rul 244
- (72 92) 1872 92 Low Bur Rul 365 (Court shall consider the plaint before action is taken upon it)

- (39) AIR 1939 Lah 158 (160)

O. 7 R. 11  
Notes 3-4

should look at the *plaint* and at nothing else<sup>1</sup> In asking the Court to decide an issue like this (which is essentially a *demurrer*) the defendants must be taken to admit *for the sake of argument* that the allegations of the plaintiff in his *plaint* are true *modo et forma*—in manner and form<sup>2</sup> In doing so they must be taken to reserve their right to show that those allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled The power to reject a *plaint* under this clause must be exercised only if the Court comes to the conclusion that even if all the allegations are proved, the plaintiff would not be entitled to any relief whatever<sup>4</sup>

As to cases where a cause of action accrues after the presentation of the *plaint*, see Order 7 Rule 7

The expression "cause of action" as used in this rule does not mean a claim which is still enforceable under the law of limitation Where, therefore, a suit is barred by time it cannot be said that the *plaint* does not disclose a cause of action, and that it falls to be dealt with under clause (a) The Court may, however, proceed under clause (d)<sup>5</sup>

3. "Where the relief claimed is undervalued." — If the Court comes to the conclusion that the plaintiff's valuation of a suit is fictitious it can require him to make a correct valuation and can reject the *plaint* on his failure to do so<sup>1</sup> and this rule applies even to cases in which under the Court fees Act it is provided that the amount of court fee is to be determined according to the amount at which the relief sought is valued in the *plaint* (see Court fees Act, Section 7, sub s 4)<sup>2</sup> But the Court cannot *itself* fix a valuation in place of the plaintiff's valuation<sup>3</sup> If the correct valuation would make the Court incompetent to try the suit, then the matter falls under Rule 10 *ante*, and not under clause (b) of this rule (see O 7 R 10 Note 2)

In order to determine whether a suit is properly valued or not, the Court must confine its attention to the *plaint* and should not look to other circumstances which

2 (17) AIR 1917 All 855 (356) 30 All 516 (Per Walsh J)  
(78) 10 Bom H O R 182 (185) (Should not refer

rejection)

(73) 10 Bom H O R 17 (18)

(70) 7 Bom H O R 92 (101)

{See also (31) AIR 1931 Cal 659 (661) 58 Cal 539}

5 (32) AIR 1932 All 543 (545) 54 All 525

Note 4

of action in determining whether there is cause of action for suit — It is not precluded from considering other allegations in the *plaint* )  
(35) AIR 1935 Pat 449 (450) (For the purpose of deciding whether the *plaint* discloses any cause of action evidence of defendant is not necessary—Such question should be decided on

not proper )

2 (17) AIR 1917 All 855 (356) 30 All 516 (Per Walsh J)

3 (17) AIR 1917 All 78 (79) 30 All 723

may subsequently influence the judgment of the Court as to the true value of the relief sought <sup>4</sup>

See also Note 5 below and Section 6 Note 4

As to Court's powers of rejection for undervaluation in cases where the plaintiff is entitled to put his own valuation see the undermentioned cases <sup>5</sup>

**5. Where the plaint is insufficiently stamped** — Where the plaint is properly valued either at the time of the presentation itself or at a time subsequent thereto, in pursuance of an order of the Court under clause (b) but is *insufficiently stamped*, the Court can act under this rule <sup>1</sup> But the Court cannot exercise the powers conferred under this clause after the suit has been *decided finally* so far as that Court is concerned <sup>2</sup> Where however, the order for making good the deficiency in court fee is made before the final decision in the suit the fee can be realised in execution even after the final decision <sup>3</sup>

Under the old Code there was a conflict of opinion as to whether a suit would become barred by limitation where the deficiency in court fee is supplied *after* the period of limitation for the suit but *within the time fixed* by the Court The conflict has now been set at rest by the enactment of Section 149 For a full discussion of the subject see Note 7 to Section 149 and the undermentioned cases <sup>4</sup>

A plaint cannot be rejected under this rule for undervaluation or for insufficiency of stamp unless the plaintiff is *given an opportunity* to correct the valuation or to supply the deficient stamp, as the case may be *within a time to be fixed* by the Court, and he fails to do so <sup>5</sup> Nor does the use of the words 'shall be rejected' prevent

(59) 18 Bom 517 (519)

(30) AIR 1930 Cal 686 (688) 58 Cal 281 (This rule is not meant to enlarge any taxing Section) [But see (57) 11 Cal W N 705 (711 712)]

4 (24) AIR 1924 Cal 969 (969)

(85) AIR 1935 Cal 278 (274 275)

[See (85) AIR 1935 Cal 838 (840) (Mere form

(05) 1905 Pun Re No 104 p 319 (FB)

(01) 4 Oudh Cas 103 (114) (The Court has a discretion to extend time)

(09) 3 Ind Cas 557 (558) (All) (Deficiency made

—Future mesne profits or future damages can not be taken into account for purpose of court fees )]

■ (30) AIR 1930 Cal 473 (474) 56 Cal 275

(29) AIR 1929 Mad 396 (398)

(31) AIR 1931 Pat 78 (79) 10 Pat 432

#### Note 5

1 (32) AIR 1932 Cal 685 (686)

(31) AIR 1931 Lah 692 (623)

(34) AIR 1934 All 989 (990)

2 (85) 7 All 528 (532)

(35) AIR 1935 Lah 75 (76) (Decree itself directing levy of additional court fee is bad and can not stand)

(25) AIR 1925 Lah 326 (327) (Suit dismissed on merits—Order for additional court fee is in competent)

3 (34) AIR 1934 Oudh 396 (398)

4

<sup>1</sup> Cases under the new Code in addition to those given in Note 7 to S 149

5

(37) AIR 1937 Pat 550 (553) 16 Pat 600 (S B)

(Suit filed in time—Deficiency made up within time allowed by Court after limitation—Plaint is within time)

(38) AIR 1938 Mad 560 (562) (Plaint insufficiently stamped filed on last day of period of limitation—Court allowing certain time for payment of deficient court fee—Proper court fee paid within time allowed but beyond period of limitation for suit—Suit is not time barred)

5 (30) AIR 1930 Cal 686 (688) 58 Cal 281

# **O. 7 R. 11** **Note 5**

the Court from exercising its powers under Section 148 of the Code and enlarge the time fixed by it from time to time<sup>6</sup> But the plaintiff cannot, as of right claim extension of the time fixed by the Court The question depends on the discretion of the Court<sup>7</sup> No *express* order is necessary for such extension of time An extension may be *inferred* from the fact that the Court has actually allowed a thing to be done beyond the prescribed time<sup>8</sup>

The rule does not apply to applications for leave to sue in *forma pauperis* Hence a Court is not bound on its dismissing an application for leave to sue in *forma pauperis* to grant a time within which a properly stamped plaint could be filed<sup>9</sup>

Where a plaint is written upon insufficiently stamped paper and the plaintiff does not supply the requisite stamp within the time fixed by the Court can he be allowed to reduce his claim so as to bring it within certain court fees? There is a conflict of opinion on this point The High Courts of Allahabad and Madras have held that it is open to the plaintiff to relinquish a portion of the claim in order to bring it

- (88) 1898 Pun Re No 156 ■ 417
- (96) AIR 1936 Mad 676 (677) (Under ■ 149 Court can accept deficient court fees after the time fixed but it cannot refuse to fix time under O 7 R 11)
- (98) 8 Mad L Jour 187 (189)
- (30) AIR 1930 Oudh 104 (105) 5 Luck 474 (Reasonable time should be allowed to make up deficiency)
- (22) AIR 1939 Pat 56 (56)
- (14) AIR 1914 Lah 268 (269) 1914 Pun Re No 85 (Deficiency not supplied within time fixed — Plaint must be rejected)
- (1900) 27 Cal 376 (378) (If within that time period of limitation expires the suit is barred by time if the deficiency is made up after the time fixed)

sufficient court fee has been by design or due to inadvertence the Court is bound by the mandatory terms of O 7 R 11 to give effect to the

upheld, it can reject plaint if deficiency

784 (Dismissal for default cannot be set aside on ground that plaintiff ought to have been rejected under this rule)

(But see (38) AIR 1938 Lah 861 (864) (F B) (Per Din Mohammad and Coldstream JJ in Order of Reference—It is not incumbent upon a Court of Justice to allow the plaintiff an opportunity to make good the deficiency under O 7 Rule 11))

- 6 (97) 19 All 240 (248 244)
- (92) 16 Bom 208 (260)
- (04) 31 Cal 75 (78)
- (19) AIR 1919 Cal 261 (261)
- (09) 2 Ind Cas 1 (2) (Cal)
- (10) ■ Ind Cas 424 (425) (Cal)
- (05) 2 Cal L Jour 70 (72 73) (Deficient court fee paid one day after time fixed—If on that date suit is not barred it can go on)
- (28) AIR 1923 Lah 274 (275)
- (94) 1894 Pun Re No 113 p 485
- (26) AIR 1926 Mad 676 (677)
- (99) 9 Mad L Jour 348 (348)
- (97) AIR 1907 Oudh 507 (507) (Refusal to take the deficient court fee for delay by one day is an

misappropriated the amount and repeatedly applied for time—Plaint was finally rejected—<sup>1</sup> applied for

(1938) All 470 (Payment of deficiency—Ques

that the action of the plaintiff in instituting a plaint on a deficient court fee is not bona fide and the worst that the Court can do is to ask the plaintiff to make up the court fee on the very day on which the plaint is presented) (See also (74) AIR 1924 Pat 271 (272) 2 Pat

- 7 (36) AIR 1936 Pat 310 (311)
- (38) AIR 1938 Mad 542 (543 544)
- 8 See Note 8 to Section 148 ante
- (07) 31 Cal 20 (24 29) (F B)
- [See also (26) AIR 1906 Mad 676 (677)]
- 9 (35) AIR 1923 Mad 878 (8 9)

within a certain court fees<sup>10</sup> The High Courts of Calcutta and Bombay held in earlier decisions that under such circumstances the Court had no jurisdiction to allow the plaintiff to reduce his claim and was bound to reject the plaint on the ground that this rule is mandatory.<sup>11</sup> A contrary view has however been taken in the undermentioned decisions of the same High Courts<sup>12</sup>

Where a plaintiff is given time to pay additional court fees under this rule and he does not appear on the date fixed in consequence of which the Court dismisses the suit the order though one of dismissal must be deemed to be an order under this rule and not under O 9 R 8 so that a fresh suit on the same cause of action will not be barred under O 9 R 9<sup>13</sup> Clause (c) of this rule does not apply to the case of failure of a plaintiff to pay stamp duty on a partition decree<sup>14</sup>

Where plaintiff is given time to make up the deficiency in court fees and within the time so allowed the plaintiff applies for permission to continue the suit as a pauper, the application should be considered on its merits and the plaint should not be considered as rejected for failure to pay the deficiency in court fees<sup>15</sup>

It has been held that when a plaint was re presented in a proper Court after being returned by the wrong Court where it was originally filed the proper Court is not debarred from requiring the proper stamp to be affixed though no objection was taken in the wrong Court<sup>16</sup>

**6 Memorandum of appeal insufficiently stamped** — This rule applies in terms to *plaints* insufficiently stamped. Where a *memorandum of appeal* is found to be presented with an insufficient court fee the Court can allow time for paying the deficit court fee<sup>1</sup>. But is the Court bound to grant time to the appellant to make up the deficiency? There is a conflict of opinion on this point. According to the High Courts of Bombay<sup>2</sup> Calcutta<sup>3</sup> and Patna<sup>4</sup> and the Chief Court of

10 (35) 27 All 151 (159)

(29) AIR 1929 All 808 (809)

(81) AIR 1931 Mad 716 (716)

11 (17) AIR 1917 Cal 77 (78) 44 Cal 352 (Court has no power to allow amendment by omitting prayer in respect of which extra court fee was ordered)

(14) AIR 1914 Bom 117 (118)

12 (39) AIR 1939 Bom 354 (357) (*Provisio facit* O 7 R 11 is mandatory only *rebus sic stantibus* that is to say when the Court has to deal simply with the position referred to in the rule and would not preclude an amendment of the

rule at  
11 and

tional decree that it was to be of no effect unless deficit court fee is paid—Such order is to be deemed an order of rejection.]

14 (19) AIR 1919 All 269 (270)

15 (33) AIR 1933 Cal 238 (239)

(39) AIR 1933 Mad 493 (499)

(29) AIR 1929 Mad 828 (829) 53 Mad 43

(36) AIR 1936 Cal 221 (222) (Mandatory provision contained in Rule 11 is intended for cases where no other complications intervene and Court has sufficient inherent power to depart from normal procedure to suit exigencies of the situation)

16 (31) AIR 1931 Pat 89 (40)

#### Note 6

1 (38) AIR 1938 Nag 322 (323)

(35) AIR 1935 Lah 448 (450) 17 Lah 127

2 (14) AIR 1914 Bom 249 (250) 21 Ind Cas 337 (337 338) 38 Bom 41

3 [See (32) AIR 1932 Cal 489 (484 493) 59 Cal 383 (Rejection of memorandum of appeal for deficiency in stamp—Properly stamped memorandum can be filed)]

4 (39) AIR 1939 Pat 437 (432) 160 Ind Cas 791 (791)

(33) AIR 1933 Pat 13 (13)

[See also (39) AIR 1939 Pat 83 (85) 17 Pat 697 (If an insufficiently stamped memoran

to allow abandonment of claim before rejecting  
power

value of property and put in deficit court fee—  
Non compliance with order—Suit dismissed for  
default on rejecting permission to withdraw  
on of  
R 1

Condi



**O. 7 R. 11**  
**Notes 6-7**

Oudh<sup>5</sup> this rule applies to memorandum of appeals also by virtue of Section 107. A contrary view has been taken by the High Courts of Allahabad,<sup>6</sup> Lahore<sup>7</sup> and Madras<sup>8</sup> and the Judicial Commissioners Court of Nagpur.<sup>9</sup> This view proceeds on the ground that the insertion of Section 582 in the old Code corresponding to Section 149 providing for memorandum of appeals, shows that the rule does not apply to memorandum of appeals.

Where an appeal is filed in time and the deficient court fee is paid within the time fixed by the Court though on that date the appeal would have been barred by limitation, the appeal must be deemed to have been filed on the date when it was presented.<sup>10</sup>

**7 Where the suit appears to be barred by any law — Clause (d) —** This clause authorises the rejection of a plaintiff where the suit appears from the statement in the plaint to be barred by any law.<sup>1</sup> Where a plaintiff appears to be barred by limitation and no ground of exemption from limitation is mentioned therein the Court

dum of appeal has in fact been accepted by the Court by inadvertence or when the amount of the court fee payable is open to doubt or the amount of the fee cannot be ascertained by the Court till the record is received or it appears

14 20 1 20 01 11

[But see (17) AIR 1917 Pat 26 (27)  
(35) AIR 1935 Pat 201 (201) (When deficiently stamped memo of appeal is filed Court can reject it at once or allow deficit to be made good)]

5 (30) AIR 1930 Oudh 104 (105) 5 Luck 474  
(35) AIR 1935 Oudh 119 (120) 10 Luck 476

[See also (87) AIR 1937 Oudh 414 (416) 13 Luck 837 (Appeal on insufficiently stamped

[See (92) 15 Mad 29(34) (Memorandum of appeal insufficiently stamped—Court is competent to levy the deficient stamp duty)

(38) AIR 1938 Mad 316 (317) (Court refusing to allow time for payment of deficient court fee—Memorandum of appeal cannot be held to be presented in time)]

[But see (90) 12 All 129 (149) (FB) (Deficient court fee if supplied after limitation appeal

**Note 7**

1 (93) 23 All 187 (193) (Suit against Secretary

14 20 1 20 01 11

late Court has no right to reject a memorandum of appeal on the ground that it is insufficiently stamped)

(50) 2 All 875 (876) (Should fix time under S 54 (b) of 1882 Code)]

7 (20) AIR 1920 Lah 92 (93) 1 Lah 234 (Decided on the assumption that S 149 applied and not this rule—Time for payment was refused as not being a bona fide case of mistake)

[But see (88) 1888 Pun Re No 156 p 417 (This would appear not to be good law in view of AIR 1920 Lah 92)]

8 (16) 1915 Mad 426 (427)

(35) AIR 1935 Mad 316 (316)

[But see (37) 1932 Mad W N 101 (101)]

9 (30) AIR 1930 Nag 221 (225) 26 Nag LR 183

10 (92) 15 Mad 78 (79)

been rejected under this rule as the suit was barred by limitation — It is submitted that in such a case the suit ought to be dismissed under S 3 of the Limitation Act and not to be rejected under this rule)

(1900 07) 1 Low Bur Rul 16 (17) (Plaint not showing that Court has jurisdiction might be

(29) AIR 1929 Oudh 495 (493) (Suit not barred by any law on the face of the plaint—But if

may in proper cases allow an amendment of the plaint under O 17 R 17 so as to make a plea of exemption if any<sup>2</sup>

O. 7 R. 11  
Notes 7-10

**8 Rejection of plaint on other grounds** — As has been seen in Note 2 *ante* the instances given in this rule are not exhaustive of the cases in which a Court may reject a plaint. But a Court has no power to reject a plaint merely because it is defective in that it does not comply with some provisions of law<sup>1</sup>. The proper procedure in such a case is to call on the plaintiff to cure the defect and on his failure to do so to proceed to decide the suit forthwith and to dismiss it under O 17 R 11 or to reject the plaint under the Court's inherent powers<sup>2</sup>. Section 203 sub-section 4 of the Madras Estates Land Act (I of 1908) provides that the following clause shall be deemed to be added to this rule as clause (c) *viz* —

(c) In any suit to which Section 203 of the Madras Estates Land Act 1908 applies if the certified copy therein mentioned is not annexed to the plaint and the plaintiff on being required by the Court to produce it fails to do so within the time allowed by the Court

**9 Rejection of plaint in part** — A plaint cannot under this rule be rejected *in part* and returned in part. It should be rejected as a whole<sup>1</sup>. Thus where in a suit by two plaintiffs against the Secretary of State for India one of them has failed to give notice as required by Section 80 of the Code the plaint should be rejected as a whole and not merely as regards the plaintiff who had failed to give notice<sup>2</sup>.

**10 At what stage plaint can be rejected** — The provisions of this rule are imperative and can be brought into operation at *any stage* of the suit. Therefore the registration of a plaint does not prevent its rejection under this rule<sup>1</sup>. Where however

{ 38 } AIR 1938 Pat 127 (128) (Secretary of State impleaded in suit along with other defendants — No statement in plaint about issue of notice under Section 80 )

2 { 09 } 8 Ind Cas 159 (160) 34 Bom 250  
[See also { 89 } AIR 1932 Cal 146 (146) 59 Cal 150 ]

#### Note 8

1 { 20 } AIR 1920 Pat 82 (83)  
{ 21 } AIR 1924 Lah 608 (608) (Non production of a document under O 7 R 18 )  
(1864) 2 Bom H O R 369 (369) (Do )  
{ 12 } 17 Ind Cas 580 (581) (Mad) (Want of signature and verification )  
{ 11 } 10 Ind Cas 731 (732) 7 Nag L R 33 (Want

{ 21 } AIR 1921 Sind 106 (109) 17 Sind L R 9

{ 35 } AIR 1935 Mad 399 (399)

{ 36 } AIR 1936 Lah 1091 (1092) (Note appended to an issue to the effect that the plaint was rejected to the extent of the claim for interest—Note does not amount to rejection of plaint as contemplated by Code )

[See however { 37 } AIR 1937 Lah 800 (801) (Suit on pro note executed by A B C and D — Court ordering that suit could not proceed against A on ground that pro note was signed by him at place beyond that Court's jurisdiction—Order held to be tantamount to rejection of plaint as regards A and appeal was therefore competent )]

2 { 31 } AIR 1931 Mad 175 (176) 54 Mad 416

{ 85 } AIR 1935 Mad 399 (399)

#### Note 10

1 { 1900 } 27 Cal 376 (378)

{ 22 } AIR 1922 Cal 505 (508) 49 Cal 880

{ 97 } 1 Cal W N 670 (671)

parties and causes of action or nonjoinder of parties )

{ 03 } 7 Cal W N 615 (616 617) (Insufficient identification of property )

[See { 97 } 1 Cal W N 674 (676) ]

But see the following cases under the old Code  
{ 87 } 14 Cal 435 (439)

{ 01 } 1901 Pun Re No 56 p 178 (Nonjoinder of an accessory party as plaintiff )

{ 67 } 8 Suth W R 15 (16) (FB) (Misjoinder of defendants and causes of action )

2 { 0 } AIR 19 0 Pat 89 (83)

#### Note 9

1 { 07 } 49 AH 335 (326)

{ 31 } AIR 1931 Mad 175 (176) 54 Mad 416

53 of the  
was held  
want of

cause of action only at or before the first hear

**O. 7 R. 11**     a plaintiff is rejected in the early stages of the suit, there is no justification for allowing  
**Notes 10-11**     excessive costs to the defendant <sup>2</sup>

**11. Appeal.** — An order rejecting a plaintiff, whether under this rule or not, is a decree as defined in Section 2, sub-section 2 *ante* and hence is appealable as such <sup>1</sup> But in cases coming under clause (b) of this rule, if the order is based merely upon a valuation of the subject-matter of the suit and the only question involved is as to the amount upon which the court-fee has to be paid, the decision of the first Court is final under Section 12 of the Court-fees Act. Where, however, the question is, what provision of the Court-fees Act applies to the relief sought for in the plaintiff or under what category the suit falls, the decision is not final under that Section and an appeal is not barred <sup>2</sup>

by the Appellate Court and remanded is of no moment )

decree sheet } }

(But see ('10) 5 Ind Cas 871 (872) (All) (Order of rejection by a Court acting under the Agra Tenancy Act is not a decree under S 127 of that Act ) )

2. ('77) 1 All 800 (862)

(80) 10 Bom 610 (616) (F B) (The decisions in

1144 200 } }

2. ('14) AIR 1914 Lah 268 (269) 1914 Pnn Re No 85

#### Notes 11

1 (28) AIR 1929 Cal 226 (237)

(21) AIR 1921 Lah 43 (43) (Memorandum of appeal must bear an *ad valorem* court fee)

(20) AIR 1929 Lah 83 (84) (It is not essential that a decree should be drawn up)

(80) 18 Cal 189 (191) (Plaintiffs proved on evi-

Judge was not one within his proper function—Appeal lies)

('01) 23 Cal 834 (338)

('81) 6 Cal 249 (250) (Section 688 (Act of 1877) removed the finality declared by S 12 of Court fees Act)

rejection was competent — even if no appeal by revision was competent as there was case decided )

All 484 (Rejection of plaintiff does not amount

appeal and plaintiff if any can be ordered only

lies as rejection is not under S 12, Court fees Act)

('24) 1894 Bom P J 425 (Decision final under

Court fees Act, was appealable ) }

An Appellate Court can reject a memorandum of appeal under this rule read with Section 107<sup>3</sup>. But a memorandum of appeal cannot be rejected on the ground that the court fee on the *plaint* in the trial Court has not been paid by the plaintiff appellant<sup>4</sup>.

As to whether the rejection of a memorandum of appeal is a decree (see Note 18 to Section 2 sub section 2 *ante*)

Where a *plaint* returned under R 10 *ante* for presentation to the proper Court is rejected by the latter Court for not making up the deficiency in court fee and the order of return is reversed on appeal the plaintiff having suppressed the fact of rejection the appellate order is void and the only remedy of the plaintiff is to appeal against the order of rejection<sup>5</sup>.

See also the undermentioned cases<sup>6</sup>

**12 Revision** — An order rejecting a *plaint* being a decree and appealable as such a revision against such an order is incompetent<sup>1</sup>. But where appeal is barred under Section 12 of the Court fees Act<sup>2</sup> or where an appeal against an order under this rule is rejected as incompetent<sup>3</sup> or where the *plaint* is rejected by a Provincial Small Cause Court<sup>4</sup> the order is revisable if the conditions of Section 115 are satisfied. There is a conflict of opinion on the question whether an order demanding *additional court fee* is open to revision so long as the order has not resulted in the rejection of the *plaint* for non compliance with the order. It has been held in the undermentioned cases<sup>5</sup> that no revision lies since the plaintiff has another remedy open to him by way of appeal on the rejection of the *plaint*. The contrary opinion has been maintained in the undermentioned cases<sup>6</sup> on the ground that the question is really one of jurisdiction as the *plaint* has to be rejected if the stamp duty has not been paid. According to the High Court of Calcutta<sup>7</sup> where the plaintiff's valuation is accepted by the Court as correct on an examination of the facts alleged the order is not open to revision inasmuch as such an order does not fall within Section 115 and as the decision could be challenged in an appeal from the decree in the suit.

■ (37) AIR 1937 All 280 (281) I L ■ (1937) All 484

4 (37) AIR 1937 All 280 (281) I L R (1937) All 484

5 (29) AIR 1929 Bom 207 (201 205)

6

Appeal and second appeal are competent—Revision from Appellate Court's order is not competent.)

(See also (19) AIR 1919 Lah 11 (11 12) 1919 Pun Re No 120 (Where under Court fees Act the order is final neither appeal nor revision lies)

(See also (19) AIR 1919 Lah 11 (11 12) 1919 Pun Re No 120 (Where under Court fees Act the order is final neither appeal nor revision lies)

and directing the trial Court to proceed with the trial of the suit. Such order is not an order under O 41 R 23 and is not appealable under O 43 R 1 (n).

(35) AIR 1935 Nag 83 (86) (F B) (Order rejecting *plaint* for failure to pay additional court fee)

O. 7 R. 11  
Notes 12-13

See also the undermentioned case<sup>6</sup>

**13. Review.** — An order rejecting a plaint can be reviewed if the conditions of O 47 R 1 are satisfied<sup>1</sup> It has been held by the Allahabad High Court that the Court has power to restore the suit to the file after it has rejected a plaint under this rule<sup>2</sup> It has also been held that the Court can treat an application for restoration as a fresh plaint under O 7 R 13 *infra*<sup>3</sup>

O. 7 R. 12

**R. 12.** [S. 55.] Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

Procedure on rejecting  
plaint

[1877, S. 55.]

**1. Rejection of memorandum of appeal.** — It has been held by the High Court of Allahabad that where a memorandum of second appeal is rejected by virtue of this rule read with Section 107, the procedure prescribed by this rule should be followed<sup>1</sup>

O. 7 R. 13

**R. 13.** [S. 56.] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Where rejection of plaint  
does not preclude presenta-  
tion of fresh plaint.

[1877, S. 56; 1859, S. 36.]

**1. Rejection of plaint does not preclude fresh plaint.** — Where a plaint is rejected under Rule 11 *ante*, the plaintiff is not thereby precluded from presenting a fresh plaint in respect of the same cause of action, provided his right of action is not barred by the law of limitation<sup>1</sup> But where the order is in substance one of dismissal though in form one of rejection, as where the Court purports to reject the plaint after a full trial on the merits and after recording a finding adverse to the

8. (35) AIR 1935 Cal 836 (337) 62 Cal 61 (Suit filed when claim is about to be barred—Rejection of plaint — No appeal filed from order — Court cannot use inherent power to set aside order—If it uses it High Court can interfere in revision)

Note 13

1.

derived under S 151 C P C)

Order 7 Rule 12 — Note 1

1. (93) 15 All 367 (370) (Per Atkman J)  
[See also (39) AIR 1939 Sind 221 (221) I L R (1939) Har 527 (Provisions of O 7 by reason of S 141 of the Code apply *mutatis mutandis* to memoranda of appeals as well as to plaints)]

Order 7 Rule 13 — Note 1

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P)

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ng a

plaint can be reviewed under O 47 R 1, C P C)]

2. (29) AIR 1939 All 452 (453)

3. (35) AIR 1935 All 985 (986) (It can allow the old court fee paid on the rejected plaint to be computed towards court fee on the fresh plaint, under Sec. 149 and under its inherent powers

of suit for default in paying the court fees and in not giving correct valuation of property — Order is one of rejection and fresh suit is not barred)

plaintiff, a subsequent suit in respect of the same subject matter based upon the same cause of action will be barred as *res judicata* <sup>3</sup>

See also Note 13 to Order 7 Rule 11 *ante*

O. 7 R. 13  
Note 1

## DOCUMENTS RELIED ON IN PLAINT

O. 7 R. 14

**R. 14.** [S 59] (1) Where a plaintiff sues upon a document

**Production of document in his possession or power, he shall produce**  
**on which plaintiff sues** it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint

(2) Where he relies on any other documents (whether in

**List of other documents** his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

[1877, Ss 58, 59, 62, 63; 1859, S 39]

### Local Amendments

OUDH

*Substitute the following for sub rule (2)*

(2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court when the plaint is presented such of them as are in his possession or power In regard to the documents not in his possession or power he shall if possible state in whose possession or power they are and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose

*Explanation* — A certified copy of a public document is a document 'in the power of a party but where a document is in the possession of a person other than the plaintiff it will not be deemed to be in the power of the plaintiff

N-W F P

*Add to sub rule (2) and shall also produce such documents as are in his possession or power*

### Synopsis

- |   |  |   |
|---|--|---|
| 1 Scope and object of the Rule  |  | 3 Failure to comply with this Rule See Note 1 and Rule 18 |
| 2 Right of the defendant to inspect the documents relied on by the plaintiff See O 11 R 15 Note 3 |  | 4 Loss of document after production See Note 1            |

### Other Topics (miscellaneous)

Defendant entitled to copy of such document before filing written statement See Note 3

He shall enter such document in a list See Note 1

Production of document on which plaintiff sues See Note 1

[See also (90) 12 All 129 (148) (FB) (S in law in the case of death and of a suit under E 10 Court fees Act) (80) 8 All 299 (237) (Do)]

2 (20) AIR 1920 Mad 449 (451)

# **O. 7 R. 14** **Note 1**

**1. Scope and object of the Rule.** — This rule makes a distinction between a document *sued* on and a document *relied* on by the plaintiff as evidence in support of his claim<sup>1</sup> Where a plaintiff *sues* upon a document he should *produce* the document into Court when the plaint is presented<sup>2</sup> except where such document is an entry in a shop book or account, in which case he should produce a *true copy* of the entry to be filed with the plaint and the procedure laid down in Rule 17, *infra*, should be followed Where the plaintiff *relies* on any document as *evidence* in support of his claim, he should enter such document in a list to be annexed to the plaint, whether the document is in his power or not<sup>3</sup> But even such documents should, if they are in his possession or power, be *produced* into Court at or before the first hearing of the suit<sup>4</sup> (See O 13 R 1, *infra*) A document on which the plaintiff has not in terms *sued*, and which is not produced into Court when the plaint is presented, can only be treated, if subsequently produced, as a piece of *evidence* and not as *creating any rights* in favour of the plaintiff<sup>5</sup>

The object of this rule is to exclude documents as to the existence of which, at the date of the suit there may be reasonable doubt and as to the genuineness of which suspicions might arise when subsequently tendered<sup>6</sup> The provisions of this rule therefore are imperative<sup>7</sup> and compel the plaintiff to produce or disclose all documents on which he relies in support of his claim<sup>8</sup> But the plaintiff's failure to produce or disclose the documents as provided by this rule does not entail the return<sup>9</sup> or rejection of the plaint or the dismissal of the suit<sup>10</sup> The only penalty for such default is that he cannot produce the documents in evidence at the hearing without the leave of the Court (see Rule 18 *infra*)

This rule however, does not apply if the plaintiff himself is not *aware* of the existence of any documents which he subsequently discovers as supporting his claim<sup>11</sup>

It has been held by the Privy Council that if the plaintiff produces the document sued on, as required by this rule, and the document is lost subsequently from the custody of the Court, the plaintiff should be allowed to adduce secondary evidence of the document under Section 65 of the Evidence Act, 1872, without showing how the original document was lost<sup>12</sup>

## **Order 7 Rule 14 — Note 1**

1 (1901) 17 B.L.R. 1000 (C)

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the documents later on of which a list was not given in the plaint, Appellate Court must consider them)

(1903) 12 Cal W N 312 (315) (When a list of documents has been attached to the plaint he need

evidence at a late stage)

[See also (31) AIR 1931 Cal 458 (461) 58 Cal 418 (The documents themselves need not be annexed to the plaint)]

4 (22) AIR 1922 Pat 569 (571)

5 (16) AIR 1916 P O 217 (219) (P O)

(37) AIR 1937 Mad 122 (123)

6 (09) 11 Ind Cas 946 (948) (Cal)

(120) AIR 1920 Pat 811 (812) (If the documents are shown to be not fabricated they may be received in evidence later on)

7. (09) 2 Ind Cas 946 (948) (Cal)

8 (17) AIR 1917 P C 6 (8) 40 Mad 402 44 Ind App 98 (P O) (Practice of withholding documentary evidence by parties trusting upon abstract doctrine of onus of proof deprecated by Privy Council)

9 (30) AIR 1930 Lah 480 (480)

10 (93) 22 Bom 971 (972)

(66) 2 Bom H C R 363 (369, 370)

(21) AIR 1921 All 218 (218)

(24) AIR 1921 Lah 608 (608)

11. (21) AIR 1921 Nag 43 (43 50)

12 (25) AIR 1923 P O 80 (82) (P O)

2. Right of the defendant to inspect the documents relied on by the plaintiff. — See Order 11 Rule 15, Note 3.
3. Failure to comply with this Rule. — See Note 1 and Rule 18
4. Loss of document after production. — See Note 1

O. 7 R. 15  
Notes 2-4

**R. 15. [S. 60.]** Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

O. 7 R. 15

Statement in case of documents not in plaintiff's possession or power.

[1877, S. 60.]

Local Amendment

ODDH

Delete the rule

**R. 16. [S. 61.]** Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

O. 7 R. 16

Suits on lost negotiable instruments.

[1877, S. 61.]

1. Suit on a lost negotiable instrument. — In a suit based on a lost negotiable instrument, the plaintiff should give sufficient indemnity against possible claims of persons in respect of that instrument.<sup>1</sup>

**R. 17. [S. 62.]** (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

O. 7 R. 17

Production of shop-book.

Order 7 Rule 16 — Note 1

1. (19) 16 Ind Cas 769 (771) (Lab)  
(20) AIR 1920 Mad 336 (336)



O. 7 R. 17  
Note 1

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

[1877, Ss. 58, 62, 63; 1859, S. 39.]

### Local Amendments

#### ALLAHABAD

Add the following proviso to sub-rule (2)

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in Order 13 Rule 12 as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original

#### LAHORE

After sub rule (2) add the following Explanation

*Explanation* — When a shop-book or other account written in a language other than English or the language of the Court is produced with a translation or transliteration of the relevant entry, the party producing it shall not be required to present a separate affidavit as to the correctness of the translation or transliteration, but shall add a certificate on the document itself, that it is a full and true translation or transliteration of the original entry, and no examination or comparison by the ministerial officer shall be required except by a special order of the Court

#### UDH

Add the following proviso.

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in Order 13 Rule 12, as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original

1. **Shop-book or account.** — Section 4 of the Bankers' Books Evidence Act<sup>1</sup> provides that a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as the original entry is now by law admissible, but not further or otherwise. The term "Bankers' Books" includes ledgers, daybooks, cash books, account books and all other books used in the ordinary course of business of a bank.<sup>2</sup> Therefore, if the document sued on is a banker's book it is not necessary to produce the original book itself along with the plaint. It is enough if a certified copy of the entry or entries is produced. But it should be shown that the bank is one to whose books the provisions of the Bankers' Books Evidence Act have been extended.<sup>3</sup>

If the document sued on is not a banker's book but is an entry in a shop-book or account, the plaintiff should produce the book or account at the time of filing the

#### Order 7 Rule 17 — Note 1

1. Act XVIII of 1891

2. The Bankers' Books Evidence Act 1891,

#### S. 2 (3)

3. (1900) 4 Cal W N 433 (134) (F B).  
Act VIII of 1931, S. 2 (2) and S. 3.

plaint together with a true copy of the entry sued on<sup>4</sup> Thereupon the Court or its officers should mark the document for identification<sup>5</sup> and should, if the copy is found to be correct, file the copy along with the plaint

But the fact that the original document is *not* presented along with the plaint, as provided by this rule and the plaint is registered, is not a ground for rejecting the plaint but the plaintiff cannot afterwards produce the document in evidence except with the leave of the Court as provided by Rule 18 *infra*<sup>6</sup>

O. 7 R. 17  
Note 1

**R. 18. [S. 63.]** (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

O. 7 R. 18

Inadmissibility of document not produced when plaint filed.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

[1877, Ss. 58, 62, 63; 1859, S. 39.]

### Synopsis

1. Scope and object of the Rule.
2. Cases where leave is not necessary.
3. Revision.

### Other Topics (miscellaneous)

Appellate Court's power to consider documents rejected or admitted by trial Court See Note 1

"To refresh his (witness's) memory" See Note 2

**1. Scope and object of the Rule.** — The policy underlying this rule is to exclude evidence, the existence of which at the date of the suit is doubtful, and as to the genuineness of which suspicion may arise because it was produced at a late stage of the suit<sup>1</sup> The Court has, however, a wide discretion with regard to the reception of documents which were not produced with the plaint or entered in the list of documents<sup>2</sup> and where there can be no doubt about the genuineness of the documents produced, such as certified copies of public documents or records of judicial proceedings, Courts will not as a rule shut them out<sup>3</sup> But even in such cases leave may be refused

4. ('20) AIR 1920 Lah 136 (140). 1 Lah 6  
[See however ('29) AIR 1928 Pat 555 (557) 7 Pat 589 (In this case it was held that the ac-

### Order 7 Rule 18 — Note 1

1. ('09) 2 Ind Cis 946 (949) (Cal)
2. ('27) AIR 1927 Cal 168 (169, 173)
3. ('09) 111 Cal W N 812 (315)
- ('82) 4 Mad 417 (418) (Improper rejection — Urged as a ground in appeal)
- ('84) 8 Bom 577 (579).

O. 7 R. 18  
Notes 1-3

where there has been unreasonable delay in the production of documents, unless satisfactory reasons are assigned for the delay<sup>4</sup> An Appellate Court will not ordinarily interfere with the discretion exercised by the lower Court under this rule<sup>5</sup>

The leave granted by the Court need not be *express*, but may be gathered from the records and the circumstances of the case<sup>6</sup>

**2. Cases where leave is not necessary.** — Sub rule 2 of this rule enacts that the rule as to the inadmissibility of documents not produced with, or referred to in the plaint, does not apply to the following cases —

- (1) Where the document is to be handed over to the witness for the purpose of refreshing his memory and not to be relied upon as a probative document in itself in support of the plaintiff's case<sup>1</sup>
- (2) Where the documents are produced in answer to any case set up by the defendant<sup>2</sup>
- (3) Where they are produced for the cross examination of the defendant's witnesses<sup>3</sup> The words "defendant's witnesses" include also plaintiff's witnesses who have turned hostile to the plaintiff and whom the plaintiff is permitted to cross examine<sup>4</sup>

**3. Revision.** — The question of admission of evidence is not ordinarily a question of jurisdiction but is merely one of law and no revision will lie in such cases<sup>5</sup>

### Local Amendments

#### ALLAHABAD

Add the following Rules 19 to 25

O. 7 R. 19  
(Allahabad)

'19 Every plaint or original petition shall be accompanied by a proceeding giving an address written in English in block letters at which service of notice, summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature

O. 7 R. 20  
(Allahabad)

20 An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the

- (18) AIR 1918 Cal 320 (330)  
(1864) 1864 Suth W R Act X 67 (68)  
(21) 60 Ind Cas 372 (374) (Pat) (If document is proved to be not fabricated it can be received

- (69) 12 Suth W R 32 (32) 18 Moo Ind App 77 (PC) (Where trial Court admitted documents at a late stage)

Note ■

(Documents produced after close of argument cannot be received in evidence)

5 (85) 8 Mad 373 (374 375) (Documents not filed along with the plaint received by the trial Court — Appellate Court is bound to consider them)

(21) AIR 1921 Nag 49 (50) (Objection as to admissibility of documents cannot be taken for the first time in appeal)

(1864) 1 Suth W R 12 (12) (Documents received

Defendant denying receipt of consideration — Plaintiff in answer producing documents not included in list of documents filed with plaint — Adverse inference could not be drawn against plaintiff )

3. (37) AIR 1937 All 55 (56) (Plaintiff is entitled to tender in evidence previous statement in writing by defendant for purpose of contradicting him under S 145 Evidence Act)

4. (20) AIR 1920 Nag 43 (43 44)  
[See also (53) AIR 1935 Cal 65 (66) CO Cal 341]

Note 3

I. (14) AIR 1914 Cal 826 (827)

District Court within which the party ordinarily resides if within the limits of the United Provinces of Agra and Oudh

O. 7 R 20  
(Allahabad)

21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just

O 7 R 21  
(Allahabad)

22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the notice summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served

O 7 R 22  
(Allahabad)

NOTES—Where service has been effected by affixure of the notice on the outer door of the house but the party is not present on the date fixed for his appearance the Court ought under this rule to order notice by registered post Otherwise the service cannot be considered to be sufficient<sup>1</sup>

This rule applies also to appellate proceedings by virtue of O 41 R 38(3) (added by Allahabad High Court)<sup>2</sup>

23 Where a party engages a pleader notices or processes for service on him shall be served in the manner prescribed by Order 3 Rule 5 unless the Court directs service at the address for service given by the party

O 7 R 23  
(Allahabad)

24 A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the record accordingly Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit

O 7 R 24  
(Allahabad)

25 Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if for any reasons it thinks fit to do so

O 7 R 25  
(Allahabad)

# **BOMBAY**

The following shall be added as Rules 19 to 26

19 Every plaint or original petition shall be accompanied by a memorandum Address to be filed with in writing giving an address at which service of notice or summons or other process may be made on the plaintiff or petitioner Plaintiffs or petitioners subsequently added shall immediately on being so added file a memorandum in writing of this nature

O 7 R 19  
(Bombay)

20 An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides

O 7 R 20  
(Bombay)

21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just

O 7 R 21  
(Bombay)

22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the

O 7 R 22  
(Bombay)

Order 7 Rule 22 (Allahabad)

- O. 7 R. 22 (Bombay)** notice, summons or other process shall be sent to the registered address by registered post pre-paid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served
- O. 7 R. 23 (Bombay)** 23 Where a party engages a pleader, notice or processes on him shall be served in the manner prescribed by Order 3 Rule 5, unless the Court directs service at the address for service given by the party
- O. 7 R. 24 (Bombay)** 24 A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit
- O. 7 R. 25 (Bombay)** 25 Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so
- O. 7 R. 26 (Bombay)** 26 Nothing in these rules shall apply to the notice prescribed by Order 21 Rule 13

## LAHORE

*Add the following as Rules 19 to 25*

- O. 7 R. 19 (Lahore)** "19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature
- O. 7 R. 20 (Lahore)** 20 An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or of the district Court within which the party ordinarily resides if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore
- O. 7 R. 21 (Lahore)** 21 Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just
- O. 7 R. 22 (Lahore)** 22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice summons or other process shall be fixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served
- O. 7 R. 23 (Lahore)** 23 Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by Order 3 Rule 5, unless the Court directs service at the address for service given by the party
- O. 7 R. 24 (Lahore)** 24 A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit

O. 7 R. 25  
(Lahore)

25 Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if, for any reasons, it thinks fit to do so "

**NAGPUR**

Add the following as Rules 19 to 23

O. 7 R. 19  
(Nagpur)

Registered address "19 Every plaint or original petition shall be accompanied by an address at which service of process may be made on the plaintiff or the petitioner. The address shall be within the local limits of the civil district in which the suit or petition is filed or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

O. 7 R. 20  
(Nagpur)

Registered address by a party subsequently added as plaintiff or petitioner 20 Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

O. 7 R. 21  
(Nagpur)

21 (1) If the plaintiff or the petitioner fails to file a registered address as required by Rule 19 or Rule 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

O. 7 R. 22  
(Nagpur)

22 Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

O. 7 R. 23  
(Nagpur)

23 A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform.

**N-W.F.P.**

Add the following as Rules 19 to 22

O. 7 R. 19  
(N-W.F.P.)

"19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons, or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately, on being so added file a proceeding of this nature.

O. 7 R. 20  
(N-W.F.P.)

20 An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed or, of the district Court within which the party ordinarily resides, if within the limits of the North-West Frontier Province.

**O. 7 R. 21**  
(N.-W. F. P.)

21 Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just

**O. 7 R. 22**  
(N.-W. F. P.)

22 A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

#### ODDH

Add the following as Rules 19 to 27

**O. 7 R. 19**  
(Oudh)

19 Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the "registered address" and service thereat shall be deemed to be sufficient service.

**O. 7 R. 20**  
(Oudh)

20 Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

**O. 7 R. 21**  
(Oudh)

21 A registered address shall be within the local limits of the District Court within which the suit or petition is filed if the plaintiff or petitioner resides or carries on business within those limits.

**O. 7 R. 22**  
(Oudh)

22 If a plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

**O. 7 R. 23**  
(Oudh)

23 Where the registered address of the plaintiff or petitioner is within the limits of a head quarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

**O. 7 R. 24**  
(Oudh)

24 In all cases to which Rule 23 does not apply where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed, such plaintiff or petitioner is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

**O. 7 R. 25**  
(Oudh)

25 Whenever a plaintiff or petitioner has engaged a pleader to act for him a notice or process for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at his registered address.

Provided that where a notice is served on a pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions.

*Explanation* — Where ten days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such ten days by the pleader concerned for further time.

26 A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit

O. 7 R. 26  
(Oudh)

27 Nothing in Rules 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner, if for any reason it thinks fit

O. 7 R. 27  
(Oudh)

#### PATNA

*Add the following as Rules 19 to 22*

"19 Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement

O. 7 R. 19  
(Patna)

20 An address for service filed under the preceding rule shall state the following particulars —

O. 7 R. 20  
(Patna)

- (1) the name of the street and number of the house (if in a town),
- (2) the name of the town or village,
- (3) the Post Office,
- (4) the district, and
- (5) the munsif (if in Bihar and Orissa) or the District Court (if outside Bihar and Orissa)

21 Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect and the Court may make such order as it thinks just

O. 7 R. 21  
(Patna)

22 A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit "

O. 7 R. 22  
(Patna)

#### SIND

*Add the following as Rules 19 to 26*

'19 *Address to be filed with plaint* — Every plaint shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff. Plaintiffs subsequently added, shall immediately on being so added file a memorandum in writing of this nature

O. 7 R. 19  
(Sind)

20 *Nature of address to be filed* — An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit is filed or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides

O. 7 R. 20  
(Sind)

21 *Consequences of failing to file address* — Where a plaintiff fails to file an address for service, he shall be liable to have his suit dismissed by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just

O. 7 R. 21  
(Sind)

22 *Procedure when party not found at the place of address* — Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of

O. 7 R. 22  
(Sind)



**O 7 R 22**  
(Sind)

the notice or process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the notice or process had been personally served

**O 7 R 23**  
(Sind)

23 *Service of notice on pleaders* — Where a party engages a pleader notice or process on him shall be served in the manner prescribed by O 3 R 5 unless the Court directs service at the address for service given by the party

**O 7 R 24**  
(Sind)

24 *Change of address* — A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to all the other parties to the suit and may be served either upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit

**O 7 R 25**  
(Sind)

25 *Rules not binding on Court* — Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if for any reasons it thinks fit to do so

## ORDER VIII.

### WRITTEN STATEMENT AND SET-OFF

**O 8 R 1**

**R. 1.** [S 110 ] The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence  
[1877, S 110, 1859, S 120 ]

Written Statement

### Local Amendments

#### LAHORE

After the word defence place a semicolon and add the following

and with such written statement or if there is no written statement at the first hearing, shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set off

(2) Where he relies on any other documents as evidence in support of his defence or claim for set off he shall enter such documents in a list to be added or annexed to the written statement or where there is no written statement to be presented at the first hearing. If no such list is so annexed or presented the defendant shall be allowed a further period of ten days to file this list of documents

(3) A document which ought to be entered in the list referred to in sub clause (2) but which has not been so entered shall not without the leave of the Court be received in evidence on the defendant's behalf at the hearing of the suit

(4) Nothing in this rule shall apply to documents produced for cross examination of plaintiff's witnesses or handed to a witness merely to refresh his memory

N W F F

Add the following as sub clause (2)

The defendant at the time of presenting a written statement shall where he relies on any documents (whether in his possession or power or not) enter such documents in a list and produce those documents which are in his possession or power

OUDH

Add the following as Rule 1 (2) and read the existing Rule 1 as Rule 1 (1)

1 (2) The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case shall produce with the written statement such of the documents as are in his possession or power and shall cause the others to be summoned on a date to be fixed by the Court for the purpose

*Explanation* — A certified copy of a public document is a document in the power of a party but where a document is in the possession of a person other than the defendant it will not be deemed to be in the power of the defendant

*Synopsis*

1 Written statement

2 Supplemental written statement See  
O 6 R 7 and O 8 R 9

3 First hearing meaning of

4 Court fee not leviable on written statement

1 **Written statement** — A written statement is the pleading of the defendant and must be filed by him *personally* or on his behalf by a *duly constituted agent*. The filing of a written statement by a *third* person on behalf of the defendant is not sanctioned by the Code<sup>1</sup>

Where after the service of summons the defendant has not had sufficient time to enable him to file a written statement<sup>2</sup> or where the Court requires him to file a written statement<sup>3</sup> it should grant an adjournment for that purpose. An Appellate Court cannot call for a written statement from any of the parties<sup>4</sup>. As to what a written statement should or should not contain see O 6 R 2 and 7.

The omission to file a written statement does not amount to an admission of the facts stated in the plaint<sup>5</sup>.

2 **Supplemental written statement** — See O 6 R 7 and O 8 R 9

3 **First hearing, meaning of** — The first hearing of a suit does not mean the day on which the *witnesses are examined* or the trial taken up. It means the day on which the Court goes into the pleadings in order to understand the contentions of the parties<sup>1</sup>. In suits in which issues have to be framed the day on which such issues are framed is the first hearing of the suit<sup>2</sup> inasmuch as on that day the Court looks into the pleadings with a view to understand the contentions of the parties. This is

Order II Rule 1 — Note 1

1 (1865) Benke Oudh Cas 153 (Third party will  
plaint)

ten statement as an evidence cannot be allowed in the Appellate Court)

5 (35) AIR 1935 Pat 306 (331) 14 Pat 70

Note 3

1 (39) AIR 1939 Nag 110 (119) 11 L R (1939) Nag 452

2 (26) AIR 1926 Mad 347 (349 349) (First hearing in O 13 R 1 means the day on which issues are framed)

(22) AIR 1922 Pat 252 (254) 6 Pat L Jour 650  
Hearing is used in different rules with a view

1 — Statement not necessary in the absence of specific notice in the summons — If the Court asks a written statement it should grant time)

4 (66) 5 Cal W R 50 (51) (Issuing the writ

O 8 R 1  
Notes 3-4

made clear by the provisions of O 10 R 1 under which 'the Court shall at the first hearing of the suit ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or written statement if any, of the opposite party

In cases in which no issues need be framed such as small cause suits the first hearing will it is conceived be the day on which the Court goes into the case of the parties for the purpose of trial

**4 Court-fee not leviable on written statement** — Written statements called for by the Court after the first hearing are specially exempted from a fee by Section 19, clause 3 of the Court fees Act 1870 But it cannot be inferred therefrom that written statements filed at or before the first hearing are chargeable with a fee since the Legislature has expressly repealed the provision in the Code of 1859 requiring court fee on all written statements<sup>1</sup> See also the undermentioned case

O 8 R 2

**R. 2. [New]** The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

[R S C, O. 19 R. 15 See O. 6 Rr. 4 and 8]

### Synopsis

- |                                    |   |
|------------------------------------|---|
| 1 Scope of the Rule                | 5 Limitation                            |
| 2 Special defences                 | 6 'Facts showing illegality'            |
| 3 Alternative defences See O 6 R 9 | 7 Joint contractors — Separate defences |
| 4 Fraud See Order f Rule 4         |   |

### Other Topics (miscellaneous)

Payment See Note 2  
Performance See Note 2  
Special pleas — Instances See Note 9

**1. Scope of the Rule** — It is the duty of a defendant to particularise in his defence all points either of fact or of law which he desires to take<sup>1</sup> If he does not do so he will not be allowed to raise a new plea depending upon evidence for its

(19) AIR 1919 Cal 70 (71) (First hearing of suit) — the day when the case is actually gone into }

[See also (65) 10 South W R 179 (181) ]

#### Note 4

1 (61) 5 Bom 400 (402 403)

(82) 12 Cal 1, R.P. 867 (370)

2 (34) AIR 1934 411 332 (333) 56 All 747

(Exemption in S. 19 (3) of Court fees Act is not limited to written statement in a suit but extends also to a written statement in a miscellaneous case.)

#### Order 8 Rule 2 — Note 1

1 (73) AIR 1973 Cal 778 (578)

(15) AIR 1914 Cal 478 (481) 4 Cal 67 (Plaintiff of purchaser for value without notice)

(103) 5 Bom LR 921 (10) (Do)

O. 8 R. 2  
Note 1

determination for the first time in appeal.<sup>3</sup> The rule requires that the defendant must raise by his pleading all matters which show that the suit is not maintainable. Hence, the defendant will not be entitled, as of right, to rely on any ground of defence which he has not taken in his written statement.<sup>4</sup> It has been held by the High Court of Calcutta that a plea of *estoppel* is not one 'which shows the suit to be not maintainable' and that therefore such plea can be allowed to be raised for the first time in appeal under O 41 R 2 though not raised in the written statement.<sup>5</sup> Whether a matter has been pleaded sufficiently to give the Court the right to form a judgment depends upon the allegations and form of the pleadings the Courts must not look to the mere wordings of the plaint but to the issues settled and the manner of the treatment in the lower Court.<sup>6</sup> The effect of the rule is for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that, the Court will deal with it in one of two ways. It may say that it is not open to him that he has not raised it and will not be allowed to rely on it, or it may give him leave to amend by raising it and protect the other party, if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just.<sup>7</sup> Thus, a plea though not taken in the statement can be raised provided it is taken before the trial has commenced and no prejudice is caused to the plaintiff.<sup>8</sup>

Where service of notice on defendant by the plaintiff is the foundation of defendant's liability and where no allegation of service of such notice is made in the plaint the plaintiff is not relieved from proving service of such notice merely because the defendant has not raised the plea in his written statement but raises it at the time

[See also (3-) AIR 1932 Cal 146 (147) 50 Cal 150 (The proper way to plead to the jurisdiction of the Court is to take the plea in the written statement)]

2 (196) 95 Ind Cas 578 (574) 28 Bom LR 513 (515) (Plea of want of notice to quit)

(22) AIR 1972 Pat 356 (358) 1 Pat 619 (Want of legal necessity)

(8) AIR 1973 All 506 (606) 51 All 186 (FB) (Abandoning the plea of legal necessity in the lower Court—It can not be raised in appeal)

3 (36) AIR 1936 Bom 10 (11) 60 Bom 34 (Defendant not objecting to suit in lower Court on ground that suit was not in representative capacity under S 53 T P Act—Defendant deemed to have waived objection and cannot raise such objection in appeal)

(37) AIR 1937 Mad 571 (574) ILR (1937) Mad 990 (Defendant not pleading S C Married Women's Property Act is bar to maintainability of suit—Defendant cannot have benefit of defence which he did not plead)

(37) AIR 1937 Bom 476 (477) (Plea that suit not maintainable is not having been brought as representative suit)

(35) 18 Nal L Jour 97 (99) (Where a defendant is absconding from a thing out in his pleading, a fact of which he is then aware, he cannot be allowed to bring it in at a late stage in the case unless the plaintiff has closed his case.)

(38) AIR 1938 Lah 96 (96) (Suit by firm—Defendant not denying registration of firm—Suit cannot be dismissed on ground that such registration was not proved)

[See also (37) 41 Cal WN 534 (536) (Where a

4 - -

6 (1912) I Ch 717 (728) In re Robinson's settlement Gant v Hobbs (Per Buckley, L J)

7. (25) AIR 1975 All 241 (242 243) 47 All 221 (Plea that notice was not given under S 60 C P C)

(37) AIR 1936 Lah 141 (141) (Witnesses summoned but not examined—Defendant taking up new plea of defence going to root of case—It is allowed)

[See also (67) 75 W R 120 (121) (Defendant may avail himself of unrequited averges on the facts proved at trial though it is not raised in the written statement)]

O 8 R 1  
Notes 2-4

made clear by the provisions of O 10 R 1 under which 'the Court shall at the first hearing of the suit ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or written statement if any, of the opposite party

In cases in which no issues need be framed such as small cause suits the first hearing will it is conceived, be the day on which the Court goes into the case of the parties for the purpose of trial

**4 Court-fee not leviable on written statement** — Written statements called for by the Court after the first hearing are specially exempted from a fee by Section 19, clause 3 of the Court fees Act, 1870. But it cannot be inferred therefrom that written statements filed at or before the first hearing are chargeable with a fee since the Legislature has expressly repealed the provision in the Code of 1809 requiring court fee on all written statements<sup>1</sup>. See also the undermentioned case

O 8 R 2

**R. 2. [New]** The defendant must raise by his pleading

New facts must be  
specially pleaded

all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality

[R S C., O 19 R 15 See O. 6 Rr. 4 and 8]

### Synopsis

- 1 Scope of the Rule
- 2 Special defences
- 3 Alternative defences See O 6 R 2
- 4 Fraud See Order 6 Rule 4

- 5 Limitation
- 6 "Facts showing illegality"
7. Joint contractors — Separate defences

### Other Topics (miscellaneous)

Payment See Note 2  
Performance. See Note 2  
Special plea — Instances See Note 2

**1. Scope of the Rule** — It is the duty of a defendant to *particularise* in his defence all points either of fact or of law which he desires to take<sup>1</sup>. If he does not do so he will not be allowed to raise a new plea depending upon evidence for its

(19) AIR 1919 Cal 70 (71) (First hearing of suit means the day when the case is actually gone into)

[See also (68) 10 South W R 179 (1b1)]

(Exemption in S 19 (3) of Court fees Act is not limited to written statement in a suit but extends also to a written statement in a miscellaneous case)

### Order 6 Rule 2 — Note 1

- 1 (51) 5 Bom 400 (402 403)
- (82) 12 Cal L R 7 867 (370)

- 2 (81) AIR 1934 All 332 (333)

- 1 (93) AIR 1923 Cal 578 (78)
- (15) AIR 1915 Cal 478 (481) 42 Cal 625 (Plea of purchaser for value without notice)
- (93) 5 Bom L R 941 (993) (Do)

**R. 3. [New.]** It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

O. 8 R 3

Denial to be specific

[R. S. C., O. 19 R. 17.]

*Synopsis*

1 Scope of the Rule. | 2 "Except damages"

**1. Scope of the Rule.** — A defendant can either admit or deny the several allegations made in the plaint. If he decides to deny any such allegation he must do so *clearly and explicitly*<sup>1</sup>. Thus, in *Grocott v. Lovatt*<sup>2</sup> the plaintiff alleged in para. 3 of his statement of claim that the defendant, on or about a certain date, falsely and maliciously wrote, printed and published a certain handbill. The reply of the defendant to this was "the defendant denies the facts alleged in para. 3 of the statement of claim." The Court of Appeal held that the denial was sufficient. But a statement that the defendant "puts the plaintiff to proof of the several allegations in the plaint" or that he "does not admit the correctness of the statements contained in the plaint" is not a sufficient denial within the meaning of this rule (see Rule 5 below). The rule is not limited to denial alone, it includes non admission as well, so that where a defendant pleads that he does not admit a particular allegation in the plaint, it would be a sufficient traverse<sup>3</sup>. As to the effect of failure to deny specifically, see O. 8 R. 5.

No party should traverse matter not alleged, he should be content to answer the case that is actually laid against him and should not plead that which he thinks his opponent meant or ought to have raised<sup>4</sup>.

**2. "Except damages."** — The exception in this rule makes it unnecessary for the defendant to deny the claim to or amount of damages.<sup>1</sup> It is probably intended that damages shall be deemed to be put in issue in all cases, unless expressly admitted.

**R. 4. [New.]** Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient

O. 8 R. 5

Evasive denial

Order 8 Rule 3 — Note 1

(27) AIR 1927 All 275 (276)

money accounts incorrect is not a specific denial)

(38) 1938 Oudh W. N. 10-0 (10-1) (Plaint allegations as to the terms of lease deed—Defendant replying that terms will appear from agreement—No specific denial)

2 (1916) 11 S. J. 28

[See also (1914) 13 L. J. Q. B. 361 (1913) Adkins v. North Metropolitan Tramways Co.]

3 (1876) 3 Ch. D. 637 (640), Thorpe v. Holdsworth (1876) 1 M. R.

(19) 4 Ind. Cas. 318 (318) (PC)

4. (1933) 1 Q. B. 571 (575) *Rassam v. Budge* (In an action for slander defendant put in issue words other than those complained of will be struck out.)

**Note 2**

1 (1854) 21 Q. B. D. 501 (504) *Wood v. Earl of Durham* (Matters in mitigation of damages need not be specifically pleaded.)

(17) AIR 1917 Cal 269 (271) 43 Cal 1001 (It is sufficient if the defendant denies generally the damages.)

O. 8 R. 4  
Note 1

to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

[ R S C, O 19 R 19 ]

**1. Plaintiff allegations not to be denied evasively.** — A sues B for dissolution of partnership alleging that he agreed to enter into partnership with him to carry on certain business. B in his written statement admits that he agreed to enter into partnership as alleged but adds that 'the terms of the arrangement between himself and the plaintiff were not definitely agreed upon as alleged'. This is an *evasive* denial of the fact of partnership and is not permissible.<sup>1</sup> Similarly, where several circumstances are set out in the plaint as constituting the details of certain transactions and the defendant instead of denying the several circumstances specifically denies them as a whole using almost the precise language of the allegations denied the denial will as a rule be considered *evasive*.<sup>2</sup> Thus if the plaintiff in an action for wages alleges that he has served the defendant as a hired servant from the 25th March 1908 to 24th June 1909 at Epsom in the County of Surrey it would be a bad traverse for the defendant to plead the plaintiff did not serve the defendant as a hired servant from the 25th March 1908 to 24th June 1909 at Epsom in the County of Surrey. He must deny that the plaintiff ever served him at all or else state how long he admits the plaintiff did serve him. He must not traverse the place which is immaterial, or if he does he must add the words 'or at any other place after the words 'the plaintiff did not serve him at Epsom'.<sup>3</sup> But where the plaintiff, claiming title under one S alleged that she died on the 28th of September 1906 and the defendant pleaded that he did not admit that S died on the 29th of September 1906 and that the suit was barred by limitation the denial is not *evasive* inasmuch as there is only one fact and that has been stated to be not admitted.<sup>4</sup> Where a denial is evasive leave to amend may be given under O 6 R 17 except where the defendant is found to have acted *malafide*.<sup>5</sup>

O 8 R. 5

**R. 5. [New]** Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

**Order 8 Rule 4 — Note 1**

- 1 (1876) 3 Ch D 637 (640-641) 45 L J Ch 405  
Tillotson v Holdsworth

- cision }  
(29) AIR 1929 AB 721 (723) (Pleading should be specific)  
(33) AIR 1909 Cal 578 (578)  
■ See Ogden's Principles of Pleadings and Practice 10th Edn page 166  
4 (24) AIR 1924 Mad 838 (839)  
5 (1878) 10 Ch D 303 (306-307) Tildesley v Harper (On appeal from (1878) 7 Ch D 403)

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission

O. 8 R<sup>2</sup>5  
Note 1

[R. S. C, O. 19 R. 13.]

### Synopsis

- |   |  |
|---|--|
| <p>1. Scope of the Rule.</p> <p>2. Facts not denied specifically will be taken as admitted</p> <p>3. "Except as against a person under disability."</p> | <p>4. Admission, if binds co-defendants</p> <p>5. Court may require the facts so admitted to be proved</p> <p>6. Rule does not apply where no written statement is filed</p> |
|---|--|

### Other Topics (miscellaneous)

Admissions in pleadings—Effect See Note 2  
Not admitted See Note 1

Onus of proof—Where plaintiff allegations not denied See Note 3

**1. Scope of the Rule.** — "The whole object of pleadings is to bring the parties to an issue, and the object of this Order is to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be decided was." <sup>1</sup> This rule states the effect of the failure to conform to Rule 3 *ante*, and must not be read in a sense inconsistent with Rule 3 therefore a general denial cannot mean a denial by implication <sup>2</sup> The rule permits the traversal of a statement in the plaint by saying that it is not admitted <sup>3</sup> The word "specifically" qualifies also the words "or stated to be not admitted" and therefore, a refusal to admit must also be stated specifically <sup>4</sup> The words "if not denied specifically" or stated to be not admitted must be read to mean "if not denied specifically" or if not stated to be not admitted. In other words, every allegation of fact in the plaint will be deemed to be admitted, if in the written statement it is neither specifically denied nor specifically stated to be not admitted <sup>5</sup>

The principle of the rule does not apply to allegations in the *written statement* and hence, it cannot be said that where there is no specific denial by the plaintiff of such allegations, he admits them <sup>6</sup>

This rule does not apply where the allegation in the plaint as to the fact which is said to be admitted by the want of a specific denial under this rule is vague and inconclusive <sup>7</sup>

In the undermentioned case, <sup>8</sup> it was held by Niamatullah J., of the Allahabad High Court that the principle of this rule may be applied to a judgment debtor on whom a notice of application for execution of a decree containing an allegation of fact is served

#### Order 8 Rule 5 — Note 1

- 1 (1876) 3 Ch D 37 (639) *Thorpe v Holdsworth* (1er Je vol M R)
- 2 (25) AIR 1925 Mad 950 (957 958)
- 3 (34) AIR 1934 Mad 579 (579) (AIR 1924 Mad 838 Followed)
- 4 (25) AIR 1925 Mad 950 (957)
- 5 (27) AIR 1927 All 225 (226 227)
- 6 (1877) 3 L T 548 (849) *Hill v L & N W Ry Co* (1er Grov J)
- 7 (1879) 12 Ch D 759 (759) *Rutter v Tregent*
- 8 (33) AIR 1933 All 521 (522) 55 All 700 (Allegation stated to be not admitted amounts to denial)

(38) AIR 1938 Mad 295 (226)

6 (37) AIR 1937 Pat 493 (429)

[See however (38) AIR 1938 Nag 163 (164)]

ILR (1938) Nag 469 (Where an assertion is made in the written statement by a party to the effect that the parties are members of a



O. S. R. 5  
Note 2

**2. Facts not denied specifically will be taken as admitted.** — The effect of this rule is to relieve the plaintiff from the obligation of proving such allegations in his plaint as are neither specifically denied nor stated to be not admitted in the written statement<sup>1</sup>. Thus, where in a suit for ejectment the land from which it is sought to eject a tenant is alleged to be 'old waste' under the Madras Estates Land Act, 1908, and this is not traversed in the written statement the defendant cannot afterwards plead that the land is not 'old waste'<sup>2</sup>. A plea that the defendant *does not admit any of the allegations* in the plaint except such as have been expressly admitted and that he puts the plaintiff to the proof of all allegations not so admitted is not a sufficient denial within the meaning of this rule, every allegation so denied will be deemed to have been admitted<sup>3</sup>. But a plea in a written statement that a particular allegation in the plaint is not admitted is a sufficient denial within the meaning of this rule so as to put the plaintiff to the proof thereof<sup>4</sup>. A denial of knowledge of a particular fact is not a denial of the fact and has not the effect of putting the fact in issue. It merely means that the defendant denies that he has any knowledge of the fact and a man can admit a fact of which he has no personal knowledge<sup>5</sup>. Thus where a plaintiff suing as a curator of the estate of a deceased person stated in the plaint that he was authorised by the Court to sue and the defendant stated in reply that those allegations were not known to him, it was held that it was not open to him to raise again the question of the plaintiff's authority to sue<sup>6</sup>. But where a landlord sues a tenant for recovery of possession on the ground that the defendant had forfeited his lease by denial of his title and this plea is not traversed by the defendant, such non denial, though amounting to an admission of the denial of title, will not by itself work a forfeiture of which the plaintiff can take advantage in that suit inasmuch as the forfeiture must have accrued before the suit was instituted<sup>7</sup>.

As to the effect of admissions made in the written statement, see the under-mentioned cases<sup>8</sup> and also Evidence Act, Sections 17 to 31 and Section 58

## Note 2

- 1 (10) AIR 1919 Pat 162 (162)
- (17) AIR 1916 Bom 103 (208 104) 41 Bom 89
- (11) 9 Ind Cas 470 (472) (Low Bur) (No reference to notice in the written statement—Held defendant must be deemed to have admitted notice)
- (22) 26 Bom 785 (797 738)
- (20) AIR 1910 Lah 68 (66)
- (23) AIR 1923 Nag 7 (7)
- (72) 18 Suth W R 287 (287) (Averments upon which no issue is framed must be taken to be admitted)
- (38) 1938 Oudh W N 1080 (1084) (Suit for damages for breach of lease—Lease not registered—Defendant not specifically denying terms of lease alleged in plaint—Held suit could be decreed on such admission in written statement though lease was inadmissible in evidence)
- (28) AIR 1938 Bom 108 (108) I L R (1938) Bom 102
- [See also (31) AIR 1931 Lah 203 (204) (Statements on certain point by plaintiff—Defendant agreeing—That much part of plaintiff's claim should be deemed to be admitted, no further proof being necessary)]
- (1863) 1 Bom H C R 85 (86)
- (31) AIR 1931 Lah 473 (475) 12 Lah 623
- [Allegations not denied will be presumed to be correct.]

- 2 (19) AIR 1919 Mad 927 (927) 42 Mad 814
- 3 (25) AIR 1922 Mad 950 (957) (1878) 7 Ch D 877 (877) Harris v Gamble.
- 4 (33) AIR 1933 All 521 (522) 55 All 700
- (24) AIR 1924 Mad 888 (899)
- (34) AIR 1934 Mad 579 (579)
- 5 (34) AIR 1934 Rang 278 (280) (Defendant in a mortgage suit merely denied knowledge of the mortgage—It is not a specific denial of the mortgage and mortgage held to be admitted)
- 6 (31) AIR 1932 All 422 (424) (Not known' does not mean not admitted)
7. (29) AIR 1929 Lah 400 (410)
- 8 (68) 9 Suth W R 290 (301) (Defendant's admission should be taken as a whole)
- (68) 9 Suth W R 130 (130) (A written statement is not a plea by way of avoidance and confession and the whole statement must be taken together)
- (69) 9 Suth W R 190 (191 190) (F B) (Do)
- (67) 7 Suth W R 29 (30) (Whole admission should be put in)
- (1864) 18 C A Suth W R (Gap) 305 (306) (Admission when relied upon as against the opponent must be taken as a whole—This rule does not apply to pleadings)
- (74) 22 Suth W R 220 (221) (Admission in a written statement—Whole of the written statement must be put in)

**3 "Except as against a person under disability."** — The rule of admission by non denial does not apply where the defendant is a person under disability such as a minor<sup>1</sup> But this exception has nothing to do with the conduct of the suit. Thus, if at the time of the framing of issues or at the trial the person representing a minor defendant admits certain allegations of fact it cannot be said that this rule in any way affects such admissions<sup>2</sup>

**4. Admission, if binds co-defendants** — As to whether and when an admission made by a defendant in his written statement will bind co defendants see Sections 17 to 23 of the Evidence Act and the undermentioned cases<sup>1</sup>

**5 Court may require the facts so admitted to be proved** — In England the rule as to admission by non denial is very stringent and a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse that fact at the trial. In India the general practice is not to construe the pleadings very strictly and on this principle the defendant who had omitted to traverse in his written statement allegations made in the plaint, was allowed in cases arising under the old Code to traverse them at the hearing under special circumstances<sup>1</sup> The proviso to this rule now makes it clear that the failure of the defendant to deny the allegations in the plaint does not necessarily amount to proof and that the Court can in its discretion require proof of such allegations<sup>2</sup> The discretion should be

(24) AIR 1924 Nag 108 (108) 20 Nag L R 7  
(Admission should be taken as a whole — Prin

(85) 7 All 353 (359) (Defendant by his admission cannot bind the shares of the co defendants)

(89) 16 Cal 627 (635) 16 Ind App 96 (P C) (Do)

(84) 6 All 395 (397) (Do)

(81) 9 Cal L Rep 350 (360) (Do)

(97) 2 Cal W N 166 (167 168) (Do) (Admission by one co tenant as to who is the landlord is not binding on the others)

(85) 11 Cal 588 (590 591) (But co contractors are bound if admission is made with reference to the transaction in issue)

#### Note 5

1 (85) 11 Cal 111 (117 118) 11 Ind App 186 (P C) (Case under S 8 of Regulation 17 of 1806)

(68) 1 Beng L R A C 133 (136) (A qualified statement cannot be used apart from the qualification against the person making it — But where a series of unqualified statements are made any one of them can be used)

(81) 5 Bom 143 (152) (Suit for specific performance of an agreement — Defendant in his written

in India)

(07) 34 Cal 57 (64) (Do)

(84) 11 All 406 (413 414)

(70) 7 Bom H C R A C 136 (137) (Mere fact that an allegation in the plaint is not traversed by the defendant does not relieve the plaintiff of the onus of proving his case)

(73) 21 Suth W R 59 (60) (Pleadings in Indian Courts should not be construed with the same strictness as they are done in English Courts)

(72) 17 Suth W R 171 (172) (Mere fact of non traverse of the plaintiff's allegation of heirship was held not to amount to an admission of title)

(70) 14 Suth W R 55 (57) (The procedure in this country is not such that if a defendant fails to dispute or contest a point he thereby admits it)

2 (14) AIR 1914 Cal 847 (849 849) (Appellate Court could not point out the inference of failure of denial of the specific point)

of deed by a defendant does not dispense with necessity of proving its validity by plaintiff)

#### Note 3

1 (23) AIR 1923 Mad 114 (115)

2 (19) AIR 1919 Mad 698 (698)

(36) AIR 1936 Pat 428 (429) (Admission by father — Minor represented by pleader not denying it — Minor is bound by admission)

#### Note 4

1 (75) 21 Suth W R 114 (115) 2 Ind App 113 (P C) (Will not bind co defendants)

(25) AIR 1941 Jh 770 (771) (Admission on behalf of defendant no civil case against the co defendants)

O. 8 R. 8  
Notes 6-8

exercised where the Court suspects that the admission is made collusively, or to avoid a rule of public policy<sup>1</sup> or where the defendant's failure to deny the allegation is due to ambiguous and unsatisfactory assertions in the plaint<sup>2</sup> or where the defendant is taken by surprise or misunderstands the plaint<sup>3</sup> The discretion should usually be exercised by the Court of first instance<sup>4</sup>

6. Rule does not apply where no written statement is filed. — It is clear from the wording of this rule that it is not intended to apply to a case where the defendant has not put in a written statement. A Court is, therefore, not justified in passing a decree on no evidence where the defendant does not file a written statement<sup>5</sup>

O. 8 R. 6

**R. 6. [S. 111.] (1)** Where in a suit for the recovery of money<sup>3</sup> the defendant claims to set-off against the plaintiff's demand any ascertained sum of money<sup>4</sup> legally recoverable<sup>6</sup> by him from the plaintiff, not

Particulars of set off to be given in written statement

exceeding the pecuniary limits of the jurisdiction of the Court,<sup>8</sup> and both parties fill the same character<sup>9</sup> as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader<sup>10</sup> in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

(74) AIR 1924 All 180 (192) 40 All 53 (Words not added at least amount to a denial by implication)

(75) AIR 1924 All 744 (746) (Fact admitted by defendant, in which case may be required to be proved)

(19) AIR 1929 Mad 463 (470) (Admission of execution of document will not cure the defect from want of proper attestation)

(19) AIR 1918 Cal 402 (402 403) (Pleadings in money are not to be strictly construed)

(103) AIR 1923 Nag 53 (54) (Ex parte case—Court requiring proof under this rule must state points to be proved in the form of issues)

(108) AIR 1923 Nag 165 (166) (Ex parte case—Points to be proved must be stated in form of issues)

(115) AIR 1915 Mad 770 (772, 773)

(18) AIR 1918 Cal 178 (179) (As the standard of pleadings in this country is not very high there

ought not to be strictly construed)

3 (20) AIR 1920 Mad 593 (594)

4 (24) AIR 1924 All 150 (152) 43 All 371

5 (23) AIR 1923 Mad 114 (115)

6 (20) AIR 1920 Mad 588 (589)

#### Note 6

1 (17) AIR 1917 Cal 969 (972 23) 43 Cal 1001

(29) AIR 1928 Lah 769 (771)

(30) AIR 1930 Pat 293 (296) (In such a case defendant is not delinquent from giving evidence traversing allegation made in plaint)

(25) AIR 1925 Nag 330 (331) (Does not apply to oral pleading)

(35) AIR 1935 Pat 306 (321) 14 Pat 70 (Omission to file written statement does not amount to admission of facts stated in plaint)

(But see (36) AIR 1936 Bom 285 (286, 286) 60 Bom 769 (Rule applies even to cases where no written statement is filed))

## Illustrations

(a) A bequeaths Rs 2 000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs 1 000 as surety for D. Then D sues C for the legacy. C cannot set off the debt of Rs 1 000 against the legacy for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs 1 000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase money by C against B, the latter cannot set off the debt against the price for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(d) A sues B on a bill of exchange for Rs 500. B holds a judgment against A for Rs 1 000. The two claims being both definite pecuniary demands may be set off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs 1 000 from A and claims to set off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers both sums are definite pecuniary demands.

(f) A and B sue C for Rs 1 000. C cannot set off a debt due to him by A alone.

(g) A sues B and C for Rs 1 000. B cannot set off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs 1,000. B dies, leaving C surviving. A sues C for a debt of Rs 1 500 due in his separate character. C may set off the debt of Rs 1,000.

[1877, S. 111; 1859, S. 121; R. S. C., O. 19 R. 3., See O. 20

## Rule 19.]

## Local Amendment

## PATNA

Add the following words

"and the provisions of Order 7, Rules 14 to 18 shall *mutatis mutandis*, apply to a defendant claiming set off as if he were a plaintiff."

## Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes</li> <li>2. Scope and applicability of the Rule.</li> <li>■ Suit must be one for the recovery of money.</li> <li>4. "Any ascertained sum of money"</li> <li>■ Equitable set off in cases of unascertained sums of money.</li> <li>6. "Legally recoverable from plaintiff."</li> <li>7. Separate debt not to be set off against joint debt.</li> <li>8. "Not exceeding the limits of the pecuniary jurisdiction of the Court."</li> </ol> | <ol style="list-style-type: none"> <li>9. Both parties must fill the same character.</li> <li>10. Winding-up proceedings.</li> <li>11. Insolvency proceedings</li> <li>12. Proceedings under the Agra Tenancy Act and other special Acts</li> <li>13. Effect of not claiming set-off.</li> <li>14. Court fee.</li> <li>15. Counter-claim</li> <li>16. Solicitor's lien for costs</li> <li>17. Appeal</li> <li>18. Limitation</li> </ol> |
|--|---|

## Other Topics (miscellaneous)

- |  |  |
|--|--|
| <p>Claims between principal and agent. See Note 2.</p> <p>Defendant entitled to a decree on set off admitted in plaint. See Note 2.</p> <p>Omission to claim set off: whether res judicata. See Note 18.</p> | <p>Rent—Could it be set off. See Note 17.</p> <p>Set off against an assignee. See Note 11.</p> <p>Shall have the same effect as a plaint. See Note 2.</p> <p>Unliquidated damages—Whether can be set off. See Notes 4 and 5.</p> |
|--|--|

1. Legislative changes. — Sub clause (3) of this rule is new

2. Scope and applicability of the Rule. — The doctrine of set off may be defined as 'the extinction of debts of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another'.

## Order 8 Rule 6 — Note 2

debts between two persons)

1. (84) All 351 (353) (Reciprocal acquittal of (19) AIR 1918 Mad 993 (997) - 40 Mad 1004

**O. S. R. 6**  
**Note 2**

A plea of *set off* must be distinguished from a plea of *payment*. A payment refers to a satisfaction or extinguishment of a debt effected prior to the raising of the defence of payment while a plea of set off *pays for* a satisfaction or extinguishment thereof commencing in the future after the date of the plea. In order to enable a defendant to claim a set off the following conditions must exist<sup>2</sup>—

- (1) The suit must be for *recovery of money*
- (2) The defendant's claim must be for an *ascertained* sum of money
- (3) It must be *legally recoverable*
- (4) Both the parties must fill the *same character*—they fill in the plaintiff's suit
- (5) The sum claimed by way of set-off should not exceed the pecuniary limits of the jurisdiction of the Court

As Illustration (d) to the rule shows a defendant can claim as set off under this rule a sum for which he has already obtained a decree against the plaintiff<sup>4</sup>

Order 20 Rule 19 clause (1) shows that a decree can be passed in favour of a defendant pleading a set off, therefore the defendant is in the position of a plaintiff as regards a set off pleaded by him in respect of the balance claimed by him<sup>5</sup>. No Court can entertain a plea of set off if it has no jurisdiction to take cognizance of a suit if one is brought for the recovery of the money sought to be set off<sup>6</sup>. But it is not necessary that the Court should have territorial jurisdiction over the subject matter of the claim of set off if a separate suit is brought in respect of it<sup>7</sup>.

Where the defendant does not specifically plead a set off in his written statement the Court may decline to allow the same to be set up subsequently<sup>8</sup>. Similarly where no issues are framed on the plea and no application is made by the

<sup>2</sup> (95) AIR 1335 Rang 22 (25) 2 Rang 849

(10) 5 Ind Cr 67 (68) (Cal) (The suit was for rent due for 1811 1312 & 1813. The defendant pleaded that the rent due from the plaintiffs to them for 1800 & 1810 should be set off—Held that the matter was not of set off in the technical sense but of account and set off in the general sense.)

(7) 4 Cal L Rep 296 (297) (Suit for arrears of rent—That Collector who was in charge of the land on behalf of the defendant had paid the rent as a plea of payment not of set off.)

[See also (27) AIR 1927 Nag 120 (120) (Plea of satisfaction)]

(8) 16 Cal 711 (714) (Right of set off to be allowed even in cases of cross demands arising out of the same transaction)]

<sup>3</sup> (31) AIR 1931 Nag 12 (13) (Suit on negotiable instrument—Set off can be claimed.)

(20) AIR 1920 Mad 819 (820 821) 42 Mad 878 (Suit on contract—Equitable set off barred at the date of the suit cannot be claimed.)

(97) 15 Mad 29 (39)

(90) AIR 1933 Bom 617 (618) (Difference between set off and counter claim pointed out.)

(86) 1855 All W N 172 (172)

(86) AIR 1936 Pesh 57 (60 61) (Essentials of set off indicated.)

[See also (39) AIR 1939 Pat 142 (144) (The claim must be ascertained and legally recoverable.)]

<sup>4</sup> (39) AIR 1933 Bom 886 (399)

<sup>5</sup> (90) AIR 1370 Mad 819 (870) 42 Mad 878

(84) AIR 1934 All 549 (545) 56 All 912 (Decree may be granted to defendant though plaintiff's suit is dismissed.)

(99) 15 Mad 29 (34)

(70) 5 Beng L R 639 (642)

(60) 6 Bom H C R A O J 151 (152) (Defendant denying plaintiff's claim can plead set off.)

(09) 9 Cal W N 748 (749) (Set off admitted in plaintiff—Defendant entitled to decree though plaintiff's suit fails.)

<sup>6</sup> (93) 15 All 404 (405) (The Court of Revenue cannot entertain a set-off in a case in which the help of the Civil Court is required.)

(22) AIR 1932 Rom 617 (618) (Suit on subject-matter of set off not entertainable by Court trying suit on grounds of jurisdiction—Set-off can be entertained.)

(33) 1899 All W N 143 (145 147)

(12) 15 Ind Cas 526 (528) (Oudh)

(7) (32) AIR 1932 Bom 517 (518)

<sup>8</sup> (27) AIR 1927 Lah 431 (437)

(15) AIR 1315 Mad 242 (243) (No plea of set-off can be raised without filing a written statement.)

(70) 14 South W R 473 (475) (Defendant seeking to claim set off is bound to tender a written statement.)

[See also (97 01) 1897 01 Upp Bur Rul 214.]

[See however (40) 6 Ind Cas 162 (162 163)]

82 All 523 (But in a suit by a principal against an agent for accounts it is unnecessary for the defendant to plead a set off.)]

defendant therefor, it is not open to him to raise it in appeal<sup>9</sup> Nor can a defendant who has failed to claim a set off before decree in a suit, claim it in execution proceedings<sup>10</sup>. Where, however, he states in the written statement that he will file a separate suit in respect of his claim, he is not precluded from proving a set off afterwards on getting the written statement amended<sup>11</sup>.

Where the defendant sets up a plea of set off falling under this rule, the Court has no option to refuse to adjudicate on it<sup>12</sup>. But a plaintiff cannot compel a defendant to plead a set off. Thus, where a plaintiff in a suit deducted a sum of money due from him to the defendant with a view to bring the suit within the jurisdiction of the Small Cause Court, it was held that the procedure was illegal and that the plaintiff could not enforce a set off on the defendant<sup>13</sup>.

**3. Suit must be one for the recovery of money.** — Under the Code of 1859, it was necessary that the suit should have been for a *debt*. A set off could not, therefore be pleaded in a suit for *mesne profits*, such suit not being for the recovery of a debt<sup>1</sup>. Under the present rule it is sufficient that the suit is one for the *recovery of money*. The Illustrations to this rule show that no matter what the title may be, no matter whether such title arises *ex delicto* or *ex contractu*, so long as the *relief sought is to recover money*, it is a suit for money, and a set off can be pleaded therein under this rule<sup>2</sup>. A suit on a negotiable instrument is a suit for money<sup>3</sup>. But a suit merely for dissolution of a partnership or for an account is not a suit for money,<sup>4</sup> though, if there is also a prayer for the payment of such balance as might be found due to the plaintiff, the suit would be one for the payment of money<sup>5</sup>. The High Court of Rangoon has held that a suit on a mortgage for payment of money and in default thereof for the sale of the mortgaged property is a suit for the recovery of money within the meaning of this rule<sup>6</sup>. The High Court of Calcutta has however, held that a suit to enforce a mortgage under which the right to a personal decree is barred is not a suit for money and no set off can be pleaded therein under this rule<sup>7</sup>.

**4. "Any ascertained sum of money."** — See Illustrations (c) (d) and (e) above. An 'ascertained sum of money' means a sum of money of which the amount is fixed and known. It does not necessarily mean a sum *admitted* by the other side or *decreed* by Court. The words are used in contradistinction to unliquidated damages<sup>1</sup>. The mere fact that an arithmetical calculation is necessary to arrive at the total sum

9 (86) 13 Cal 124 (185) 13 Ind App 48 (PC)

10 (24) AIR 1921 Oudh 431 (435) 27 Oudh Cas 248

11 (75) AIR 1925 Mad 298 (299)

12 (20) AIR 1920 Muz 142 (143)

13 (94) 21 Cal 419 (426 427)

(25) AIR 1925 Sind 319 (320)

#### Note 3

1 (76) 5 Suth W R 170 (170)

2 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

3 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

4 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

5 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

6 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

7 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

8 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

9 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

10 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

11 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

12 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

13 (85) 10 All 557 (558 599) (Suit for dissolution of partnership with a prayer for such sum)

7. (04) 8 Cal W N 174 (177) (Claim also cannot be regarded as one for equitable set off as it does not arise out of the same transaction)

#### Note 4

1 (10) 5 Ind Cas 67 (68) (Cal)

(33) AIR 1933 Rang 13 (14) (Plea of set-off in respect of a sum not admitted by plaintiff is not a claim for an ascertained sum of money)

(24) AIR 1924 All 572 (573) 46 All 972

(31) AIR 1931 Nag 12 (13) (Ascertain sum excludes such items as unliquidated damages and mesne profits)

(17) AIR 1916 Pat 177 (169) (Ascertain sum means amount which is beyond challenge and beyond dispute concluded and conclusive)

(10) 5 Ind Cas 211 (17) (All) (A plea of set-off can succeed even where no money is found due to plaintiff)

(140) 5 Q B D (N 8) 569 (575) *Stooke v Taylor* (For difference between set-off and counter-claim, see the observations of Cockburn C J)



rule is not exhaustive. The distinction, however, between a legal set off and an equitable set off is that while in the former case the Court is *bound* to entertain and adjudicate upon the plea when raised<sup>3</sup> the defence of equitable set off cannot be claimed as a *matter of right*<sup>4</sup> but the Court has a discretion to adjudicate upon it in the same suit or to order it to be dealt with in a separate suit<sup>5</sup>. Thus, where a Court thinks that the investigation into the claim of equitable set off will cause great delay, it may refuse to allow it<sup>6</sup> or may order the enquiry to proceed on such terms as it thinks fit<sup>7</sup>.

It is not the law that a claim to set off a definite sum of money can only be put forward under O 8 R 6. Nor is it the case that an equitable set off can be claimed only where the claim is to an *unascertained* amount. An equitable set off can be claimed also where the claim of the defendant is to an *ascertained* sum<sup>8</sup>.

It is essential for a valid claim to an equitable set off that the cross demands should have arisen out of the *same transaction*. A plea of equitable set off will not be available where it relates to a different transaction<sup>9</sup>. Thus, where a plaintiff who promised to supply seven hundred tons of coal, supplied only 469 tons and sued the defendant for the price thereof the latter can claim set off in respect of damages for the

(80) 4 Bom 407 (418) (Demands connected with same transaction — Amount payable by plaintiff was capable of being determined immediately — Set off allowed)

(55) 7 All 284 (286, 287)

(75) 7 N W P H C R 157 (163, 164) (On facts set off was not allowed)

(73) AIR 1908 Bom 118 (118)

(18) 21 Ind Cas 716 (718) (Cal) (A time barred debt can be claimed by way of equitable set off)

(99) 16 Cal 711 (714)

(85) 11 Cal 557 (560, 561)

(31) AIR 1931 Cal 858 (859)

(18) 19 Ind Cas 901 (903) (Cal) (Principal and agent)

(05) 80 Cal 576 (580) (Law of equitable set off applies where the cross claims though not arising out of the same transaction are closely connected together)

(01) 9 Cal W N 178 (189, 190)

(33) 20 Cal 527 (531)

(60) 4 Mad H C R 120 (126, 127) (See as to when set off can be claimed)

(85) 1885 Pun Re No 47 p 89

(13) 19 Ind Cas 390 (390) C S M I L R 188

(14) AIR 1914 P C 153 (154, 155) 17 Oudh Cas 33 (P C)

[See also (14) AIR 1914 S ud 137 (139) 8 S n I L R 193 (Suit for accounts and to recover money due on a dissolved partnership — Defendant's claim for decree on account is not a counter claim)]

[But see (69) 10 S ud W R 295 (295)]

3 (20) AIR 19 0 Mad 142 (143)

4 (97) 21 Bom 126 (135)

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[But see (36) AIR 1936 Nag 290 (290) I L R (1937) Nag 481]

9 (04) S Cal W N 174 (177)

11 way of set-off an amount as share of profits realized by plaintiff)

(23) AIR 19 3 Bom 24 (25) 47 Bom 187

(4) 22 S ud W R 15 (16, 17) (Circumstances under which equitable set-off will be allowed considered)

(39) AIR 1933 Pat 444 (455) (1 pure set off)

(36) AIR 133 Cal 7 (26)

(34) AIR 1 34 Pat 3 (25) I L R (1935) Bom

[See (34) AIR 1 34 Pat 3 (25) (In this case



O. 8 R. 6  
Notes 5-6

breach of contract caused by the failure to supply the full stock promised<sup>10</sup> Similarly, in a suit for the recovery of the principal and interest due on a mortgage bond, the defendant can plead an equitable set off in respect of the loss occasioned by the plaintiff's failure to make repairs while in possession of the mortgaged properties<sup>11</sup>

Similarly, where a washerman who lost some of the articles given to him for washing, sued his employer for wages it was held that the latter could equitably set off the price of the articles so lost<sup>12</sup> In all the above cases it will be seen that the cross demand of the defendant arose out of the same transaction as that on which the plaintiff's claim was based But where the plaintiff sues a limited company for recovery of dividend payable to him as a shareholder, the company is not entitled to set off damages for breach of a contract by him to deliver cotton<sup>13</sup> The reason is that the latter claim arises out of a different transaction altogether from that on which the plaintiff's claim is based

**6. "Legally recoverable from plaintiff."** — Where a legal set off is claimed it is necessary that the amount set off must be 'legally recoverable' from the plaintiff The words 'legally recoverable' have no reference to the ability of the debtor to pay the demand in full a sum is legally recoverable, though, in the result the creditor must be satisfied with a dividend<sup>1</sup> A sum cannot be said to be 'legally recoverable' where the plaintiff is not bound by law to pay it<sup>2</sup> or where he is not liable to the defendant in respect of that debt<sup>3</sup> or where the claim is barred by *res judicata*<sup>4</sup> or is based upon a decree incapable of execution<sup>5</sup> or upon a document not receivable in evidence<sup>6</sup> A barred debt is not legally recoverable and therefore, in order to enable a defendant to claim a set off under this rule the sum due to him must not have been barred by the law of limitation on the date of the suit<sup>7</sup> The right to plead this defence arises when the action is brought so that it does not become barred subsequently by

—Sale and mortgage being separate transactions B's claim held could not be reduced and being unliquidated I held was not allowable under O 8 R 6 C P O

(38) 40 Cal W N 751 (752) (A claim for equitable set off will not arise simply because there are cross demands there must be some connection between them which will make it inequitable to drive the defendant to a separate suit The two claims must arise out of the same transaction and there must be known by both sides of an existing debt due to one party and a credit by the other party founded on and in time to such debt as a means of discharge &c at)

[See also (93) 21 Cal 417 (423)]

10 (10) 6 Ind Cas 924 (925) 87 Cal 334

(93) 15 All 9 (11)

11 (92) 15 Mad 290 (291)

12 (10) 7 Ind Cas 1006 (1006) 1910 Pun Re No 77

13 (25) AIR 1923 Bom 24 (25 26) 47 Bom 182

## Note 6

1 (06) 30 Bom 173 (193 194)

2 (92) 15 Mad 29 (34)

(79) 4 Cal 57b (581)

(82) 11 Cal L Rep 140 (142)

(66) 8 South W R (Civ Rel) 26 (27) (Case of rent — Suit for house rent — Tenant repairing the house without permission from the lessor cannot set off the expenses of repair)

(74) 22 South W R 1 (2) (Suit for rent—Tenant cannot set-off money in deposit with plaintiff unless at the time of suit the deposit had become payable)

3 (26) AIR 1926 Oudh 301 (302 303) (Suit by vendor for return of purchase money on the ground of repudiation by vendor a relatives — Set off of means profits cannot be allowed)

(26) AIR 1926 Sind 225 (226) 21 Sind L R 385

(06) 11 Cal W N 215 (216) (Suit by beneficiary against A—Costs awarded to A—Subsequent suit by real owner against A—Latter cannot set off costs)

4 (11) 15 South W R 257 (252)

[See also (80) 8 All 396 (401) (Claim for set-off was not barred by *res judicata*—Claim was allowed)]

5 (71) 16 South W R 309 (309 310)

6 (70) 13 South W R 307 (309)

7 (21) AIR 1921 Cal 67 (68) 48 Cal 817

(21) AIR 1921 Mad 688 (688) (Time barred debt cannot be claimed by way of set off)

(19) AIR 1919 Cal 916 (917) (Debt barred at the time of filing the written statement cannot be set off)

(18) AIR 1918 Mad 259 (262)

(85) 8 Mad 381 (393) (Only so much of the claim as is not barred will be allowed to be set off)

(80) 122 Ind Cas 490 (493) (Lah)

(93) 1898 Pun Re No 53, page 178

the statute of limitations<sup>8</sup> A claim which is barred by limitation according to the law of the place where the suit is instituted, but is subsisting according to the *lex loci contractus* is a legally recoverable claim<sup>9</sup>

Where A transfers to C a debt due to him by B, C takes it subject to the liabilities and equities to which A is subject as against B, under the provisions of Section 132 of the Transfer of Property Act, 1882 If B therefore has a legally recoverable claim against A in respect of another debt, he can enforce the same as against C also, by way of set off<sup>10</sup>

In cases of *equitable set off*, can a barred debt be pleaded by way of set off? It has been held that where there is a fiduciary relationship, as of trustee and *cestus que trust* or where there is accountability as between plaintiff and defendant, even barred debts can be set off<sup>11</sup> But in the undermentioned case<sup>12</sup> the High Court of Madras refused to extend this principle to a case of lessor and lessee and to allow an equitable set off in answer to a suit for rent, on the ground that equity cannot act contrary to the statute of limitations or evade its operation See also the undermentioned cases<sup>13</sup>

Where on a plea of set off it is found that money is due to the defendant in excess of that due to the plaintiff, and the defendant's claim is barred on the date of the written statement but not on the date of the plaint, the question arises whether the Court can pass a decree for the balance in favour of the defendant The High Courts of Madras<sup>14</sup> Bombay,<sup>15</sup> Allahabad,<sup>16</sup> and Calcutta<sup>17</sup> and the Judicial Commissioner's

(36) AIR 1936 Pesh 57 (61)	(Set off based on	(19) 21 Ind Cas 701 (701 702) (Mad) (Do)
		(80) 5 Cal 833 (335) (Do)
		(93) C P L R 22 (23) (Do)
	is 1006	(26) AIR 1926 Lah 633 (634) (Do)
	which	(26) AIR 1926 Pat 77 (79) (Do)
	of the	(18) 21 Ind Cas 716 (718) (Cal)
	state is	(07) 12 Cal W N 60 (62)

8. (1850) 15 Q B 1016 Walker v Clements

(21) AIR 1921 Cal 67 (68) 48 Cal 817

9. (18) 35 All 288 (290 240)

10. (12) 16 Ind Cas 686 (687) (Mad) (Assignee by operation of law)

(07) 80 Mad 235 (238)

(17) 17 Mad L Jour 481 (482) (Suit by receiver of estate of A against B—B having claim against A)

12. (17) AIR 1917 Mad 258 (259) 89 Mad 999

13. (20) AIR 1920 Mad 819 (821 822) 49 Mad

873 (Where defendant could sue independently if the claim were within time—Such claim if barred by limitation cannot be pleaded as set off)

(23) AIR 1923 Bom 113 (118) (Equitable set-off not allowed if claim barred on the date of suit)

(36) AIR 1936 Nag 290 (290) ILR (1937) Nag

481 (Ascertained sum barred by limitation—No equitable set-off can be claimed)

14. (20) AIR 1920 Mad 819 (820 821 822) 49

Mad 873

15. (23) AIR 1923 Bom 113 (118) (In the case

of a counter-claim it is enough if it is proved to have been barred when it was pleaded)

16. (34) AIR 1934 All 42 (423 430) 56 All 821

(But see (35) 7 All 254 (255 256))

17. (36) AIR 1936 Cal 277 (278 279) (In a case

Payee to the maker)

(See (36) AIR 1936 Nag 217 (218) (Right to

11. (5) (Trustee and *cestus que trust*)

(05) 52 Cal 576 (580) (Between mortgagor and mortgagee)

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Court of Nagpur<sup>15</sup> have held that the plea is a weapon of defence, up to the amount of the plaintiff's claim but that it is one of attack so far as the amount is in excess of the claim and that, therefore, limitation in regard to its recovery must be determined with reference to the date of the *written statement*

**7. Separate debt not to be set-off against joint debt.** — Illustrations (f) and (g) to this rule adopt the general principle of law that a joint debt and a separate debt cannot be set off against each other<sup>1</sup> Where the debt sought to be set off is due jointly to the defendant and another who is not a party to the suit, it cannot be pleaded by way of set off, for, the defendant could not have sued the plaintiff without making the other person a party to the suit<sup>2</sup>

See also the undermentioned cases<sup>3</sup>

**8. "Not exceeding the limits of the pecuniary jurisdiction of the Court."** — It has been seen in Note 2, *ante*, that a Court cannot entertain a plea of set off if it has no jurisdiction to take cognizance thereof. It follows that the value of the claim of set off must be within the *pecuniary jurisdiction* of the Court<sup>1</sup> Where both the amount of claim and the value of the set off are each within the jurisdiction of the Court, it is immaterial that the *combined amount* of the two claims is beyond its jurisdiction<sup>2</sup> The words "not exceeding the pecuniary limits of the jurisdiction of the Court" must be construed as applying to the whole of the ascertained sum, therefore the valuation of the set off for purposes of jurisdiction is the *entire sum* pleaded and not the difference between the plaintiff's claim and the defendant's claim.<sup>3</sup> But where the plaintiff admits in the plaint any portion of the defendant's claim, that portion must be deducted in determining the jurisdiction of the Court to try the set off<sup>4</sup> In a small cause suit a set off beyond the pecuniary limits of the Small Cause Court's jurisdiction cannot be entertained, even though it may be within the pecuniary limits of that Court sitting on the original side<sup>5</sup>

**9. Both parties must fill the same character.** — In order to entitle a defendant to plead a set off it is necessary that the parties should fill the *same character* as they fill in the plaintiff's suit<sup>1</sup> See also Illustrations (a) and (b) to this

amount due to him the claim must be legally recoverable at the date of the written statement in which he makes the claim)

18. (25) AIR 1925 Nag 445 (447)

{See also (37) AIR 1937 Nag 210 (210, 211) (Suit for money due in partnership business—Defendant pleading discharge and payment of loan to plaintiff and claiming same—Claim is counter claim and if barred on the date of written statement cannot be allowed)}

**Note 7**

1. (85) 3 Bom 373 (403)

(78) 2 Cal L Rep 414 (418) (Case of rent — For set off, the debts should be mutual due from and to the same parties and in the same right)

1 Ind Jour (N.S.) 354

(75) 23 Satb W R 184 (184, 185) (Rights not mutual to the opposing parties cannot be set off)

2. (10) 5 Ind Cas 570 (571) (Cal)

3. (34) AIR 1934 All 543 (545, 546) 56 All 912 (To a suit for joint debt defendant, if he denies former debt may plead set off due to him alone — Thus (g) to O. S. R. 6, does not apply)

(36) AIR 1936 Pesh 57 (61) (Suit by depositor against Bank to recover deposit—Bank claiming

set off in respect of debt on promissory note executed by depositor and others—Set-off cannot be allowed)

**Note 8**

1. (71) 8 N W P H C II 114 (116)

(32) AIR 1932 Bom 617 (617)

(53) 1843 All W N 5 (5) 5 All 236 (Provided the set off is within the limits it is immaterial if it exceeds the claim of the plaintiff)

2. (89) 1639 Pan Re No 69 page 220

3. (25) AIR 1925 Rang 65 (66, 67) 2 Rang 467 (Same rule applies to equitable set-off)

(25) AIR 1925 Rang 33 (35) 2 Rang 549.

(93) 20 Cal 527 (532)

(90) 1890 Pan Re No 17, page 46

4. (25) AIR 1925 Rang 65 (66) 2 Rang 462

5. (90) 14 Bom 371 (372) (See S. 33 Act IV of 1887)

{But see (68) 12 Bom 31 (33) (Submitted not correct)}

**Note 9**

1. (27) AIR 1927 Loh 223 (229) 3 Loh 105 (Dealings "not mutual" cannot be set off one against the other)

rule Thus, an amount due to the defendant in the capacity of a *manager* cannot be set off against a *personal* claim against him<sup>2</sup>

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Notes 9-1

**10. Winding-up proceedings.**—A debtor to a company, who is not a member thereof, is entitled in an action by the liquidators to recover the amount due from him, to plead by way of set off an ascertained sum of money due to him from the company, provided it had become payable before the date of suit<sup>1</sup> But a debt due by the company to a firm of which the defendant is a partner cannot be set off since the defendant does not fill the *same character* as in the plaintiff's suit<sup>2</sup> A member of a company with limited liability, which is under liquidation, is not entitled to set off paid up calls or calls to be paid up against a debt due by him to the company and thus give himself a preference over the other creditors of the company<sup>3</sup> But, in a suit by the liquidator of a company for recovery of money due to the company from a director, the director can plead a set off in respect of sums due to him from the company<sup>4</sup>

**11. Insolvency proceedings.**—Section 47 of the Presidency Towns Insolvency Act (III of 1909) and Section 46 of the Provincial Insolvency Act (V of 1920) provide for set off in case of *mutual dealings* between an insolvent and his creditors There can be no set off unless there are mutual dealings<sup>1</sup> Mutual credits which may be set off include credits which have a natural tendency to terminate in debts, and not merely credits which must necessarily terminate in debts<sup>2</sup> This principle of set off in insolvency is a doctrine of equity and its object is not merely to avoid cross actions, but to do substantial justice Therefore, it cannot be extended to a case where at the time of insolvency the debtor of the insolvent, with full knowledge that the latter has become hopelessly involved, buys a third person's claim against the insolvent in order to relieve himself of the liability of having to pay his just debts<sup>3</sup>

**12. Proceedings under the Agra Tenancy Act and other special Acts.**—Section 193 (g) of the Agra Tenancy Act (II of 1901) provides that no set off shall be allowed in any suit under that Act except a sum due to the defendant on an *unsatisfied decree under that Act* or any other enactment repealed thereby<sup>1</sup> No set off can be allowed, under Section 140 of the Oudh Rent Act (XXII of 1886), in a suit for

(92) 15 Mad 29 (89) (Debt due to defendant by deceased can be set off in a suit by the legal re

2 (27) AIR 1927 Lah 226 (229) ■ Lah 105

3 (18) AIR 1918 Mad 995 (996 997) 40 Mad 1004

4. (66) 30 Bom 173 (194)

#### Note 11

1. (1836) 1 Moo Ind App 57 (147 148 149) (P C) (80) 6 Cal L Rep 294 (295) (Set off allowed as a case of mutual credits)

2 (10) 5 Ind Cas 845 (846) 33 Mad 53 (54)

[But see (92) 19 Cal 146 (159) (Reciprocal demands must terminate in a debt)]

3 (14) AIR 1914 Lah 317 (318) 1914 Pun Ro No 53

#### Note 12

1 (24) AIR 1924 All 341 (344 349) 46 All 305 (F B) (Decree for rent against assignors of plain tiff not allowed to be set off)

1A Mutual claim as landlord — Defendant as a pujari—No set off)

(91) 15 Bom 186 (189) (Different character)

(25) AIR 1925 Sind 142 (143 144) (Do)

(36) AIR 1930 Pesh 57 (61) (Suit by depositor against Bank to recover deposit—Bank claiming set-off in respect of debt on promissory note executed by depositor and others — Parties do not fill same character)

2 (89) 5 All 299 (301)

#### Note 10

1 (07) 23 Cal 10 (143)

(13) AIR 1915 Lah 204 (205 207) 1915 Pun Ro No 63

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arrears of rent\* A Revenue Court acting under Section 24 of the Bengal Tenancy Act (X of 1859) has jurisdiction to allow the claim of set off<sup>3</sup> No set off, whether legal or equitable, shall be pleaded by way of defence to any suit under the Madras Estates Land Act (I of 1908)<sup>4</sup>

**13. Effect of not claiming set-off.** — A defendant who has a claim for set off is not bound to put it forward in answer to the suit against him and his omission to do so does not preclude him from bringing a separate suit in respect of it<sup>1</sup> But if he does set up such claim he must do so in respect of the entire amount due He cannot claim a set off in respect of a portion only, and subsequently sue for the balance<sup>2</sup> There is, however, an exception to this rule In all actions for goods sold and delivered with a warranty, or for work and labour as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject matter of the action was worth by reason of the breach of the contract and to the extent that he obtains or is capable of obtaining an abatement of the price on that account he must be considered as having received satisfaction for the breach of contract and he is precluded from recovering in another action to that extent but no more<sup>3</sup>

#### Illustration

A an agent sued B his principal for recovery of money alleged to be due to him on account of advances made by him for purchase of chillies giving credit in the plaint for the price of 82 bags of chillies belonging to B and sold by him B then sued A in another Court for damages on the ground that the sale of the 82 bags was unauthorised B's suit was stayed under Section 10 of the Code He did not agree to have the question of damages tried by way of set off in A's suit and a decree was passed in favour of A as claimed in the plaint Then in B's suit A pleaded that B having already recovered a portion of the damages in his suit namely to the extent which he (A) had given credit in his plaint the claim for the balance is barred It was held that the suit was not barred on the principle stated above<sup>4</sup>

**14 Court-fee.** — Before this Code was enacted the general trend of opinion among the several Courts was that *ad valorem* court fee must be paid on a written statement pleading a set off under this rule<sup>1</sup> It has now been made clear by the

( 57 ) AIR 1987 All 820 (321) (Suit for profits — Prior settlement of account between parties in respect of transaction other than profits — Agreement between them to set off sum due from plaintiff towards his share of profit — Court can recognise such a set off already agreed upon though under Sec 2 No 10 Agr Tenancy Act Court cannot allow set off in suit for profits — Plea of set off is in effect plea of payment in such cases )

2 ( 93 ) 1 Oudh Cas 100 (102) (Suit for rent against thekaders — See 146 applies)

3 ( 72 ) 18 Suth W R 330 (310)

4. Section 192 (e)

#### Note 13

1 ( 15 ) AIR 1915 Mad 1213 (1213)  
( 19 ) AIR 1915 F R 220 (220) 1915 Pm R No "4  
( 26 ) AIR 1926 Mad 1090 (1021) (Same rule applies to cases of equitable set-off)  
( 25 ) AIR 1925 Mad 880 (831) (Do)  
( 39 ) AIR 1939 Pat 94 (265) (Landlord taking advances and buying goods from tenant — Under standing to set off dues against rent — Rent suit by landlord — Tenant not claiming set off but filing cross suit — Cross suit is not barred)  
( See ( 23 ) AIR 1923 Bom 24 (25) 47 Bom 182 (Set off can be the subject of a separate suit) ]

[See however ( 20 ) AIR 1920 Mad 581 (581 533) (Suit upon mortgage — Mortgagor not counter claiming amounts due from mortgagees — Later suit in respect of it is barred )]

2 ( 04 ) 82 Cal 654 (557 650 660 662)

3 ( 1811 ) 4 M & W 555 (871 879) Mondel v Steel (1871) 6 Q B 667 (689) Davis v Hedgess

4 ( 25 ) AIR 1925 Mad 880 (832)

#### Note 14

1 ( 92 ) 15 Mad 39 (31) (The written statement should be treated as a plaint for purposes of cross claim)

( 89 ) 15 Bom 672 (673) (Written statement claiming set off is chargeable with court fees chargeable for a plaint of that nature)

( 06 ) 10 Cal W N 109 (200)

( 86 ) 8 All 396 (401)

( 85 ) 7 All 234 (239) (Defendant not paying court fee on the set off claimed — The excess should not be decreed in favour of the defendant — Per Douthett J)

[But see ( 04 ) 8 Cal W N 174 (178) (Defendant not paying court fee on the set off claimed — Obiter)]

( 03 ) 1 Low Bur Hal 186 (190) (FB) (Written statement claiming set-off under § 113 C P Code of 1882 need not bear court fee stamps)]

amendment of the Court-fees Act referred to in Schedule IV of this Code that court-fee must be paid on such statements, regarding them as plaints.<sup>2</sup>

It has been held in the undermentioned cases that written statements pleading *equitable set-off* are not chargeable with court-fee.<sup>3</sup> But the High Court of Madras has held that the word "set-off" in Article 1, Schedule I of the Court-fees Act includes also an equitable set-off and as such court-fee is payable on such set-off.<sup>4</sup> The same view has been held by the Allahabad High Court in the undermentioned decision<sup>5</sup> and also by the Nagpur High Court.<sup>6</sup> A plea of set off should not be entertained by a Court until the court-fee with respect to it has been paid by the defendant.<sup>7</sup>

Although the proviso to Article 1, Schedule I of the Court-fees Act refers only to the maximum fee leviable on a plaint or a memorandum of appeal, there is no authority for charging a larger sum on a written statement pleading a set-off or counter-claim.<sup>8</sup>

No court-fee is payable on a written statement pleading an *adjustment* of the plaintiff's claim.<sup>9</sup>

**15. Counter-claim.** — A set-off is a statutory defence to a plaintiff's action, a counter-claim is substantially a cross action. The counter-claim need not be an action of the same nature as the original action or even analogous thereto.<sup>1</sup> Though there is no provision in the Code for making a counter-claim,<sup>2</sup> a Court has got the power to treat the counter-claim as the plaint in a cross suit and hear the two together if the counter-claim is properly stamped.<sup>3</sup> It has, however, been held by the Calcutta High

to be paid at any stage of the suit and the order was proper.]

[But see ('39) AIR 1939 Bom 886 (888) (Though a defendant pleading a set off should fail to pay the necessary court fees on his claim the omission to pay the court fees does not affect his claim to the set off since he can be called upon to pay the necessary court fees at any stage of the proceedings under S 149 C P C).]

8. ('30) AIR 1930 Oudh 140 (141) 5 Luck 621.

9. ('27) AIR 1937 Lah 62 (62).

#### Note 15

1. (1881) 17 Ch D 174 (182), *Beddall v. Maitland*, (Per Try, J.)

('32) AIR 1932 Bom 617 (618) (Difference be-

by defendant—Plaintiff's claim and damages arising out of same contract—No separate court-fee is necessary.)

claim is the defendant's defence but every counter claim cannot be pleaded as a set off.]

2. ('24) AIR 1924 Rang 346 (346) ■ Rang 276

[See ('30) AIR 1930 Bom 216 (216) (Rule 119 B of the Bombay High Court Rules provides for counter-claim being made)]

3. ('24) AIR 1924 Rang 346 (346) 2 Rang 276 (In a suit for possession of land, defendant counter claimed on the strength of an agreement of sale in his favour)

('35) AIR 1935 Rang 116 (117) (When the defen-

[See also ('34) AIR 1934 Rang 160 (161) (Suit by plaintiff and counter-claim by defendant—

discretion under s 149 to order the court fees

O. 8 R. II Court that it has no such power<sup>4</sup>  
Notes 15-16

**16. Solicitor's lien for costs.**— "A solicitor has, at Common Law, and apart from any order of the Court or statute, a lien over property recovered or preserved or the proceeds of any judgments obtained for the clients by his exertions"<sup>1</sup> This lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 & 24 Vic., Ch 127, by which statute the lien was very much extended<sup>2</sup> It applies to property of every description including costs ordered to be paid to the client<sup>3</sup> except that it does not attach to real property<sup>4</sup> But the Calcutta High Court has held in the undermentioned case<sup>5</sup> that it applies to immovable property also This lien has priority over any attachment by a judgment-creditor so long as the moneys attached remain within the jurisdiction of the Court, that is, until they are realised and paid off to the judgment creditor<sup>6</sup> The Solicitor's lien is a particular lien, it is, therefore, not available for the general balance of account between the solicitor and the client<sup>7</sup> Although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney<sup>8</sup> As to the power of the Court to enforce the lien by summary procedure, see Note 38 to Section 35, *ante*

Under sub rule (2) of this rule a set off cannot be made so as to affect the lien of the pleader in respect of his costs<sup>9</sup> Thus, costs ordered to be paid by a petitioning creditor to a debtor when an adjudication in bankruptcy is set aside, cannot be set off to the prejudice of the solicitor's lien against the debts due to the petitioning creditor<sup>10</sup> But, it has been held by the Calcutta High Court that a solicitor's lien upon a judgment obtained by his client is only a claim or right to ask for the intervention of the Court for his protection when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs and that the lien is subject to all the equities between the client and the other parties interested in the

comes before the Court as plaintiff in general gives the Court jurisdiction to entertain a counter claim or in other words a cross action against him ]]

4 ( 22 ) AIR 1922 Cal 1 (1)

[See ( 33 ) AIR 1933 P C 29 (32) 60 Ind App 297 60 Cal 980 (PC) (Counsel admitted that in successful court a counter claim is incompetent )]

[See however ( 33 ) AIR 1933 Cal 111 (28) 60 Cal 833 ]

Note 16

1

lations of documents )

2. ( '86 ) 10 Dom 248 (253)

3 ( 27 ) AIR 1927 Bom 542 (545) 51 Bom 855

4 ( 23 ) AIR 1928 Bom 108 (110) 52 Bom 396

( 27 ) AIR 1927 Bom 542 (545) 51 Bom 855

5. ( 17 ) AIR 1917 Cal 652 (654, 655) 43 Cal 676.

6. ( 25 ) AIR 1925 Bom 351 (352) 40 Bom 505

( 87 ) 14 Cal 374 (375 376)

7. ( 09 ) 4 Ind Cas 398 (399) 33 Mad 251 (Money realized in one case cannot be appropriated for dues in another case )

8. ( 06 ) 30 Bom 27 (33)

( 35 ) AIR 1935 Cal 168 (172 173) 61 Cal 1005 (Bona fide compromise between parties—Court will not interfere for preserving solicitor's lien—But if it is collusive Court will interfere )

( 98 ) 25 Cal 897 (900)

[See also ( 74 ) 12 Beng L R 110 (112 113) (Where there is no fraud the compromise will not be set aside at the instance of the attorney )]

9 ( 06 ) 30 Bom 173 (195)

10 ( 30 ) AIR 1930 Bom 516 (517) 55 Bom 377 (1867) 2 Ch 608 (812, 813) *Ex parte Cleland* In re Davies

property, so that it ought not to intercept the right claimed by the judgment-debtor to set off a prior decree which he had obtained against the attorney's client <sup>11</sup>

O. 8 R. 6  
Notes 16-18

**17. Appeal.** — An appeal does not lie against an order on a preliminary issue disposing of the claim to a legal set off, advanced by the defendant. The reason is that under O 20 R 19 only one decree can in such a case be drawn up and, therefore, it cannot be said that there is a conclusive adjudication within the meaning of Section 2, clause 2 <sup>1</sup>. An objection cannot be taken up in appeal, for the first time, that a plea of equitable set off cannot be entertained by the Court <sup>2</sup>.

The valuation of a claim of set off is the amount claimed by the defendant and an appeal relating to a claim of set off will lie to the High Court where it exceeds Rs 5,000 <sup>3</sup>. Where a claim of set off is disposed of without demanding court fees from the defendant and the lower Appellate Court decides that no court fee is necessary, such an omission is only a mere irregularity within the meaning of Section 99 of the Code and is not a ground for reversing the decision in second appeal <sup>4</sup>.

**18. Limitation.** — See Note 6, *ante*

**R. 7. [New.]** Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

O. 8 R. 7

Defence or set-off  
founded on separate  
grounds

[R. S. C., O 20 R. 7. See O. 7 R. 8.]

**R. 8. [New.]** Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

O. 8 R. 8

New  
defence

[R. S. C., O. 24 Rr. 1 and 2. See R. 9, *infra*]

**1. Court can take notice of subsequent events.** — A Court can take cognizance of events which happen during the pendency of the litigation as a defence to the action <sup>1</sup>. Though a Court of appeal will not ordinarily take notice of any facts

11 (17) AIR 1917 Cal 241 (242-243) 43 Cal 932  
[See also (79) 4 Cal 742 (744)  
(30) AIR 1932 B 10 (11) 1032

3 (71) 3 N W P H O R 114 (116)  
(85) 10 All 587 (594)

4 (13) 111 Ind Cas 918 (919) (Cal) (FR)

Order 8 Rule 8 — Note 1

1 (28) AIR 1923 Bom 427 (430) 52 Bom 8-7  
(21) AIR 1921 Bom 310 (314) 45 Bom 245  
(Defendant can plead in his written statement  
in a judgment of the claim in a set off or suit)  
[But see (11) 10 Ind Cas 10 (4) (Cal)]

#### Note 17

1 (17) AIR 1917 Lah 261 (265) 1917 Pan Re  
No 1  
2. (31) AIR 1 31 Cal 359 (360)



O. 8 R. 8  
Note 1

which may have arisen subsequent to the judgment of the lower Court, it will do so in exceptional cases where, by so doing, it can shorten litigation and best attain the ends of justice.<sup>2</sup> See also O 7 R 7, Note 4.

It has been held that there can be no limitation against a plea in defence.<sup>3</sup>

O. 8 R. 9

**R. 9. [S. 112.]** No pleading subsequent to the written

Subsequent pleadings.

statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same

[1877, S 112; 1859, S. 122. See O. 6 R. 7.]

**1. Subsequent pleadings.** — This rule requires the leave of the Court before any party can present a further pleading after the written statement has been filed.<sup>1</sup> Even in the case of a minor defendant, he is not entitled, on attaining majority, to put in an additional written statement without leave of the Court.<sup>2</sup> As to when a party will be allowed to file a subsequent pleading and when not, see the undermentioned cases.<sup>3</sup> If the pleadings of either party are too vague, the Court may require such party to file a further and fuller statement under this rule.<sup>4</sup> It has been held by the High Court of Bombay in the undermentioned case<sup>5</sup> that where the defendant does not make a counter claim or plead a set off, the plaintiff cannot be called upon to put in a written statement in answer to the defendant's allegations. It is submitted that this decision is not correct.<sup>6</sup> An additional written statement filed long after the fixed date cannot be removed from the record unless the opposite party takes immediate steps for its removal.<sup>7</sup>

The additional written statement should not set up a new case or state facts inconsistent with the original written statement. See Notes to O 6 R 7

2. (1917) 6 Cal L Jour 74 (76)

3. (1929) AIR 1929 All 77 (78)

Order 9—Note 1

1. (1915) AIR 1915 Bom 390 (392, 396)

(1915) AIR 1915 Mad 984 (988)

2. (1915) AIR 1915 Mad 117 (117)

(1917) AIR 1917 Pat 625 (626)

3. (1900) 24 Bom 403 (406). (Defendant was ignorant of true facts and was therefore allowed to file a subsequent pleading)

(1914) 22 Suth W R 377 (377) (Subsequent statement as explaining plaint—No prejudice to other party—Allowed)

(1913) 3 Beng L R App 11 (12) (Defendant allowed on condition of costs of the application of the other side being paid)

(1918) AIR 1918 Pat 230 (231) (Delay of more than a year—Refused)

(1913) 27 Bom 485 (491) 30 Ind App 127 (PC)

(After close of plaintiff's case not allowed)

(1910) 4 Bom 576 (578) (Cannot be allowed after the hearing is begun)

Bourke PO 153 (Not allowed—No sufficient cause)

(1915) AIR 1915 Lah 449 (450) (Pleading piecemeal should be avoided as far as possible)

4. (1901) 17 Cal 840 (845)

(1911) 11 Suth W R 71 (72) (Additional written statement merely giving the names of two witnesses admittedly belonging to the suit properly)

(1916) 5 Suth W R 50 (51) (Can only be called for by Court of original jurisdiction)

5. (1919) AIR 1923 Bom 413 (418)

6. [See also (1915) AIR 1925 Bom 390 (392)] (The observations of Marten, J., suggest that Court can call upon a plaintiff to file a written statement)

7. (1915) 9 Bom 373 (381, 392)

**R. 10.** [S. 113.] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

O. 8 R. 10

Procedure when  
party fails to present  
written statement  
called for by Court.

[1877, Ss. 113, 370; 1859, S. 106.]

### Synopsis

1 Scope. | 2. Appeal

Other Topics (miscellaneous)

'Pronounce judgment' See Note 1  
Written statement not filed — Court's power to decree suit  
See Note 1

**1. Scope.** — It has been held by the High Court of Rangoon that the power given to the Court by this rule to pronounce judgment refers to a written statement which has been demanded by the Court under Rule 9<sup>1</sup>. But according to Mr Justice Kyling of the High Court of Madras,<sup>2</sup> — and the Chief Court of Oudh<sup>3</sup> also seems to take the same view — this rule relates back to Rule 1, as well as to Rule 9, and therefore applies to written statements required by the Court under Rule 1 as well. Mr Justice Seshagiri Ayyar took a contrary view.

This rule applies only to a *specific* requirement by the Court to the filing of a written statement and not to *general direction* in the summons that such a statement may be filed.<sup>4</sup> The High Court of Bombay has held in the undermentioned case<sup>5</sup> that a Court has no power to call upon a plaintiff to put in a written statement except in answer to a set off, and to dismiss the suit on his failure to do so. It has been already submitted in Notes to Rule 9 that this view is not correct. A conditional order, as for instance, an order directing a statement, *if any*, to be filed<sup>6</sup> or an order merely permitting a statement to be filed<sup>7</sup> will not entail the penalty imposed by this rule. Where a party files a written statement expressing his inability to supply the *particulars* asked for by the Court, it is not a failure to present a written statement within the meaning of this rule.<sup>8</sup>

The Court cannot strike out a defence for failure of the defendant to present a further written statement called for by it.<sup>9</sup> A judgment pronounced under this rule must satisfy the requirements of 'judgment' as defined in Section 2 sub section 9 and, therefore, the Court should go into the case and pronounce a decision upon the facts so far as they are before it.<sup>10</sup> A plaintiff is not entitled to obtain a decree before the date on which the summons is returnable, even though the summons directs that the written statement should be filed on or before a day before such returnable date.<sup>11</sup>

#### Order 8 Rule 10 — Note 1

1. (28) AIR 1928 Rang 261 (262) 6 Rang 466
2. (18) AIR 1918 Mad 1163 (1164)
3. (But see (1865) 2 Mad II CR 311 (312) (Dissen  
sent from in AIR 1918 Mad 11(3))
4. (25) AIR 1925 Oudh 867 (568)
5. (12) 15 Ind Cas 212 (212) 15 Oudh Cas 78
6. (25) AIR 1925 Oudh 867 (568)
7. (29) AIR 1929 Bom 413 (413)
8. (27) AIR 1927 Mad 1007 (1008)
9. (57) 1887 34 Ind P J 31
10. (106) 16 Mad L Jour 30 (31 32)

O. 8 R. 10  
Notes 1-2

The Bombay High Court has in the undermentioned case<sup>12</sup> expressed the view that where a defendant is ordered to file a written statement within a certain time and he fails to do so, it is not justifiable to pass an order that the suit should proceed *ex parte* against him. According to the above decision, the failure of the defendant to file a written statement as required by the Court means only that he admits the allegations in the plaint, and he is entitled to appear and submit any argument open to him on the plaint, for instance, that the plaint discloses no cause of action or that the claim is time barred.

**2. Appeal.** — An order pronouncing judgment against a party under this rule is appealable as an order under O 43 R 1 (b).<sup>1</sup> But an order refusing to pronounce judgment under this rule is not appealable.

## Local Amendments

## ALLAHABAD

Add the following Rules

O 8 R 11  
(Allahabad)

'11 Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing file in Court a proceeding stating his address for service written in English in block letters and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

O 8 R 12  
(Allahabad)

12 Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

## BOMBAY

The following shall be added as Rules 11 and 12

O 8 R. 11  
(Bombay)

'11 Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a memorandum in writing stating his address for service, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit.

Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under Section 7 of the Dekkhan Agriculturists Relief Act 1879 or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

O. 8 R. 12  
(Bombay)

Applicability of R 20 and 22 of O 7 to addresses for service

12 Rules 20, 22, 23, 24, 25 and 26 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

## LAHORE

Add the following Rules

O 8 R. 11  
(Lahore)

'11 Every party, whether original added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons notice or

12 (39) AIR 1939 Bom 470 (471)

will be )

Note 2

1 ('25) AIR 1925 Oudh 567 (567) (Where Court ought to have proceeded under O 9 R 6 instead of this rule an application under O 9 R 13 2

other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

O. 8 R. 11  
(Lahore)

12 Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule "

O. 8 R. 12  
(Lahore)

**NOTE Lahore Rule 11.**—This rule applies to defendants who are corporations as well as to other defendants<sup>1</sup> The rule is mandatory so far as the filing of the proceeding stating the addresses for service is concerned, but the matter is left to the discretion of the Court and it is not bound to strike off the defence of the defaulting party in every case<sup>2</sup>

## NAGPUR

Add the following as Rules 11 to 13 —

"11 Every defendant in a suit or opposite party in any proceedings, shall on the first day of his appearance in Court, file an address for service on him of any subsequent process. The address shall

O. 8 R. 11  
(Nagpur)

be within the local limits of the civil district in which the suit or petition is filed or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution

12 (1) If the defendant or the opposite party fails to file a registered address as required by Rule 11, he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the same position as if he had made no defence

O. 8 R. 12  
(Nagpur)

Consequences of non filing of registered address

An order under this rule may be passed by the Court *suo motu* or on the application of any party

(2) Where the Court has struck out the defence under sub rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out

(3) Where the Court has struck out the defence under sub rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order, and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding

Provided that where the decree is of such a nature that it cannot be set aside

1 (2) AIR

2 (20) AIR

{See also (2)

**O. 8 R. 12 (Nagpur)** as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties

**O. 8 R. 12 (Nagpur)** 13 Rules 20, 22 and 23 of Order 7 shall apply, so far as may be, to addresses for service filed under Rule 11."

N.-W.F.P.

Add the following Rules :

**O. 8 R. 11 (N.-W.F.P.)** "11 Every party, whether original, added or substituted, who intends to appear and defend any suit or original petition shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

**O. 8 R. 12 (N.-W.F.P.)** 12 Rules 20 and 22 of Order 7 shall apply, so far as may be, to addresses for service, filed under the preceding rule "

ODDH

Add the following Rules

**O. 8 R. 11 (Ouddh)** "11 Every defendant in a suit or opposite party in any proceeding shall, on the first day of his appearance in Court, file an address (to be called the "registered address ) for service on him of any subsequent notice, summons or other process, and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence, or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply

An order under this rule may be passed by the Court, *suo motu* or on the application of any party

**O. 8 R. 12 (Ouddh)** 13 Rules 21, 23 and 25 to 27 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule, and Rule 24 shall, in the same manner, apply, but as if the words at the beginning, "In all cases to which Rule 23 does not apply' were omitted

**O. 8 R. 13 (Ouddh)** 13 Nothing in Rules 11 and 12 shall apply to the notice prescribed by Order 21 Rule 22 "

PATNA

Add the following Rules

**O. 8 R. 11 (Patna)** "11 Every party, whether original, added or substituted, who appears in any suit or other proceedings shall, at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

**O. 8 R. 12 (Patna)** 13 Rules 20 and 22 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule "

SIND

Add the following Rules

**O. 8 R. 11 (Sind)** 11. Parties to file address —Every party whether original, added or substituted,

who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him, as the date of hearing, file in Court, a memorandum in writing stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had

not defended In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just

O. 8 R. 11  
(Sind)

Provided that this rule shall not apply to a defendant who has filed a written statement, but who is examined by the Court under Section 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise

12 *Applicability of Rules 20 and 22 26 of Order 7 to addresses for service —* Rules 20, 22, 23, 24, 25 and 26 of Order 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule

O. 8 R. 12  
(Sind)

NOTE — Order 7 Rule 26 is now deleted by the Sind Court

## ORDER IX.

### GENERAL

#### Synopsis

- |  |   |
|--|---|
| <p>1 Applicability of Order 9 to execution proceedings</p> <p>2 Applicability of Order 9 to applications under Order 9 itself.</p> <p>3 Applicability of Order 9 to proceedings under local and special Acts</p> | <p>4 Applicability of Order 9 to miscellaneous proceedings See S 141 and Notes thereto and O 9 R 9 Note 6</p> <p>5 Failure of party to appear at adjourned hearing See O 17 R 1</p> |
|--|---|

1. **Applicability of Order 9 to execution proceedings** — There is nothing in Order 21, which deals with execution of decrees and orders, specifically empowering the Court to apply Order 9, to execution proceedings. Hence, the provisions of Order 9 can apply, if at all, only by virtue of Section 141. In *Thakur Prasad v Fakirullah*,<sup>1</sup> the Judicial Committee of the Privy Council held that the proceedings referred to in Section 647 of the Code of 1882 (now Section 141) included *original matters* such as proceedings in probates, guardianships, and so forth and did not include executions. Notwithstanding this decision of the Privy Council, it was still held in some cases<sup>2</sup> that Section 141 could be applied to make Order 9 apply to execution proceedings. The consensus of authorities in the several High Courts may, however, now be fairly taken to be that Order 9 does not apply to execution proceedings.<sup>3</sup> Thus, it has been

Order 9  
General

#### Order 9, General—Note 1

(33) AIR 1933 Mad 418 (422) 56 Mad 490 (FD)  
(34) AIR 1933 Lah 99 (101) 13 Lah 761 (Exc  
ution application can however be restored under  
inherent powers of the Court)  
(29) AIR 1929 Bom 217 (219) (O 9 R 8 does

**Order II  
General  
Notes 1-2**

held not to apply to proceedings under O 21 R 2,<sup>4</sup> or O 21 R 89,<sup>5</sup> or O 21, R 90,<sup>6</sup> or O 21 R 97 to 101.<sup>7</sup> For a full discussion, see Section 141 *ante*. When an execution application is dismissed for default the party can file a fresh application<sup>8</sup> and in a proper case can invoke the inherent powers of the Court for a rehearing.<sup>9</sup> Under the new Rule 15 added by the Madras High Court Rules 6 13 and 14 of this Order have been declared to be applicable to those proceedings in execution falling within Section 47 of the Code in which notice to the opposite party is required to be given. See Rule 15 added by the Madras High Court *infra*.

See also Order 9 Rule 9 Note 6

**2 Applicability of Order 9 to applications under Order II itself.** — Where an application under R 4 or R 9 or R 13 of this Order is itself dismissed for default does a fresh application to restore that application lie? There is a conflict of opinion on this point. It has been held by the High Courts of Lahore,<sup>1</sup> Madras<sup>2</sup> and Rangoon<sup>3</sup>

- (20) AIR 1935 Cal 441 (415)  
(21) AIR 1942 Cal 111 (17)  
(18) AIR 1918 Cal 1011 (1012)  
(16) AIR 1918 Cal 117 (118) 44 at J J ur 330  
(2) AIR 1912 Cal 211 (18) 18 at L R 157  
(1) AIR 1911 Cal 55 (55) 24 Oudh Cas 159  
(24) AIR 1926 Oudh 478 (478) 41 W re a subse-  
quent application for execution is dismissed Court  
under S 151 restored the application to its file  
(1) AIR 1911 Pat 331 (93)  
(1) AIR 1931 Sind J 34 25 at L R 475 (FB)  
(But inherent power refused to exist to set aside ex-  
parte order as passed in execution proceedings)  
(S. 1) AIR 1915 Cal 59 (59)  
(27) AIR 1937 Sind 273 (273) 41 Sind L R 180  
(Application under O 9 R 2 not an execution  
proceeding—O 9 R 2 and 4 apply to such  
application)  
(See also (15) AIR 1915 Mad 611 (612) 38 Mad  
103)  
[But see (1) AIR 1924 Mad 715 (715) 47 Mad  
1 (C. of I. n. p. n. o.)]  
(20) AIR 1913 Cal 114 (115)  
(S. 1) AIR 1913 Cal 114 (115) (Con-  
ced. I. n. p. n. o.)  
(26) AIR 1913 Bom 377 (378) 50 Bom 437  
(Application under O 1 R 89: not an original  
proceeding)  
(21) AIR 1921 Pat 293 (294) (Inherent power  
to set aside ex parte order recog-  
nised)  
(21) AIR 1927 Cal 938 (939)  
(21) AIR 1926 Cal 109 (109)  
(19) AIR 1919 Pat 192 (193) 4 Pat L Jour 135  
(F B)  
(31) AIR 1931 All 594 (595)  
(38) AIR 1938 Mad 495 (495) (Court has inherent  
power to dismiss for default application under  
O 21 R 90)  
(26) AIR 1926 Mad 412 (414 415)  
(19) AIR 1919 Pat 540 (541) (Order under O 21  
R 100 and 101 = not a suit Hence O 9 R 4  
inapplicable)  
(14) AIR 1914 Cal 126 (127) 41 Cal 1 (Applica-  
tion under O 21 R 100—O 9 R 13 not applied)  
[But see (23) AIR 1923 Pat 239 (241) 2 Pat  
372 (Application under O 21 R 100 is an  
original matter in the nature of suit—O 9 R 9  
held applicable)]

- (18) AIR 1916 Pat 486 (486) 11 Pat L Jour 250  
(Application under O 21 R 100 — Rehearing  
under O 9 can be obtained)  
(23) AIR 1923 All 460 (460) 45 All 148  
(16) AIR 1918 Pat 67 (68) 4 Pat L Jour 830  
(22) AIR 1922 Oudh 201 (202)  
(17) AIR 1917 Cal 81 (83 33) (Obiter)  
[See also (20) AIR 1920 Cal 458 (458)  
(28) AIR 1928 Cal 170 (170 180) (Where Code  
does not provide a remedy nor does it prohibit  
the granting of it S 151 is applicable)  
(33) AIR 1938 Lah 99 (101) 13 Lah 781  
(38) AIR 1938 Nag 176 (176) 29 Nag L M 176  
(Objection was restored under inherent powers)  
(21) AIR 1921 Sind 25 (56 57) 17 Sind L R 105  
(Application under O 21 R 90)  
(14) AIR 1914 Sind 61 (62) 8 Sind L R 377  
(Execution application adjourned to 6th January  
was by mistake called on the 5th—Inherent power  
of restoration to be exercised)  
(20) AIR 1929 All 485 (487)  
(24) AIR 1924 Lah 850 (850 831)  
(25) AIR 1929 All 801 (801) (Mistaken order of  
dismissal for default can be rescinded)  
(27) AIR 1927 Cal 420 (420)  
(21) AIR 1931 Lah 67 (68) 2 Lah 66  
(23) AIR 1928 Nag 18 (19 20)  
(39) AIR 1939 Lah 273 (223) (Court has inherent  
powers under R 1 to restore application in  
execution dismissed for default)

**Note 2**

- (10) AIR 1919 Lah 155 (156) (7 Nag L R 39  
Followed)  
(20) AIR 1920 Lah 301 (304) 1 Lah 337  
(Application for restoration of dismissed applica-  
tion was described as one for review)  
(27) AIR 1927 Lah 71 (71) (Second application  
for restoration is competent)  
(27) AIR 1927 Lah 904 (905) (The application  
for setting aside the dismissal of application under  
O 9 R 13 is not to be treated as original appli-  
cation for setting aside the ex parte decree)  
(29) AIR 1929 Lah 678 (678)  
(26) AIR 1926 Mad 325 (326)  
(26) AIR 1926 Mad 654 (654)  
(26) AIR 1926 Rang 74 (75) 8 Rang 534  
[See also (33) AIR 1938 Rang 406 (407) (The  
point was left undecided, however, it was held

the Judicial Commissioner's Court of Peshawar<sup>4</sup> and the Chief Court of Oudh<sup>5</sup> that such an application can be filed, the reason being that the proceedings contemplated under Order 9 are in the nature of an original suit and that by virtue of Section 141, Order 9 applies to them<sup>6</sup>. On the other hand, the High Courts of Bombay,<sup>7</sup> Calcutta<sup>8</sup> and Patna<sup>9</sup> have held that a *second application* to restore a prior application dismissed for default does not lie. But the High Court of Allahabad,<sup>10</sup> and the High Courts of Calcutta and Madras in some cases<sup>11</sup> have struck a *via media* and held that the application for restoration can itself be treated as a *second application* for restoring the suit provided there is no bar by limitation. In some cases the same High Courts have held that in a proper case the Court can also restore a prior application dismissed for default under its *inherent power*<sup>12</sup>. See also the undermentioned case<sup>13</sup>.

It has been held by the Nagpur Judicial Commissioner's Court that an application for the restoration of a suit which application itself has been dismissed for default can be restored under the inherent power of the Court but not under O 9 R 9 read with Section 141<sup>14</sup>. The reason given is that O 9 R 9 creates a substantive right of applying to restore a suit dismissed for default and this right cannot be conferred by Section 141.

But no appeal lies under O 43 R 1 from an order refusing to restore an application for restoration of suit dismissed for default<sup>15</sup>.

### 3. Applicability of Order 9 to proceedings under local and special Acts. —

It is a general principle that once a matter comes before a regular Civil Court its further course will be governed by the provisions of the Code (See Section 141 *infra*). Hence, the provisions of this Order apply to an application to the Court under Section 84 of the Madras Hindu Religious Endowments Act of 1927 and the dismissal of such application for default can be set aside under this Order<sup>1</sup>.

4. **Applicability of Order 9 to miscellaneous proceedings.** — See Section 141 and the Notes thereto and Order 9 Rule 9, Note 6

5. **Failure of party to appear at adjourned hearing.** — See O 17 R 2

that the Court had inherent power to deal with application for setting aside order of dismissal )

4. (34) AIR 1934 Pesh 13 (14)

5. (23) AIR 1923 Oudh 146 (146)

[See (37) AIR 1937 Oudh 344 (346) 13 Luck 246 (An application to set aside the dismissal

(14) AIR 1914 Mad 438 (433)

[See (23) AIR 1923 Cal 552 (552) (Successive applications for restoration are competent)]

12. (25) AIR 1925 All 773 (774 775) 47 All 878

(29) AIR 1929 All 621 (621)

(17) AIR 1917 All 125 (126 127)

(27) AIR 1927 Cal 534 (536) 51 Cal 405

13. (36) AIR 1936 All 737 (739) (Order 9 R 9 does not in terms apply to an application for restoration of suit dismissed for default)

14. (32) AIR 1932 Nag 101 (102) 28 Nag L N 83 (FB) (Overruling AIR 1923 Nag 293 16 I C 705 must also be deemed as overruled by this decision)

15. (37) AIR 1937 Mad 633 (633) ILR (1933)

6. (26) AIR 1926 Mad 325 (326)

7. (23) AIR 1923 Bom 386 (386)

8. (29) AIR 1929 Cal 17 (18)

9. (22) AIR 1922 Pat 121 (121) 4 Pat L Jour 287

10. (24) AIR 1924 All 503 (504) 40 All 319

11. (27) AIR 1927 Cal 534 (536) 51 Cal 405 (But if the application is not within time, then S 151, C P C, may be invoked)

(17) AIR 1917 Cal 519 (519) 41 Cal 950 (Second application is competent)

1. (37) AIR 1937 Mad 633 (633) ILR (1933) Mad 216



**O. 9 R. 1**      **APPEARANCE OF PARTIES AND CONSEQUENCE OF NON APPEARANCE**

**R. 1. [S 96]** On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court

Parties to appear on day fixed in summons for defendant to appear and answer.

[1877, S 96; 1859, S 109]

**1 Applicability of the Rule** — This rule and Rule 2 of this Order apply to the Arakkan Hills<sup>1</sup>

**O. 9 R. 2**      **R. 2. [S 97]** Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent

[1877, S 97; 1861, S 5]

### Local Amendment

#### ALLAHABAD

After the words for such service: insert the words 'or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant'

### Synopsis

- |   |                                      |
|---|--------------------------------------|
| 1 Scope of the Rule   | 4 Plaintiff's remedy after dismissal |
| 2 Defendant   | 5 Appeal                             |
| 3 Failure to pay court fee or postal charges when entails dismissal | 6 Revision                           |

### Other Topics (miscellaneous)

On the day fixed See Note 3

Prov so See Note 3

**1 Scope of the Rule** — The rule applies only to cases of plaintiff's failure to pay process fee or postal charges for service of summons on the defendant. Consequently, the Court cannot dismiss the suit under this rule for failure on the part of the plaintiff to furnish the correct address of the defendant<sup>1</sup> The Allahabad High

#### Order II Rule 1 — Note 1

#### Order 9 Rule III — Note 1

- 1 See The Arakkan Hills Civil Justice Regulation (VIII of 1874) and the Arakkan Hills District Laws Regulation 1916 (1 of 1916) Sch 1
- 1 (2) AIR 1927 Lah 170 (170) (Nor for the failure of the plaintiff to accompany process-server)

Court has held in the undermentioned case<sup>2</sup> that where the plaintiff failed to pay the process fee and the Court ordered him to pay a certain sum as damages and he failed to pay that also, and the Court dismissed the suit, such dismissal of the suit was under this rule

The failure contemplated is not merely an omission to pay the requisite charges but also to pay the same *within the time fixed*<sup>3</sup>

Where a suit is dismissed for default and an application for its restoration is dismissed for failure to pay the process fees, it has been held that the order dismissing the application falls under Rule 9 *infra* and not under this rule<sup>4</sup>

This rule applies to an application under O 34 R 5 by virtue of Section 141 and such an application can be dismissed for non payment of process fees<sup>5</sup>

2. "Defendant." — The word 'defendant' does not include the guardian *ad litem* of a minor defendant as he is not a defendant in the legal sense of the term and the mere fact that no process fee is paid for issuing notice to such a guardian is no ground for dismissing the suit under this rule,<sup>1</sup> especially where there are other major defendants in the suit<sup>2</sup> Where the summons has been served upon a wrong person instead of on the real defendant, and he appears and denies his liability, the proper order to pass is to dismiss the suit with costs<sup>3</sup>

3. Failure to pay court-fee or postal charges — When entails dismissal. — O 48 R 1, sub rule 2 requires that the Court shall fix a time for payment of the process fee And unless it so fixes a time for the deposit of the process fee<sup>1</sup> and gives the party reasonable time and opportunity to comply with its orders,<sup>2</sup> it cannot dismiss the suit But mere ignorance on the part of the plaintiff's agent as to the proper Court in which the process fees ought to be deposited is no ground for not dismissing the suit<sup>3</sup>

There is a conflict of opinion as to whether the failure on the part of the plaintiff to pay process fees for a *newly added defendant* will entail the dismissal of the whole suit The High Court of Bombay has held that the whole suit ought to be dismissed even against the original defendant unless he waives his objection thereto<sup>4</sup> But according to the Allahabad<sup>5</sup> and Patna<sup>6</sup> High Courts the dismissal should be only as against that *particular* defendant According to the proviso, if notwithstanding the plaintiff's default in paying the process fees the defendant appears the Court cannot

(81) AIR 1931 Lah 655 (655) (O 9 R 5 applies to such a case)

2. (127) AIR 1927 All 464 (464)

3. (11) 11 Ind Cas 906 (907) 7 Neg L R 114

and to get a guardian appointed for him does not justify the dismissal of the suit under O 3 R 2 C P C, as against the other defendants who had been duly served)

3 (80) 4 Bom 619 (623)

#### Note 3

1 (24) AIR 1924 Nag 298 (299)

(69) 11 Suth W R 290 (290) (Process fee for summoning witnesses)

[See also (33) AIR 1933 Pat 582 (583) (Non payment of process fee required for fresh summons with the application = no ground for

#### Note 2

1 (11) 11 Ind Cas 317 (318) 1912 Pan Re No 35

2 (70) AIR 1900 Pat 820 (821) (The suit must be proceeded with against the major defendants) [See (37) AIR 1937 Ouh 502 (507) (The fact that the plaintiff through his negligence had failed to get a minor defendant properly served

3

4

was added to Court)

5. (60) 2 All 318 (319)

6 (21) AIR 1921 Pat 422 (422)

**O. 9 R. 2**  
**Notes 3-6**

dismiss the suit.<sup>7</sup> It follows that the Court cannot dismiss the suit on a day previous to the date fixed in the summons for the appearance of the defendant.<sup>8</sup>

Where the plaintiff is prepared to pay the process fees but it is the Court which refuses to take it because according to its view the process fee is being deposited late, this rule does not strictly apply.<sup>9</sup>

A Court has no power to require the plaintiff to pay process fee before fixing the date for the appearance of the defendant, and where the Court does so, the failure of the plaintiff to comply with its order does not entail the dismissal of the suit under this rule.<sup>10</sup>

**4. Plaintiff's remedy after dismissal.** — The plaintiff can apply under Rule 4 to set aside the order of dismissal or may bring a fresh suit.<sup>1</sup>

**5. Appeal.** — The order of dismissal is not a decree within Section 2 (2) and no appeal lies therefrom.<sup>2</sup> The undermentioned decisions to the contrary<sup>3</sup> under the old Code are no longer good law.

**6. Revision.** — Where under O 5 R 10 as amended in the Punjab the plaintiff has an option to have the summons served in the ordinary way or by registered post and the Court ordered the plaintiff to pay both process fees and postal charges, the order is illegal and the suit cannot be dismissed for failure of the plaintiff to pay the postal charges. The High Court will in such a case, revise the order of dismissal.<sup>4</sup> Similarly, where the process fee was paid in sufficient time though not within the date fixed by the Court and the suit was dismissed, the High Court will interfere in revision.<sup>5</sup> For other instances of interference by the High Court, see the undermentioned cases.<sup>6</sup>

**O. 9 R. 3**

Where neither party appears, suit to be dismissed

**R. 3. [S. 98.]** Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed

[1877, Ss 98, 99; 1859, S. 110]

*Synopsis*

- 1 Where neither party appears
- 2 "Appearance" See O 9 R 9 and O 3 R 1
- 3 "When the suit is called on for hearing"
- 4 "The Court may make an order that the suit be dismissed"

- 5 Dismissal pending arbitration proceedings
- 5a Dismissal of suit for default after preliminary decree See Note 8
- 6 Appeal and review

7. (19) AIR 1919 Pat 372 (378)
- (91) 15 Bom 160 (162 163)
8. (80) All 318 (320)
9. (36) AIR 1936 All 797 (739)
10. (32) AIR 1932 Pat 160 (160)

**Note 4**

1. (83) 9 Cal 163 (165)

**Note 5**

- 1 (16) AIR 1916 All 326 (376) 39 All 357
- (83) 9 Cal 627 (628)
- [See (11) 9 Ind Cas 494 (485) (All)] [No appeal lies from order of Appellate Court restoring a suit dismissed for want of payment of process fee.]

2. (67) 7 Suth W R 338 (339)
- (1865) 3 Suth W R Mts 23 (Appeal)
- Note 6**
- 1 (27) AIR 1927 Lah 157 (158)

**1. Where neither party appears.** — A dismissal under this rule is justified only where neither party appears. Thus, if the plaintiff<sup>1</sup> or his agent<sup>2</sup> or his pleader duly instructed<sup>3</sup> is present, the fact that *no evidence is adduced* will not enable the Court to order a dismissal under this rule. If, however, both the parties are absent,<sup>4</sup> the mere presence of the pleaders *without instructions* is not an appearance and a dismissal under this rule is justified.<sup>5</sup>

Where the plaintiff and *some* of the defendants do not appear but the other defendants appear and the suit is dismissed, the dismissal, *in so far as it is against the absent defendants*, is under this rule, while, as against the defendant or defendants who appeared, it is under Rule 8.<sup>6</sup>

Where an application was filed by the respondent in an appeal praying that the appellant should be called upon to give security for the costs of the appeal and, on the day fixed for the hearing of the application, both parties were absent in consequence of which the application was rejected, it was held that the dismissal must be taken to be one under this rule read with Section 141.<sup>7</sup>

**2. "Appearance."** — See Order 9 Rule 9 and Order 3 Rule 1.

**3. "When the suit is called on for hearing."** — The hearing referred to is obviously the *first hearing* after the issue of the summons to the defendant,<sup>1</sup> and not necessarily a hearing of evidence.<sup>2</sup> But when read with O 17 R 2, *infra*, this rule may be applied to cases where the parties are absent at the *adjourned* hearings.<sup>3</sup> The rule may be applied where the parties are absent at a hearing after remand.<sup>4</sup>

But before there can be a dismissal under this rule it is essential that the suit should have been posted to a *specified day for hearing* and that the parties have notice thereof. The word 'hearing' refers to hearing of the case by the Court and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all.<sup>5</sup> It has also been held that where the date has been fixed by the clerk of the Court and not by the Judge, parties are not bound to attend on such date and failure to attend on such date will not justify dismissal of the suit for default of appearance.<sup>6</sup> It is not proper to dismiss a suit on a date

(32) AIR 1932 Oudh 106 (107) (Dismissal of a small civil suit under this rule—Revision lies under S 25 Provincial Small Cause Courts Act)

Order 9 Rule 3 — Note 1

[See (17) AIR 1917 Mad 196 (197) (Dismissal was on the adjourned hearing)]

■ (20) AIR 1920 Bom 54 (55) 44 Bom 767

(26) AIR 1926 All 169 (170) 49 All 97 (Fresh suit is therefore not barred against absent defendants)

(14) AIR 1914 Nag 20 (20) 10 Nag L R 39

7. (85) 7 All 542 (544)

#### Note 3

2. (22) AIR 1922 Pat 504 (507) (Authorised agent with witness present in Court—Dismissal for non appearance of pleader is illegal)

3. (20) AIR 1920 Pat 600 (601) 4 Pat L Jour 277 (Pleader present and asked for adjournment—No indication in the order dismissing the suit if the pleader was not ready to continue the suit on refusal of adjournment)

(11) 9 Ind Cts 812 (814) (Cal)

4. (31) AIR 1931 Pat 18 (19) (Non appearance of party on day fixed—Case governed by R 3 and not by R 5)

5. (11) 3 Ind Cts 847 (848) (Cal)

(35) AIR 1935 Cal 1, 4 (18)

1. (19) AIR 1919 Sind 89 (91) 13 Sind L R 149

(22) AIR 1922 Pat 252 (254) 6 Pat L Jour 650 (The word 'hearing' is used in different rules with a view to state different purposes for which a date for hearing is fixed)

2. (19) AIR 1919 Sind 89 (91) 13 Sind L R 149

3. (33) AIR 1933 Nag 231 (235 236) 29 Nag L R 326 (Although the party has closed his case, it is his duty to appear at the adjourned hearing)

4. (70) 11 South W R 81 (82)

5. (75) AIR 1935 Rang 760 (762)

6. (31) AIR 1931 Lah 254 (255) 33 Pan L R 604 (Followed)

O. 9 R. 3  
Notes 3-4

of which the parties had no previous notice<sup>7</sup> or at a place not notified<sup>8</sup> or on a day fixed for considering only an application for amendment of the issues<sup>9</sup>. Similarly, when a day is fixed merely for the appearance of the guardian *ad litem* of a minor defendant<sup>10</sup> or for the attendance of the plaintiff only,<sup>11</sup> a dismissal of the suit on that day under this rule is not justified. A day fixed for judgment is not a day fixed for the hearing of the suit<sup>12</sup>. Where on a day fixed for the hearing of a preliminary issue, the onus of proof of which lies on the defendant, both the parties are absent, the Court ought not to dismiss the suit for default but should decide that issue against the defendant, especially in a case where a portion of the claim is admitted<sup>13</sup>. A date fixed solely as the last day for filing a list of witnesses is not a date fixed for 'hearing' and failure to file the list of witnesses within such date cannot entail dismissal of suit under this rule or Rule 14 *infra*<sup>14</sup>.

After a preliminary decree has been passed, the suit cannot be dismissed for default of appearance: the reason is that on the passing of the decree the parties acquire rights or incur liabilities which become fixed unless and until the decree is varied or set aside<sup>15</sup>. But although an order dismissing the suit for default of appearance after a preliminary decree has been passed is illegal unless such order is revoked or set aside, it cannot be ignored<sup>16</sup>.

4. "The Court may make an order that the suit be dismissed." — Under the old Code the expression used was "the suit shall be dismissed" and the Judge was

7 (01) 14 C P L R 134 (184) (Such dismissal is illegal)

[See also (135) AIR 1935 Lah 163 (1f4) (Where

'...')]

appearance of parties on that day—No ground for dismissal of suit)

[See (27) AIR 1927 Lah 888 (888) (Do)]

13. (29) AIR 1920 Lah 830 (831)

[See also (14) AIR 1914 Mad 381 (382) (Parties

veyed to the counsel of the parties or to the parties by the counsel concerned—For absence of parties on such date there is sufficient cause within the meaning of R. 4 *infra*)

miss under this rule)]

14. (138) AIR 1938 Rang 860 (862) (The utmost result of the failure of a party to give a list of witnesses within the time fixed would be that

9. (21) AIR 1921 Pat 96 (97) 6 Pat L Jour 331 (Only the application can be dismissed)

(34) AIR 1934 Lah 237 (237, 238) (AIR 1921 Pat 96, Followed)

[See (27) AIR 1927 Sind 228 (229) (Date fixed for hearing an application in the suit—That application and not the suit, can be dismissed)]

10. (23) 73 Ind Cas 559 (560) (Pat)

11. (25) AIR 1925 Lah 96 (96)

(31) AIR 1931 Lah 69 (70)

(21) AIR 1921 Lah 320 (321) (Where no date

missal of a suit)

15. (24) AIR 1921 P O 103 (200) 4 Pat 61 61 Ind App 321 (P C)

(32) AIR 1932 Mad 519 (522)

(33) AIR 1933 Oudh 229 (230) 8 Luck 496

(36) AIR 1936 Lah 875 (876)

(38) AIR 1938 Pesh 27 (27) (The suit should be adjourned *sine die* and made revivable on payment of costs)

O. 9 R. 3  
Notes 4-6

bound to dismiss the suit unless, for reasons to be recorded, he otherwise directed.<sup>1</sup> But under the present rule a discretion is given to the Court in the matter of dismissing the suit.<sup>2</sup>

The Court has no power to *strike a case off its file* but can only make an order dismissing the suit.<sup>3</sup> Where, however, the parties state that the case is settled and at their request the case is struck off, it is not a dismissal for default under this rule.<sup>4</sup>

**5. Dismissal pending arbitration proceedings.** — When a suit is referred to arbitration and is pending before the arbitrator, the Court has no power to dismiss the suit for default under this rule unless an express order superseding the reference to arbitration has first been passed.<sup>1</sup>

**5a. Dismissal of suit for default after preliminary decree.** — See Note 3.

**6. Appeal and review.** — A dismissal under this rule is not a decree within Section 2 (2) and, therefore, no appeal lies.<sup>1</sup> The use of the word "order" makes it clear beyond doubt that the dismissal is not a decree.

It has been held in the undermentioned cases<sup>2</sup> that such an order is not open to review.

**R. 4. [S. 99.]** Where a suit is dismissed under rule 2 or

O. 9 R. 4

Plaintiff may bring fresh suit or Court may restore suit to file.

rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

[1877, Ss. 98, 99; 1859, S. 110.]

### Local Amendment

#### BOMBAY

Rule 4 shall be numbered Rule 4 (1) and the following sub rule (2) shall be added to it, namely :

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under this Rule"

#### Note 4

1. (10) 8 Ind Civ 156 (187) (Mad)
- (93) 23 Bom 657 (1898) (Temporary appointment of the plaintiff as a Subordinate Judge was good reason for not dismissing the suit under Section 94)
2. (36) AIR 1136 Pat 437 (183)
3. (87) 10 Mad 270 (271)
4. (17) AIR 1917 Mad 435 (1896, 1897) (Taking of amounts to a withdrawal by the plaintiff) [See (18) 18 with W R 233 (234) (The court has discretion, to restore to its files any case which

it has itself removed therefrom undetermined)]

#### Note 5

- 1 (99) 1899 Pun Ro No 10 p 52

#### Note 6

1. (02) 29 Cal 60 (62) (Dismissal under O 9 R 8)

2. plaintiff had allowed his rights under O 9 R 4 to be barred)
- (99) 26 Cal 513 (600, 601). (Cister)

O. 9 R 4  
Note 1

## Synopsis

- |   |  |
|---|--|
| 1 Scope of the Rule   | 6 Applicability of the Rule to insolvency proceedings      |
| 2 'Sufficient cause'  | 6a Applicability of the Rule to miscellaneous applications |
| 3 Application under Rule 4 dismissed for default, it can be restored See Order 9 General Note 2 | 7 Notice to defendant                                      |
| 4 Applicability of the Rule to execution proceedings See Order 9 General Note 1                 | 8 Appeal   |
| 5 Applicability of the Rule to applications in forma pauperis                                   | 9 Revision   |
|   | 10 Limitation  |

**1. Scope of the Rule** — Where a suit is dismissed under Rule 2 or Rule 3, or under O 17 R 1 read with these rules a *fresh suit* is not barred<sup>1</sup> It may be brought notwithstanding the fact that no application for restoration has been made under this rule or even after an application under this rule has proved unsuccessful<sup>2</sup> The two remedies are not mutually exclusive<sup>3</sup> But the period covered by the restoration proceedings under this rule cannot be excluded under Section 14 of the Limitation Act for the purpose of the suit<sup>4</sup>

It is only the Court which passes the order of dismissal that can set it aside under this rule<sup>5</sup> Unlike Rules 7, 9 or 13 the present rule does not authorise the Court to impose any terms as to costs<sup>6</sup> The effect of a restoration of the suit under this rule is to bring the suit back as regards parties to the same position in which it was at the time of dismissal<sup>7</sup> The question whether ancillary orders which must be taken to fall along with the dismissal of the suit are restored when the suit is restored should however be decided with reference to the intention of the officer who passed the order restoring the suit and the terms of the order of restoration If he intended to restore the suit and all the ancillary matters (such as injunction orders etc.) connected with it they are all restored If he did not so intend they are not restored As a matter of general rule the intention would be to restore the suit and all incidental matters<sup>8</sup> Where there are more plaintiffs than one the suit can be restored on the application

## Order 9 Rule 4 — Note 1

- 1 (19) 10 P 10 (10) (10)  
 11 " " " " " "  
 (70) 2 All 818 (320)  
 (20) AIR 1920 All 191 (131) 30 All 887 (Suit dismissed under O 9 R 3)  
 (75) 24 South W R 114 (115)  
 { " " " " " " }

which O 9 R 9 commences a dismissal under O 9 R 3 would still not operate to preclude the plaintiff from suing again even if O 9 R 4 did not expressly save his right of suit Rule 4 in effect does not create but declares the right of bringing a fresh suit whilst at the same time permitting the plaintiff in the alternative to proceed with his original suit — Per Rowland J

- 3 (37) AIR 1937 Pat 9 (11) 15 Pat 716  
 (37) AIR 1937 Oudh 262 (262) 13 Luck 103  
 4 (20) AIR 1920 Nag 219 (221) 25 Nag LR 90  
 5 (20) AIR 1920 Lah 418 (419)  
 6 (01) 26 Bom 201 (203)  
 7 (24) AIR 1924 Cal 814 (815) (After the res

representatives on record not maintainable}}

- 2 (21) 63 Ind Crs 299 (230) (All)  
 (26) AIR 1926 All 678 (678)

{ 37) AIR 1937 Pat 9 (11) 15 Pat 716 (In the absence of some such provision as that with

improper }

8 (34) AIR 1934 Mad 49 (51) 57 Mad 303

of any one of them<sup>9</sup> Where a suit brought by a shebat in the name of an idol is dismissed for default under O 9 R 3, an application for restoration under this rule can be made by another shebat who is the shebat at the time of the application<sup>10</sup>

O. 9 R. 4  
Notes 1-5

2. "Sufficient cause."—An order under this rule without giving the applicant an opportunity to show sufficient cause is *ultra vires*<sup>1</sup> As to what is sufficient cause is a matter of discretion and no hard and fast rule can be laid down<sup>2</sup> Where the plaintiff is prevented from attending Court due to unavoidable causes, e.g., picketing by volunteers of Gandhiji, it was held that there was sufficient cause for non appearance<sup>3</sup> Similarly, where the plaintiff had been taken ill and his counsel was only a few minutes late, it was held that the suit should be restored to file<sup>4</sup> A *bona fide* mistake which is not unreasonable is a sufficient cause to order restoration<sup>5</sup> But the mere fact that the summons has been returned unserved on the defendant is no ground for setting aside the order of dismissal<sup>6</sup> See also Notes under Rule II

If sufficient cause is shown for non appearance, the Court is bound to restore the suit, it has no choice in the matter<sup>7</sup> See also the undermentioned case<sup>8</sup>

3. Application under Rule 4 dismissed for default, if can be restored.—See Order 9 General, Note 2

4. Applicability of the Rule to execution proceedings.—See Order 9, General, Note 1

5. Applicability of the Rule to applications in *forma pauperis*.—It has been held by the High Court of Rangoon, applying the provisions of Section 141 of the Code, that where at the hearing of an application to sue in *forma pauperis*, neither party appears and the application is dismissed a fresh application to sue in *forma pauperis* is not barred under the provisions of this rule<sup>1</sup> But if the dismissal

9. (24) AIR 1924 Cal 814 (815)

10 (88) AIR 1938 Cal 547 (548) (The real plaintiff in the suit must be held to be the idol and not the shebat who was suing in his name)

#### Note 2

1 (87) 1889 Bom P J 216 (216)

2 (1865) 1865 Bourke (O C) 115 (Illness of the plaintiff supported by a medical certificate is sufficient cause)

(27) AIR 1927 Lah 911 (912) (Plaintiff's statement on oath that process fee was paid but apparently mislaid in Court is sufficient)

(11) 8 Bom L R 180 (181) (The application for restoration need not be accompanied by an affidavit)

(26) AIR 1926 Lah 631 (631) (Absence not being intentional is a sufficient cause for restoration of a suit)

(30) AIR 1930 Lah 70 (71) (Do)

(85) 7 All 542 (545) (Delay of a few minutes ought to be excused)

3 (31) AIR 1931 Pat 87 (88)

4 (34) AIR 1934 Lah 34 (34)

5 (11) 3 Bom H C R O C 60 (62)

(24) AIR 1924 Lah 882 (882) (Mistake on the part of the Court in

(1864) 2 Hyde 216 (216) (Absence owing to an understanding between the parties for an adjournment)

(85) AIR 1935 Lah 163 (164) (Appellate Judge noting in order that parties are to appear before lower Court on certain date—No proof that either pleaders or parties were informed of it—For parties' absence on such date there is sufficient cause)

(36) 165 Ind Cas 563 (564) (Lah) (Transfer of case to another Court without information to parties—Case decided in absence of party—Application for restoration should be allowed)

6 (26) AIR 1926 Cal 112 (112)

7 (33) AIR 1933 Nag 39 (40) 29 Nag L R 295

8 (39) AIR 1939 Lah 592 (592) 41 Pun L R 592 (592) (In this matter the Court is not bound to

imperative or there is contumacious obstruction or deliberate delay with a view deliberately to lengthen proceedings. The dismissal of suits without considering whether payment of costs will not meet the situation so far as the opposite side if any is concerned must be deprecated)

#### Note 5

1 (20) AIR 1926 Rang 200 (201) 4 Rang 215

(24) AIR 1924 Rang 161 (161)

keastodate



**O. 9 R. 4** instead of being one under Rule 3 is one under Rule 8, a fresh application will be  
**Notes 5-10** barred.<sup>2</sup>

**6. Applicability of the Rule to insolvency proceedings** — It was held in the undermentioned cases<sup>1</sup> that where an insolvency petition was dismissed on the analogy of Rule 3 for non payment of process fee, a fresh application for insolvency is not barred, by virtue of the provisions of this rule

**6a. Applicability of the Rule to miscellaneous applications** — An application for a final decree in a mortgage suit is not an application in execution and by virtue of Section 141, this rule will apply to such applications also. Where an application for a final decree has been dismissed for non payment of *batta* the applicant can file a fresh application for the same.<sup>1</sup> When an application for amendment of a decree is dismissed for non payment of *batta*, a fresh application for amendment can be made.<sup>2</sup> Where an application for adjudication as an insolvent is dismissed on account of the default of both the parties, an application can be made to restore the previous application.<sup>3</sup>

**7. Notice to defendant.** — Notice to defendant is not necessary for restoration under this rule.<sup>1</sup> Where however the suit is restored and a date is fixed for the hearing of the case, the defendant is, as of right entitled to a notice of such date.<sup>2</sup>

**8. Appeal.** — No appeal lies from any order passed under this rule.<sup>1</sup>

**9. Revision.** — The High Court of Lahore has held in the undermentioned case<sup>1</sup> that an order rejecting an application under this rule is not open to revision under Section 115, Civil Procedure Code, but that the High Court can interfere under its inherent powers

**10. Limitation.** — Under Article 163 of the Limitation Act 1908, the period of limitation prescribed for an application under this rule is thirty days from the date of dismissal. Time cannot be extended under Section 5 of the Limitation Act in the absence of any express provision made by the High Court under its rule making powers.<sup>1</sup> Similarly where an application under this rule is time barred, the bar of limitation cannot be evaded by purporting to prefer an application under O 47 R 1.<sup>2</sup>

2 (25) AIR 1925 Mad 986 (998)

Note 6

1 (17) AIR 1917 Pat 593 (593)

(18) AIR 1918 Cal 164 (164)

(19) AIR 1919 Cal 125 (125) (In this case there is both an appeal and a rule)

(10) 6 Ind Cas 464 (464) (All)

(87) 10 Mad 270 (271)

(11) 11 Ind Cas 238 (238) (Lah)

Note 9

1 (17) AIR 1917 Pat 593 (593)

2 (18) AIR 1918 All 176 (177)

3 (18) AIR 1918 All 176 (177)

Note 7

Note 10

1 (20) AIR 1929 All 197 (193) 51 All 487

(28) AIR 1928 Mad 556 (557)

See also sub rule (2) asked by the Bombay High Court

2 (37) AIR 1933 Pat 537 (538)

1 (17) AIR 1917 Pat 593 (593)

(18) AIR 1918 All 176 (177)

# R. 5. [S. 99A] (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that —

Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons

issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the

officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that —

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

a. Substituted by the Code of Civil Procedure (Amendment) Act XXIV of 1920 Section 2 for the original rule (1)

## Synopsis

1 Legislative changes after 1908

2 'Period of three months' computation of

3 Fresh summons when granted

4 Failure to take fresh summons does not discharge the defendant from any liability

5 Appeal

## Other Topics (miscellaneous)

Fresh suit See Note 4

Order not decree See Note 11

Order under this rule — Whether res judicata See Note 4

1 Legislative changes after 1908 — Sub rule (1) has been newly substituted for the old sub rule by the Amending Act, XXIV of 1920 thus effecting the following important changes —

(1) The period during which the plaintiff may remain without applying for fresh summons is reduced from one year to three months

(2) The words *shall make an order* have been used in the place of the words *may make an order*

(3) Provision has been made in sub clause (c) for extension of time for making the application referred to

2 "Period of three months," computation of — Under the old Code the period fixed was one year and it was calculated not from the filing of the plaint but

Order 9 Rule 5 — Note 2

not bound to wait for the whole period as the Rule is only an enabling provision

1 (10) 3 ILR 453 (N) (Cal) (But Court was

O. 9 R. 5  
Notes 2-5

from the return of the summons unserved \* The question also arose whether the period was to be calculated from the date of the return of the serving officer or from the date of the return of the officer whose duty it was to certify to the Court the return of the serving officer. It was held in the undermentioned case<sup>3</sup> that the period was to be calculated from the date of the return made by the latter officer. Effect has been given to that decision in the present rule. A dismissal of a suit under this rule before the expiry of the period of three months is premature and irregular<sup>4</sup>

**3. Fresh summons, when granted** :— The plaintiff must apply for fresh summons within the prescribed period : *e.* three months from the date of the return of non service on the defendant<sup>1</sup>. If he wants an extension of time he has to apply to the Court within three months and satisfy the Court as to any of the circumstances mentioned in sub clauses (a) (b) and (c)<sup>2</sup>. See also the undermentioned case<sup>3</sup>

**4. Failure to take fresh summons does not discharge the defendant from any liability.** — Failure on the part of the plaintiff to take fresh summons and the consequent dismissal of the suit does not take away the liability of the defendant and does not operate as *res judicata* in a fresh suit against him<sup>1</sup>. Nor can a co defendant plead that he is only a surety and that as the other defendant who is the principal debtor is not served he is not liable<sup>2</sup>. Where however, the records of a suit were consigned to the record room owing to the non service of summons on one of the defendants a subsequent suit against the same defendant on the same cause of action was held to be barred on the ground that the suit must be deemed to be still pending<sup>3</sup>

**5 Appeal** — The words shall make an order that the suit be dismissed in the place of 'may dismiss the suit' occurring in the old Code make it perfectly clear that the dismissal under this rule is not appealable as a *decree*. This rule does not apply to appeals as Order 41 contains specific rules covering corresponding cases that arise in appeal<sup>1</sup>

O 9 R. 6

**R. 6. [S 100] (1)** Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then —

Procedure when only plaintiff appears

When summons duly served

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte*;

2 (55) 7 Bom L R 998 (929)  
3 (89) 13 Bom 500 (502)

service )

1 (OG) 28 All 749 (751 752) <sup>Note 4</sup>

3 (17) AIR 1917 Lah 211 (211)

<sup>Note 5</sup>  
1 (27) AIR 1927 Bom 68 (69 70) 110 Bom 815  
(Per Fawcett J)

1 Up

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant,

When summons  
not duly served

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant

When summons served,  
but not in due time

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement

[1877, Ss 100, 101; 1859, Ss 111, 112, 113]

### Synopsis

1 Scope of the Rule

2 Ex parte decree

3 Remedies in the case of an ex parte decree

4 Subsequent appearance of defendant pending suit See Rule 7

5 Second summons — Clause (b)

6 Sufficient time — Clause (c)

### Other Topics (miscellaneous)

Adjourned hearing—Applicability of rule to See  
Note 1

Appeal See Note 3  
Order 9 Rule 6 and O 17 R 2 See Note 1

**1. Scope of the Rule** — This rule contemplates the hearing of the suit on the day fixed in the summons, whereas O 17 R 2 contemplates the hearing of the suit on some later date to which the hearing may be adjourned<sup>1</sup> Thus, if the defendant had already appeared in answer to the summons but fails to appear at the adjourned hearing the case falls under O 17 R 2<sup>2</sup> though the procedure contemplated in either case is the same<sup>3</sup> When an appearance under Order 9 is in question the word 'hearing' means the *first day of the hearing*<sup>4</sup>

The fact that the summons may have directed the defendant to file a written statement does not authorise the Court to proceed under O 8 R 10 if the defendant does not appear, the proper procedure is that prescribed under this rule<sup>5</sup>

**2. Ex parte decree** — The plaintiff is not entitled to have the suit declared *ex parte* before the returnable date fixed in the summons<sup>1</sup> Before proceeding *ex parte* the Court must be satisfied that there is due service of summons on the defendant<sup>2</sup>

#### Order 9 Rule 6 — Note 1

1 (22) AIR 1922 Pat 485 (487, 488) 1 Pat 188  
(37) AIR 1937 All 347 (348)

2 (14) AIR 1914 Cal 360 (361) 41 Cal 956  
(78) 2 All 7 (70-71) 5 Ind App 243 (1-3)  
(31) AIR 1931 All 703 (704)

3 (22) AIR 1922 Pat 485 (487) 1 Pat 188

4 (27) AIR 1927 Mad 799 (800)

(85) 7 All 538 (540)

(37) AIR 1937 All 347 (349)

5 (25) AIR 1925 Oudh 56\* (56a)

#### Note 2

1 (08) 32 Bom 534 (539)

2 (1900) 23 All 99 (100)

(6) 11 Both W II 210 (211-212)

(40) 5 Cal 353 (355)

**O. 9 R. 6**  
**Notes 2-6**

{ An *ex parte* proceeding ought not to be taken on the basis of service effected by registered post<sup>3</sup> The *onus* of proving due service is, of course, on the plaintiff in the first instance<sup>4</sup>

The Code does not prescribe any procedure to be followed in the case of an *ex parte* suit. The practice is that no issues are framed, though the plaintiff is called upon to prove his case<sup>5</sup>. The plaintiff is bound to prove his case to the satisfaction of the Court and his burden is not lightened because the defendant is absent<sup>6</sup>. Except in suits relating to negotiable instruments, as under O 37 R 2, evidence should be adduced by the plaintiff<sup>7</sup> and a *prima facie* case made out<sup>8</sup>. The Court is bound to consider the interests of the absent defendant<sup>9</sup> and not to rely on evidence otherwise unreliable simply because the case is *ex parte*<sup>10</sup>.

**3. Remedies in the case of an *ex parte* decree.** — A defendant against whom an *ex parte* decree has been passed can —

- (1) apply under Rule 13, *infra*, to set aside the *ex parte* decree, or
- (2) appeal from the decree under Section 96, or
- (3) apply for a review under O 47 R 1<sup>1</sup>.

As to when a suit can be brought to set aside an *ex parte* decree, see Note 12 to Rule 13. As to the limitation for applications under Rule 13, see Note 28 thereto.

**4. Subsequent appearance of defendant pending suit.** — See Rule 7.

**5. Second summons — Clause (b).** — If it is not proved that there was due service, the Court is bound to order fresh summons for the defendant. If the non-service or failure to effect due service is due to plaintiff's *default*, the Court is bound to order him to pay the costs of the postponement under sub-rule 2<sup>1</sup>.

**6. Sufficient time — Clause (c).** — The words '*duly served*' mean served in sufficient time to enable the defendant to appear in person or by a pleader<sup>1</sup> and the Court is bound under sub-clause (c) to direct fresh summons if he is not served in sufficient time.

If the defendant though not served in sufficient time nevertheless appears and asks for time, the Court is not justified in refusing it and proceeding *ex parte*. By his appearing he should not be placed in a worse position than he would be in if he had not appeared at all<sup>2</sup>.

(190) 1890 Bom P J 136 (186) (*Ex parte* decision against a defendant, who has never been served with notice of suit, is bad.)

3 (26) AIR 1926 Lah 579 (580)

4. (25) AIR 1925 Cal 801 (802) 52 Cal 453

(1900) 23 All 99 (100)

5 (23) AIR 1923 Nag 83 (84) (But Court

9 (24) AIR 1924 Cal 647 (648)

10 (17) AIR 1917 Oudh 194 (196)

Note 3

1. (74) 23 Suth W R 213 (214) (Can apply for a review)

(Do)

Cal 1001

8. (71) 15 Suth W R 503 (504)

(26) AIR 1926 Oudh 193 (193)

(66) 1866 Pun Re No 85, p 90

Note 6

1. (1900 02) 1 Low Bur Rul 226 (227, 228)

(70) 7 Bom H C R A C 133 (133)

2. (72) 18 Suth W R 141 (142)

**R. 7. [S. 101.]** Where the Court has adjourned the hearing **0.9 R. 7**

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non appearance.

to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

[1877, Ss. 100, 101; 1859, S. 111.]

### Synopsis

- 1. Scope of the Rule.** | **2. "Assigns good cause."**

**1. Scope of the Rule.** — The underlying principle of this rule is that until a suit is actually called and so long as an *ex parte* decree is not passed, the defendant is entitled to come in and defend the suit.<sup>1</sup> The Courts should be liberal in construing this rule and should not take a stringent view of the defendant's absence.<sup>2</sup>

The rejection of an application under this rule is no bar to an application under Rule 18 after the passing of an *ex parte* decree.<sup>3</sup>

2. "Assigns good cause." — If the defendant wants to set aside the order placing him *ex parte* and be relegated to the stage at which the suit was, when he absented himself, then he has to assign good cause for his previous absence. But if he merely wants to take part in the proceedings *at the stage at which it is* when he appears, it is not necessary to get the previous order placing him *ex parte* set aside. The reason is that the rule is not intended to be penal and by the very fact of his appearance the proceedings cease to be *ex parte* thenceforth.<sup>1</sup>

Though the rule gives a discretion to the Court to impose terms, failure to do so is not an irregular or improper exercise of discretion such as to justify interference in revision.<sup>3</sup>

## Order ■ Rule 7 — Note 1

1. ('22) AIR 1922 Bom 345 (345)  
(72) 9 Beng L R App 15 (16)  
AIR 1922 All 110 (111)  
[See ('24) AIR 1924 Cal 806 (808)]  
[See also ('81) Bom 184 (188)]
2. ('31) AIR 1931 Oudh 159 (160)
3. ('98) 21 Mad 324 (325)  
(96) 10 C P L R 45 (46)  
(82) 11 Cal 272 (274)

**Note 2**

†  $f(0) = 1$  and  $f(1) = 0$  are the only solutions.

[See also ('39) AIR 1939 Mad 885 (885) (Though it is the practice in the mofussil to pass an order

who appears at the adjourned hearing, any

defendant an opportunity to file a written statement at that stage — Mere fact that on new statement additional issues may have to be framed does not amount to re-opening anything

the 1990s, the number of people in the United States who are 65 years of age or older is projected to increase from 20 million to 35 million, and the number of people 75 years of age or older is projected to increase from 10 million to 17 million (U.S. Census Bureau, 1996). The number of people 85 years of age or older is projected to increase from 2 million to 4 million (U.S. Census Bureau, 1996). The number of people 90 years of age or older is projected to increase from 500,000 to 1 million (U.S. Census Bureau, 1996). The number of people 95 years of age or older is projected to increase from 100,000 to 200,000 (U.S. Census Bureau, 1996). The number of people 100 years of age or older is projected to increase from 10,000 to 20,000 (U.S. Census Bureau, 1996).

O. 9 R. 8

**R. 8. [S. 102.]** Where the defendant appears and the

Procedure where defendant only appears.

plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

[1877, Ss. 102, 103; 1859, S. 114.]

*Synopsis*

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. Appearance. See Rule 9</li> <li>3. "When a suit is called on for hearing"</li> <li>4. More plaintiffs than one.</li> <li>■ More defendants than one</li> </ol> | <ol style="list-style-type: none"> <li>6 "Shall make an order that the suit be dismissed"</li> <li>7. Unless the defendant admits.</li> <li>8. Effect of dismissal under this Rule.</li> <li>9. Revision.</li> </ol> |
|---|--|

*Other Topics (miscellaneous)*

Appeal when lies See Notes 3, 6 and 7  
Dismiss the suit See Note 3

Procedure when the plaintiff dies See Note 1  
Shall pass a decree See Note 7

**1. Scope of the Rule.** — This rule deals with the procedure to be followed when the plaintiff does not appear and the defendant alone appears. In such a case, the only thing that the defendant is entitled to claim is to have the plaintiff's suit dismissed. He is not entitled to call evidence to disprove charges of fraud, etc., made against him in the plaint.<sup>1</sup>

The Court has no power to dismiss a suit for default under this rule where the plaintiff *dies*. Such an order of dismissal is a nullity, the reason being that the rules applicable to a defaulter cannot be applied to a dead man.<sup>2</sup> Similarly, a dismissal under this rule is not proper if the plaintiff has been adjudicated *insolvent* before the hearing, as there is none on the record who is bound to appear, the Court should, in such a case act under Order 22 Rule 8.<sup>3</sup>

Where a reference to arbitration in a suit provided that the arbitrator should hear evidence and determine the case and that if one of the parties failed to appear, he should have power to proceed *ex parte*, the arbitrator cannot, on failure of one of the parties to appear, act under the provisions of this rule.<sup>4</sup>

**2. Appearance.** — See Notes under the same heading in Rule 9, *infra*

**3. "When a suit is called on for hearing."** — The hearing of the suit may be either on the day named in the summons or on a subsequent day to which the hearing

**Order 9 Rule 8 — Note 1**

1. (12) 17 Ind Cas 87 (87) 40 Cal 119
2. (19) 19 Ind Cts 596 (527) 35 All 831 40 Ind App 151 16 Oudh Cas 194 (PC)
- (19) AIR 1919 Lah 447 (447) 1918 Pun Ro No 96
- (24) AIR 1924 Oudh 114 (114) (Order passed under this rule after plaintiff's death is a nullity)
- (20) AIR 1930 Oudh 4 (5) 5 Luck 241.
- (35) AIR 1935 Nag 189 (190) 81 Nag L R 374

3. (27) AIR 1927 Cal 76 (77, 78) 53 Cal 844
4. (18) AIR 1918 Cal 247 (247) (He should hear the other party before making award)

be adjourned<sup>1</sup> The date fixed for the settlement of issues is as much a day fixed for the hearing as any other date fixed<sup>2</sup>

O. 9 R. 8  
Note 3

A dismissal of a suit at an *adjourned hearing* for default of plaintiff's appearance is under the provisions of O 17 R 2 read with this rule<sup>3</sup> As will be seen from the provisions of Order 17 *infra*, a dismissal under Rule 2 of that Order may be set aside under the provisions of Order 9 and the suit restored,<sup>4</sup> while, if the dismissal is under Rule 3 of that Order the remedy of the party aggrieved is only by way of appeal or review and not by an application for restoration under O 9 R 9<sup>5</sup>

A Court will not be justified in dismissing a suit under this rule where the evidence on record is sufficient to decree the claim of the plaintiff,<sup>6</sup> or where the evidence has been completely recorded and nothing remains to be done except to hear arguments,<sup>7</sup> or where the suit was adjourned in the course of arguments,<sup>8</sup> or for pronouncing judgment<sup>9</sup> Similarly, where part of the plaintiff's claim was fully determined by a preliminary order and the rest of the claim was abandoned, the Court is not justified in dismissing the suit for default<sup>10</sup> A failure to amend the plaint as per order of Court and to pay costs of the adjournment does not justify a dismissal of the suit for default after the evidence is finished<sup>11</sup>

It is not proper for the Court to dismiss the suit on a day not fixed for the hearing of the suit<sup>12</sup> as, for example, when the day was fixed for the appointment of a guardian *ad litem* of a minor defendant,<sup>13</sup> or on a day which is not duly notified to

#### Note 3

- (88) 4 Mad H O R 56 (59)  
(118) AIR 1918 Pat 62 (62)  
(119) AIR 1925 Oudh 682 (682)  
(120) AIR 1922 Mad 416 (416)  
(121) AIR 1922 All 69 (69)  
(122) AIR 1924 All 199 (199)  
(123) 20 Bom 736 (744)  
(124) 1880 Pun Re No 41, page 68  
(125) 12 Mad L Jour 478 (474)  
(126) AIR 1925 Oudh 433 (434)  
(127) 6 Ind Cas 233 (234 235) 34 Mad 97.  
(128) 5 Low Bur Rul 75 (76)  
(129) AIR 1917 All 136 (136 137)  
(130) 7 Mad 41 (42)  
(131) AIR 1923 Pat 530 (531)  
(132) 1 Sind L R 224 (225)  
(133) 71 Cal 235 (236 237, 239)  
(134) AIR 1918 Cal 330 (331)  
(135) AIR 1932 Lah 477 (478) (Default on date fixed for hearing of the objections to award)  
(136) 116 Ind Cas 752 (752) (All)  
(137) AIR 1937 Rang 437 (438)  
See also (39) AIR 1933 Nag 213 (213) 11 LR (1939) Nag 574 (If an order is made under O 17 R 2 read with O 9 R 8 then it is as though it were an order under O 9 R 8 and is not appealable at all)  
(138) 13 Cal 247 (248)  
(139) AIR 1915 All 16 (17)  
See (20) AIR 1925 All 723 (730)  
(140) 7 Bom L R 261 (262)

- (141) 3 Ind Cas 683 (684) 5 Low Bur Rul 75  
(142) (81) 3 All 292 (294) (Order appealable)  
(143) (81) AIR 1931 Bom 111 (113)  
(144) (11) 11 Ind Cas 842 (842 843) (Lah)  
(145) (10) 6 Ind Cas 592 (593 594) 37 Cal 426  
(146) 37 Ind App 80 (P C)  
(147) (26) AIR 1926 Lah 571 (571)  
(148) (29) AIR 1929 Lah 374 (375)  
(149) (70) 14 Suth W R 401 (402) (Suit remanded—A day was fixed which was not notified to the parties—Dismissal of the suit on such a day was held to be improper)  
(150) (36) AIR 1936 Lah 759 (760) (Date fixed merely for filing objections against the report of the commissioner is not date fixed for hearing)  
(151) (33) AIR 1933 Rang 360 (362) (Date fixed for filing list of witnesses is not date fixed for hearing)  
(152) (37) AIR 1937 Lah 118 (118) (Day fixed for payment of costs of adjournment by defendant to plaintiff—Not date fixed for hearing)  
(153) (36) AIR 1936 Lah 280 (281) (An order dismissing the suit of the plaintiff for default on a date fixed for the submission of the report of the commissioner as to the market value of the property in suit for purposes of Court fees is without jurisdiction as such date is not the date of the hearing within the meaning of O 9 R 8)  
(154) (35) AIR 1935 Pesh 186 (183)  
(155) (11) 10 Ind Cas 313 (314) 33 All 500  
(156) (31) AIR 1921 Pat 714 (715)  
(157) (29) AIR 1922 Pat 252 (254 255) 7 Pat L Jour 650  
(158) (23) 73 Ind Cas 539 (560) (Pat)



# O. 9 R. 8 Notes 3-6

the parties,<sup>14</sup> or on holidays<sup>15</sup> The word 'hearing' does not mean only the recording of evidence It means the hearing of the suit before the *Court* and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all<sup>16</sup> The Court should not hastily dismiss a suit for non appearance when the suit is pending reference to arbitration and when the arbitrator had applied for extension of time to make the award<sup>17</sup> Where a commissioner has been appointed and he has not made his report, the suit cannot be heard until the commissioner has finished his work and there can be no dismissal for default<sup>18</sup> After a decree has once been made, a suit cannot be dismissed for default<sup>19</sup> Thus, there can be no dismissal under this rule after a preliminary decree for partition, and if an order is so made, it is passed without jurisdiction<sup>20</sup> The Court should in such cases adjourn the suit *sine die* with liberty to the plaintiff to apply to restore the suit to the list on payment of costs<sup>21</sup> Where on an amendment of the plaint being allowed, the plaintiff is directed to give the value of the property (relief as to which has been allowed to be added by amendment) and to put in deficit court fee, the proper order to pass on non compliance is an order *rejecting the plaint* and not one dismissing the suit for default<sup>22</sup>

**4. More plaintiffs than one.**—This rule is meant to provide for a case where a single plaintiff does not appear or, where there are several plaintiffs, and all of them do not appear<sup>1</sup> Cases, where *some only* of several plaintiffs do not appear, are provided for in Rule 10, *infra*

**5. More defendants than one.**—Under this rule there can be a partial or total dismissal for default<sup>1</sup> As has been seen in the Notes to Rule 3 *supra*, so far as the

14 (26) 96 Ind Cas 245 (245) (Lah)  
(34) AIR 1984 Lah 91 (91) (Transferee Court

(32) AIR 1932 Mad 519 (522) (Do)

issuing notice to plaintiff and his counsel to appear on certain day—Notice on plaintiff not served—Notice on counsel served but he refused to accept notice—Trial Court holding service on counsel good and dismissing suit—Procedure held to be unfair)

(18) 18 Ind Cas 280 (281) (Lah) (Case heard in camp and not at headquarters—No notice to parties)

(26) 2 Bom H O R 381 (382)

(23) AIR 1923 Lah 431 (432)

[See (23) AIR 1923 All 79 (80) (Notice of hearing date not given to defendant—Ex parte decree must be set aside)]

15 (1904) 100 D. & P. 374 (374) (Lah)

dismissal of suit for failure to appear on date fixed for filing objections to report of commissioner

16 (1904) 100 D. & P. 374 (374) (Lah)

17 (1904) 100 D. & P. 374 (374) (Lah)

Note 4

Note 5

1. (23) AIR 1923 All 425 (426)

defendant or defendants who appear are concerned, the order of dismissal will be one under this rule and will bar a fresh suit against them. With regard to the defendants who are absent, the dismissal will be under Rule 3 and a fresh suit is not barred.<sup>2</sup> Even if the defendant appears and applies for time, the dismissal would fall only under this rule and not under Rule 3.<sup>3</sup>

**6. "Shall make an order that the suit be dismissed."**—These words were substituted under the present Code to make it clear that the dismissal is not a decree but only an order which is not appealable.<sup>1</sup> The earlier decisions<sup>2</sup> which held that the dismissal under this rule was a decree are now no longer law.

The Court has no option under this rule but to dismiss the suit<sup>3</sup> and is not justified in enquiring into the merits of the case<sup>4</sup> or receive evidence or record any statement from the defendant.<sup>5</sup> While dismissing under this rule, the Court has no jurisdiction to add any proviso in the order, as for example, that the order shall not prejudice the interest of the minor plaintiff.<sup>6</sup> Striking off the suit is not a proper mode of dismissing a suit under this rule.<sup>7</sup>

A filed a suit against B for recovery of a certain amount of money which had been paid under protest, and also for damages for wrongful attachment. The Court framed a preliminary issue on the question whether the suit, so far as the return of the money was concerned, disclosed a cause of action, and after hearing arguments dismissed that part of the claim with costs and directed the suit to proceed as regards the claim for damages. No decree was drawn up in respect of the portion dismissed. When the suit came on for hearing the plaintiff was absent and the Court dismissed the whole suit for default under this rule. It was held by the Privy Council<sup>8</sup> that the dismissal for default under this rule was wrong so far as the recovery of money was concerned, inasmuch as a final decision had been passed thereon on the merits, and that, therefore, an appeal lay so far as such portion was concerned.

**7. Unless the defendant admits.**—When the defendant admits the claim of the plaintiff either in whole or in part, the Court cannot dismiss the suit but must pass a decree for the amount admitted.<sup>1</sup>

Where, however, the admission of the defendant is not in reality an admission of the claim of the plaintiff, e.g., where the plaintiff claims to pre-empt on a payment of Rs. 1500 and the defendant admits the right of the plaintiff to pre-empt but states

2 ('26) AIR 1926 All 169 (170) 48 All 97

3 ('25) AIR 1925 Pat 835 (837) 7 Pat 838

Note ■

1. ('13) 20 Ind Cas 1 (2) (Cal)

(25) AIR 1925 Oudh 485 (485) 28 Oudh Cas 124

Refer in the following cases decided prior to

(91) 1 Mad L Jour 395 (397)

[See (73) 21 Suth W R 121 (124)]

3. ('33) AIR 1933 Nag 213 (214) 1 L R (1933) Nag 574

4. (21) AIR 1921 Pat 325 (326)

(15) AIR 1915 All 139 (140) 37 All 460

5. (18) 20 Ind Cas 1 (1) (Cal)

(20) AIR 1920 All 193 (193)

(12) 17 Ind Cas 87 (87) 40 Cal 119

[See (75) 24 Suth W R 141 (141)]

6. ('21) AIR 1921 Pat 103 (103) 6 Pat L Jour 317

7. (72) 17 Suth W R 219 (220)

8. ('23) AIR 1923 P C 114 (116) 50 Ind App

102 4 Cal 234 (P C) (I quote from the

judgment of Lord Moulton in second appeal

before the Board between the same parties.)

Note 7

1. ('21) AIR 1921 Sml 50 (51) 15 Sml I R 172

(23) AIR 1923 Pat 712 (712)

[See also (01) 3 Ind Cas 112 (113) 33 Cal 475]

O. 9 R. 8  
Notes 7-9

that the price is Rs 12,000, the Court cannot pass a decree in favour of the plaintiff under this rule for pre-emption on payment of Rs 12,000 but must, on default by the plaintiff, dismiss the suit.<sup>2</sup>

The word 'claim' is not necessarily synonymous with the amount sued for. It may refer to the right claimed irrespective of the amount stated in the relief column.<sup>3</sup> A decree passed on the admission of the defendant is appealable.<sup>4</sup>

**8. Effect of dismissal under this Rule.** — Unlike the dismissal of a suit under Rule 3 a dismissal under this rule precludes a fresh suit on the same cause of action.<sup>1</sup> But two other remedies are open to the plaintiff —

- (1) to apply under Rule 9 for restoration of the suit or
- (2) to apply for a review of the order.<sup>2</sup>

It is not necessary that the plaintiff should apply under Rule 9 before applying for a review<sup>3</sup> and there is nothing in the Code to limit the parties to one particular remedy. But a review will not lie except on the grounds mentioned in O 47 R 1. It has been held by the High Court of Bombay in the undermentioned case<sup>4</sup> that where a suit is dismissed under O 9 R 8 there could be no such grounds for review as those mentioned in O 47 R 1 inasmuch as the fact that the applicant was absent when the suit was called on for hearing was neither a discovery of any new and important matter, nor an error apparent on the face of the record nor a ground analogous to any of those specified in the rule. There is a conflict of opinion as to whether a plaintiff who has failed to make an application within thirty days under O 9 R 9 can be allowed to prefer an application for review. The High Courts of Patna<sup>5</sup> and Lahore<sup>6</sup> have held that he cannot be allowed to do so, on the ground that the law of limitation should not be allowed to be evaded in that way. The High Courts of Madras<sup>7</sup> and Calcutta,<sup>8</sup> on the other hand, have held that such an application would lie and that the fact that the plaintiff will get a longer period of limitation by the adoption of a particular remedy is no ground for refusing him relief.

It has been held by the Lahore High Court<sup>9</sup> that a Court has inherent power to restore a suit which has been dismissed in default owing to a mistake of the Court itself.

**9. Revision.** — Where the Court refuses to act under this rule in a case to which the rule applies<sup>1</sup> or acts under this rule illegally or with material irregularity,<sup>2</sup> a revision will lie.

2. (21) 60 Ind Cas 724 (724) (Lah.)

3. (17) AIR 1937 Mad 732 (734)

4. (12) 15 Ind Cas 601 (602) (Cal.)

#### Note 8

1. (25) AIR 1925 Mad 996 (988)

(16) AIR 1916 Cal 791 (791, 792)

2. (25) AIR 1925 Lah 517 (518)

(28) AIR 1928 Rang 177 (178) 6 Rang 254

(70) 7 N W P H O R 126 (130)

3. (90) 26 Cal 595 (601)

(19) AIR 1919 Mad 614 (614)

4. (46) AIR 1925 Bom 621 (622) 49 Bom 833

[See however (28) AIR 1928 Bom 395 (395)]

5. (17) AIR 1917 Pat 678 (673, 674) 1 Pat L

Pat 547.

6. AIR 1938 Pat 557 (558)

7. AIR 1930 Pat 491 (491)

8. AIR 1925 Lah 517 (518). (Application for

restoration of suit made but dismissed as barred by

limitation.—Subsequent application for review of judgment held not competent.)

(97) 1897 Pun Ra No 15, p 54

7. (19) AIR 1919 Mad 844 (844) (Following 26 Cal 594)

8. (93) 26 Cal 593 (601)

9. (36) AIR 1936 Lah 759 (760) (AIR 1928 Lah 534 and G O 208, Followed)

#### Note 9

1. (10) AIR 1919 Pat 372 (373) (Process fee not paid but plaintiff appearing and applying for time to file written statement.—Plaintiff absent.—Court dismissing suit under O 9 R 2 instead of under O 9 R 8.—This amounts to refusal to exercise jurisdiction.)

2. (21) AIR 1921 Lah 139 (140) (Dismissal of suit for default.—Order mentioning that plaintiff was present but that he subsequently went away.—Order held improper.)

**R. 9. [S 103 ] (1)** Where a suit<sup>6</sup> is wholly or partly dismissed under rule 8, the plaintiff<sup>7</sup> shall be precluded from bringing a fresh suit<sup>5</sup> in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause<sup>8</sup> for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[1877, Ss 103, 108, 109, 588; 1859, S 119 See O 22 R 9 ]

#### Local Amendments

#### BOMBAY

Add the following as sub rule (3)

(3) The provisions of Section 5 of the Indian Limitation Act 1908 shall apply to applications under this rule

#### CALCUTTA

Re number sub rule (2) as sub rule (3) and insert after the words 'notice of the application' the words 'with a copy thereof (or concise statements as the case may be)

Insert the following as sub rule (2)

The plaintiff shall for service on the opposite parties present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties or

(ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf a like number of concise statements

#### LAHORE

Add the following proviso to sub rule (1)

Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage although a former suit may have been dismissed for default

#### N W F P

Same proviso as that added by the Lahore High Court is added

### Synopsis

1 Scope of the Rule

2 Appearance, meaning of

3 Appearance in person See O S R 1

Note 4

4 Appearance by pleader See O S R 1

Note 6

5 Bar of fresh suit

6 Suit ' meaning of

7 Minor plaintiff

8 ' Sufficient cause '

9 Restoration of suit in favour of one of several plaintiffs—Whether can operate in favour of all

10 Inherent power of Court to order restoration See Note 9 to Sect on 151

10a Conditional order of restoration

11 Limitation

12 Appeal

13 Revision

## O. 9 R. 9

## Notes 1-2

## Other Topics (miscellaneous)

- Applicability to other proceedings See Notes 1 and 8 Rule applicable only when dismissal under R. 8  
 Letters Patent Appeal See Note 12 Same cause of action See Note 5

**1. Scope of the Rule.** — The remedy provided for by this rule is not open to a plaintiff whose suit has been dismissed for any reason, other than default of appearance under Rule 8.<sup>1</sup> Hence no application lies under this rule where the dismissal is under O 17 R 3<sup>2</sup> or O 11 R 21,<sup>3</sup> or where the dismissal is due to a failure on the part of the plaintiff to adduce evidence<sup>4</sup> or where the plaint is rejected under O 7 R 11 for failure to pay deficient court fees.<sup>5</sup> The rule applies only to suits and not to appeals.<sup>6</sup> It applies also to suits under Section 9 of the Specific Relief Act, 1877 which are dismissed for default. That Section bars only a review and not an application for rehearing.<sup>7</sup> As to the restoration of appeals dismissed for default of appearance of the appellants, see Order 41 Rule 19.

The Court cannot *suo motu* order a restoration without an application on the part of the plaintiff.<sup>8</sup> The word "plaintiff" has been held to include his legal representatives who can also therefore apply under this rule.<sup>9</sup> No fresh *talatnama* is necessary for an application under this rule.<sup>10</sup>

The effect of restoration under O 9 R 9 is to bring the suit, as regards parties, to the exact position in which it was at the time of dismissal.<sup>11</sup>

See also Note 6 *infra*

**2 "Appearance," meaning of.** — The term "appearance" has nowhere been defined in the Code and it must be understood in reference to the particular subject-matter to which it relates.<sup>1</sup> Appearance in Order 9 means either—

(a) by the party in person or

(b) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some other person able to do so.<sup>2</sup>

For a full discussion see Order 3 Rule 1, *ante*

## Order 9 Rule 9 — Note 1

- 1 (15) AIR 1915 All 136 (191)  
 (21) AIR 1911 All 417 (418) (Default under O 10 R 4 not covered by Order 9)  
 [See *contra* (32) AIR 1912 All 595 (596) (Default under O 10 R 4 is covered by Order 9)]  
 2 (69) 4 Mad H C R 56 (53)  
 (85) AIR 1935 All 210 (212)  
 3 (15) AIR 1925 Rang 218 (218) B Pang (S Appeal or review the proper remedy)  
 4 (43) AIR 1933 All 639 (510)  
 (17) AIR 1917 Pat 689 (698)  
 (78) 6 N W 1 H C R 74 (71)  
 5 (29) AIR 1929 Mad 944 (345) (Plaintiff absent on the day fixed for payment of additional court fees—Dismissal of the suit held to be under O 7 R 11 and not under O 9 R 8)  
 [See (23) AIR 1923 Lat 351 (351) 2 Pat 504 (Point conceded)]  
 (32) AIR 1912 Pat 11 (12) (Plaint in former suit rejected under O 7 R 11—1st suit filed on the same cause of action — District Judge holding second suit barred under this rule—Held by High Court that this rule did not apply)]

- 6 (1864) 1864 Soth W R Misc 21 (21)  
 7 (82) 1 Mad 217 (218)  
 8 (25) AIR 1925 Oudh 105 (106) (Plaintiff applied for restoration as against one out of two defendants — The Court also restored the suit against the other defendant and that too beyond the period of limitation—Held order of restoration as against the other defendant was *ultra vires*)  
 (22) AIR 1922 Oudh 160 (160) 25 Oudh Cas 67, 9, (83) 6 Oudh Cas 81 (36 88)  
 [See (31) 1991 Pan Re No 117 p 527 (Plaintiff a suit dismissed for default under O 9 R 8 — Plaintiff's representatives cannot bring a fresh suit)]  
 10 (40) 1890 Bom P J 121 (124) (Plaintiff himself need not make the application—Application by pleader is competent)  
 11 (24) AIR 1924 Cal 814 (815)  
 (19) AIR 1919 Cal 10 (12)

## Note 2

- 1 (07) 31 Cal 403 (413) (T E)  
 2 (99) 23 Lom 414 (421 422) (Besides these two modes of appearance there is a third mode of

3. Appearance in person. — See Order III Rule 1 Note 4.

4. Appearance by pleader. — See Order 3 Rule 1 Note 6

5. Bar of fresh suit. — Where a suit is dismissed for default, it cannot be said to have been *heard* and decided on the merits and therefore cannot operate as *res judicata*.<sup>1</sup> But the plaintiff is, under the specific provisions of this rule, barred from bringing a fresh suit on the *same cause of action*<sup>2</sup> and the fact that the *mode of relief* claimed in the subsequent suit is different will not be a ground for not applying the bar under this rule.<sup>3</sup> Thus, a suit on the basis of entries in the plaintiff's account book, in respect of the same sum of money for which a prior suit on a promissory note given therefor had been dismissed for default, will be barred under this rule.<sup>4</sup> Similarly, where a suit filed by the voluntary liquidator of a company against an alleged share holder for the recovery of a sum of money due to the company is dismissed for default under this rule, a subsequent application by the official liquidator to have the name of the defendant placed in the list of contributories in respect of the same claim is barred.<sup>5</sup>

Where the cause of action in the subsequent suit is *different* from that in the first suit, this rule will not apply.<sup>6</sup> Thus, a suit for partition dismissed for default under this rule does not bar a subsequent suit for partition. The reason is that the right to enforce partition is a *continuous* right which is a legal incident of a joint tenancy and which endures so long as the joint tenancy continues.<sup>7</sup> See Note 86 to

appearance viz appearance by a party's recognized agent)  
(28) AIR 1928 Mad 831 (884) (Where attendance of pleader is no appearance)

#### Note 5

1. ('10) 5 Ind Cas 298 (300) (Cal)  
(14) AIR 1914 All 222 (228)  
(82) 6 Bom 482 (486)  
(85) AIR 1935 Cal 212 (216, 217) 62 Cal 15  
(Where the suit is dismissed for want of prosecution under the provisions of Ch 10 III 86 of Calcutta High Court Rules and Orders (Original Side) the plaintiff is not debarred from bringing a fresh suit)

See also Note 106 to S 11

[See also ('91) 18 All 53 (54, 55 62) 17 Ind App 150 (P C) (Previous suit dismissed for want of evidence)]

2. ('16) AIR 1916 Cal 791 (791) (A Court while dismissing a suit for non prosecution under O 9 R 8 imposed a condition that such dismissal will not be a bar to any fresh suit—*Held* fresh suit barred under this rule in spite of the condition)

(63) 9 Cal 426 (429)

(01) 25 Bom 82 (84, 85)

(16) AIR 1916 Lah 278 (273, 274) 1916 Pan Re Ns 66

(23) AIR 1929 Pat 685 (689, 691) 9 Pat 447  
(Suit for declaration of title dismissed for default—Subsequent suit for possession on the same facts barred)

(39) AIR 1931 Nag 145 (146) (Where a plaintiff's suit alleging that defendant had forcibly and illegally taken possession of certain land and

suit, that defendant's possession constituted a trespass and praying that the defendant be ejected from the land and tank is dismissed under O 9 R III a subsequent suit alleging forcible and wrongful possession and praying for possession of same land is barred because the cause of action is the same and not a continuing one)

3. (28) AIR 1928 Rang 73 (74) 6 Rang 785

(26) AIR 1926 Lah 562 (563)

(88) 15 Cal 422 (430 431) 15 Ind App 66 (PC)  
(In the first suit sub proprietary right claimed while in the second suit superior proprietary right was claimed)

4. ('20) AIR 1920 All 840 (341) III All 193

5. ('20) AIR 1920 Lah 43 (44) 1 Lah 237 (Such application partakes of the nature of suit)

6. ('20) AIR 1920 Cal 407 (408)

(33) AIR 1933 Lah 365 (368) 14 Lah 483

(15) AIR 1915 All 395 (395, 396)

(23) AIR 1923 All 409 (410) 45 All 81

(20) AIR 1920 Mad 710 (711 712) (First suit for declaration—Second suit for partition and separate possession)

(17) AIR 1917 Cal 11 (11)

(14) AIR 1914 All 222 (223)

(27) AIR 1927 Pat 375 (376) 7 Pat 28 (Fresh suit for enhancement of rent of the same tenure held not barred)

(25) AIR 1925 Nag 366 (368) (Even one different fact makes cause of action different)

(86) 10 Bom 29 (30) (This rule should be strictly construed)

7. (07) 23 All 627 (629)

(26) AIR 1926 Mad 1018 (1018) 49 Mad 937.

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Section 11, *ante*. As regards suits for redemption it was held by the Privy Council in *Shankar Baksh v Daya Shankar*<sup>3</sup> that where a first suit for redemption was dismissed for default under this rule, a second suit for redemption will be barred as being based on the same cause of action. The Allahabad<sup>2</sup> and Bombay<sup>10</sup> High Courts have, however, distinguished the said decision of the Privy Council on the ground that their Lordships did not consider the effect of Section 60 of the Transfer of Property Act and that the effect of that Section is not to bar a second suit for redemption.

The rule does not apply unless the plaintiff in the prior suit is the plaintiff in the subsequent suit.<sup>11</sup> Thus a dismissal for default of a suit by a Hindu widow in respect of her deceased husband's estate is no bar to a fresh suit by the reversioner in respect of the same matter.<sup>12</sup> The rule only precludes a fresh suit; it does not preclude a plea raised by a defendant in a suit.<sup>13</sup> The bar of a fresh suit under this rule applies only where the suit has been dismissed for default under Rule 8 and not otherwise.<sup>14</sup>

**6 "Suit," meaning of.**—According to the High Courts of Allahabad<sup>1</sup> and Calcutta<sup>2</sup> the rule is plainly intended to apply only to suits and not to applications, such as applications for probate. See also the undermentioned decision.<sup>3</sup> But the High Court of Madras<sup>4</sup> has held that the present rule applies to those applications which, under Section 83 of the Probate and Administration Act are treated as suits. So also, it has been held by the High Court of Madras that this rule read along with Section 141 applies to an application for leave to sue as pauper, and where such application is dismissed for default of appearance it can be restored under this rule.<sup>5</sup> It has further been held by that Court that where an application for restoration of a petition is maintainable by virtue of Section 141 of the Code, the Court cannot decline to consider the application on its merits on the ground that the applicant has another remedy open to him.<sup>6</sup> The Lahore High Court has also held that an application for probate

(35) AIR 1935 Mad 458 (459)  
[See (24) AIR 1928 Rang 73 (74 75) 5 Rang  
785]

(O) 10 (a) W N 839 (840) (Application for  
a return of preliminary decree for partition dis-  
missed for default.—This rule inapplicable.)

8 (39) 15 Cal 420 (431) 15 Ind App 66 (PC)

[See also (O) 1071 un R N 48 p 179]

(O) 12051 n R N 32 p 121]

(O) 2 Ind Cas 190 (131 (132) (111)

10 (28) AIR 1928 1 out (1 7) 52 Bom 111  
[Order 9 Rule 9 does not override provisions of  
S 60 T P Act]

11 (10) 5 Ind Cas 698 (699) 33 Mad 31

(33) AIR 1933 Lah 365 (368) 14 Lah 485

(1900) 2 Bom L R 206 (210)

[See (24) AIR 1929 All 661 (662) (Mortgagees  
fraudulently allowing suit to be dismissed for  
default.—Attaching creditors purchasing mort-  
gaged interest subsequently are not bound by  
dismissal.)]

12 (84) 1881 Pun Re No 89 p 216

13 (38) 42 Cal WN 6 (38 v) (Suit on a first mort-  
gage.—Third mortgagee who was impleaded as one  
of the defendants claiming priority over second  
mortgage and S 78 of the T P Act.—Suit  
previously filed by third mortgagee to obtain a  
declaration of his priority dismissed for default  
—Third mortgagee not prevented from raising  
contention as to priority in this suit.)

14 (33) AIR 1935 Cal 764 (766) (Amendment

of plaint allowed.—Plaintiff directed to give value  
of property and put in deficit court fee.—Non  
compliance with order.—Suit dismissed for de-  
fault on rejecting permission to withdraw under  
O 23 R 1.—Proper order is rejection of plaint.—  
Fresh suit is not barred by O 23 R 1, O 9 R 9,  
O 2 R 2)

#### Note 6

1 (15) AIR 1915 All 172 (173) 37 All 280 (See  
251 O P Code held applicable)

2 (10) 7 Ind Cas 126 (129) (Cal)

(26) AIR 1926 Cal 1057 (1057) 53 Cal 678

3 (37) AIR 1937 Sind 273 (278) 31 Sind L R  
180 (The words the plaintiff shall be precluded  
from bringing a fresh suit in respect of the same  
cause of action in O 9 R 9 are not appli-  
cable to an application under O 31 R 5 and an  
application is not barred because a previous one  
has been dismissed for default under O 9 R 9  
1er Davis J C. Obiter)

4 (10) AIR 1919 Mad 112 (112)

5 (39) AIR 1939 Mad 691 (691) (AIR 1933 Mad  
5 Followed)

[See also (37) AIR 1937 Mad 653 (653) I L R  
(1939) Mad 216 (Ord 9 applies to an applica-  
tion made for filing a declaration of a  
petition made under S 81 of the Madras Hindu  
Religious Endowments Act.)]

6 (39) AIR 1939 Mad 691 (691)

dismissed for default of appearance can be restored under this rule<sup>7</sup> But the same High Court has held that an application under Section 292 of the Succession Act of 1925 is in the nature of an execution proceeding and that, therefore, Section 141 does not make this rule applicable to such an application. So, it has been held by that Court that where such an application is dismissed for default, a fresh application can be made<sup>8</sup>

In the undermentioned case,<sup>9</sup> it was held by the Oudh Chief Court that an application under Section 47 of the Code stands on the same footing as a suit and that where such an application is dismissed for default of appearance, a fresh application on the same allegations is not maintainable

The bar under this rule does not apply to a fresh application for adjudication as insolvent after the dismissal of a prior application for default<sup>10</sup> An order of annulment passed under Section 43, sub-section 1 of the Provincial Insolvency Act of 1920 cannot be set aside by virtue of the provisions of Order 9<sup>11</sup> The reason is that Section 10, clause (2) of the Provincial Insolvency Act itself provides for a remedy in such cases

The rule does not apply to applications under Section 158 of the Bengal Tenancy Act<sup>12</sup>

See also Note 5 to Section 2, sub clause (2), Note 21 to Section 11, and Order 9, "General"

**7. Minor plaintiff.**—A suit by a minor is liable to be dismissed for default of appearance on the part of the next friend<sup>1</sup> and the provisions of this rule cannot be nullified because the plaintiff happens to be a minor<sup>2</sup> But where the next friend is guilty of gross negligence in the conduct of the suit, the minor can bring a fresh suit, notwithstanding this rule, either himself after attaining majority or through another next friend<sup>3</sup> He can also apply under this rule for setting aside the order of dismissal<sup>4</sup> See also Note 3 *infra* under the sub-heading "Absence of next friend of minor plaintiff"

**8. "Sufficient cause."**—The only ground for restoring a suit under this rule is the existence of a sufficient cause for the non appearance of the party at the time the suit was called on for hearing<sup>1</sup> The term "sufficient cause" has not been defined

7 ('86) AIR 1986 Lah 868 (864) (17 All 106 AIR 1919 Mad 112 and 20 I C 281, Rehd on, AIR 1936 Lah 712, Affirmed)

8. ('85) AIR 1935 Lah 145 (145)

9. ('87) AIR 1937 Oudh 337 (338) 18 Luck 309 (The combined effect of Ss 2(2) and 47, O P C., is that an application under S 47 stands on the footing of a suit and the determination of such an application is tantamount to a decree)

10. ('27) AIR 1927 Mad 579 (580)

11. ('26) AIR 1926 Mad 942 (943) 49 Mad 935

12. ('28) AIR 1923 Pat 381 (382, 384) 2 Pat 192 (The rule applies only to suits)

#### Note 7

1 ('10) 8 Ind Cas 547 (547) (Lah)

2. ('21) AIR 1921 Sind 200 (202) 17 Sind L R 41 (Fresh suit through different next friend held barred)

3. ('95) 22 Cal 8 (14)

4. ('15) AIR 1915 Mad 52 (52)

('25) AIR 1925 Mad 774 (775)

#### Note 8

1. ('10) 4 Low Bur Rul 221 (222)

(33) AIR 1933 Lah 169 (171) (If there is no sufficient cause, suit cannot be restored as a matter of grace)

(33) AIR 1933 Pesh 59 (60) (Suit cannot be restored under inherent powers in the absence of sufficient cause)

(27) 106 Ind Cas 821 (821, 822) (Lah) (The applicant must however be given opportunity to adduce evidence in support of his allegations)

(35) AIR 1935 Pesh 145 (146)

(38) AIR 1938 Cal 74 (75) 1 L R (1938) 1 Cal 213 (In an application for restoration under O 9 R 2, the plaintiff must show some fact which was either not known to the Court when it dismissed the suit or at least at that stage lacked satisfactory proof)

[See ('76) 1876 Pun Re No 113, p 235 (It is enough if he shows sufficient cause for his absence)]

(29) 117 Ind Cas 382 (382) (Lah) (Application to restore case dismissed for default—Applicant is bound to explain counsel's absence)]



O 9 R 9  
Note 8

anywhere. It is a question of fact depending upon the circumstances of each case<sup>3</sup> and is not subject to any hard and fast rule except that the Court must exercise a judicial discretion in the matter.<sup>4</sup> In the undermentioned case<sup>5</sup> the Rangoon High Court held that under this rule if sufficient cause is shown the Court is bound to restore the suit while if sufficient cause is not shown the matter is in the discretion of the Court. It is submitted with respect that the view that the Court has power to restore a suit even where it holds that sufficient cause has not been shown is open to question.

*Absence of party* — A generous construction should be placed on the enactment to restore a suit dismissed for default<sup>6</sup> and a party should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part.<sup>7</sup> The test to be applied as a general rule is to see whether the party applying honestly intended to be present at the hearing of the suit and did his best to do so.<sup>8</sup> The High Court of Allahabad has in the undermentioned case<sup>9</sup> held that even though the plaintiff was negligent enough to start for the last train and missed it the suit ought to be restored observing that negligence is human and not irreparable and can be amply compensated by costs. The following grounds have been held to amount to sufficient cause for the absence of the party —

(1) A *bona fide* mistake which is not unreasonable or for which the party is not responsible.<sup>10</sup> Thus where the bench clerk gave a wrong date of hearing<sup>11</sup> or

2 (27) AIR 1927 Lah 622 (64)

unde suitable for Court to act on precedents in such a matter)

5 (36) AIR 1936 Rang 835 (336)

6 (66) 30 Mad 274 (276)

(15) AIR 1915 Mad 16 (17)

(05) 1905 Fun Re No 72 p 263

(17) AIR 1917 All 290 (290)

7 (23) AIR 1923 Mad 83 (84) 46 Mad 60

cause)

(12) 13 Ind Cas 468 (468) (Lah) (Petit on dismissed in the early part of the day owing to the temporary absence of the party or pleader

cient cause)

(27) AIR 1927 Lah 40 (41) (Late arrival of train is sufficient cause)

(37) AIR 1935 Sind 198 (200)

(See (92) 1892 Bom P J 104 (104) (Misappre

as de)

(33) AIR 1933 Cal 73 (74) (Plaintiff's strenuous attempt to get witnesses to Court is sufficient cause)

1924 Bom 327 that when a party arrives late on the same day the suit must as a rule of practice be restored on payment of costs — To the same effect is AIR 19 3 Bom 450)

(38) AIR 1933 Bom 122 (201) (S B) (To restore a proceeding is a matter of discretion — It is

hearing not given to party or his counsel)

(1865) 11 Bom II G R 60 (62)

11 (24) AIR 1924 Rang 271 (272)

(27) AIR 19 7 Rang 46 (47) 4 Rang 403

where the suit was dismissed on a date not fixed for hearing,<sup>12</sup> or where the day fixed for hearing was a holiday,<sup>13</sup> or where the suit was transferred without notice to the parties,<sup>14</sup> or where no proper notice of hearing was served on the party,<sup>15</sup> or where the suit was called on after 5 P.M. on the day of hearing<sup>16</sup> or where the absence was due to some confusion regarding the observance of a local holiday,<sup>17</sup> the suit was ordered to be restored

(2) Where the plaintiff was prevented from appearing owing to a breach in the railway line<sup>18</sup>

(3) Where the plaintiff was prevented from appearing owing to illness<sup>19</sup>

(4) Where the agent of the plaintiff left the Court after attending to some cases of the plaintiff under the *bona fide* belief that the plaintiff had no more cases that day<sup>20</sup>

(5) Where the plaintiff was present but went away to answer imperative calls of nature<sup>21</sup>

(6) Where the party is prevented from appearing owing to the fraud of the opposite party<sup>22</sup>

(7) Where in a land acquisition case the Collector who was a party admitted receipt of notice of the proceeding but did not attend owing to pressure of work<sup>23</sup>

See also the undermentioned cases<sup>24</sup>

The following have been held not to amount to sufficient cause within the meaning of this rule—

(1) Where the non appearance is wilful and deliberate<sup>25</sup>

12 (60) 12 Suth W R 428 (479)

(80) AIR 1930 Cal 251 (251)

13 (15) AIR 1915 Lah 476 (477)

14 (34) AIR 1934 Lah 91 (91) (Notice of trans

cause—It is not for the Court to argue that there was no hurry for the operation and that the petitioner could have waited for a week more)

(09) 5 Ind Cas 23 (26) 38 Mad 241

[See also (84) AIR 1934 All 163 (164) 56 All 588]

20 (129) AIR 1929 Rang 224 (224)

21 (26) 96 Ind Cas 402 (403) (Lah)

22 (72) 18 Suth W R 457 (457)

23 (27) AIR 1927 Rang 150 (153) 5 Rang 80

24 (36) AIR 1936 Rang 204 (206) (Non appearance on account of missing the train is due to sufficient cause)

(88) AIR 1938 Cal 789 (790) (Three suits filed by petitioners—Petitioner taking all necessary

with reference to O 41 R 19)

(26) AIR 1926 Mad 1210 (1211) (Case pertaining to appeal)

(17) AIR 1917 Lah 393 (400) (Notice not duly

unable to attend—Court refusing adjournment and dismissing suit for default—Application by petitioners under O 9 R 9 also rejected—Held that lower Court had exercised its jurisdiction wrongly in dismissing petitioner's application under O 9 R 9 and in affirming decision dismissing suit for default)

(38) AIR 1939 Lah 295 (295) (Break down of lorry

these hours—Case disposed of in absence of defendant after Court hours—Application for restoration should be granted)

17 (23) AIR 1923 All 549 (550)

18 (23) AIR 1923 Mad 69 (74) 46 Mad 60

[See (80) 8 Bom 98 (31) (Sudden closing of telegraphic communication—Inability to communicate with leader)]

19 (12) AIR

25 (05) 190, Pun R. No 47 page 164

(21) AIR 1921 Mad 617 (618)

O. 9 R. 9  
Note 8

(2) Where the party deliberately takes the risk of not obtaining a carriage in time<sup>29</sup> or fails to be in time to catch the train<sup>27</sup>

(3) Where he leaves the Court house to attend to his other business without instructing his pleader<sup>23</sup> or thinking that a part-heard case will take some more time<sup>29</sup>

(4) Illness of a near relation of the party<sup>30</sup>

See also the undermentioned decision<sup>31</sup>

*Absence of next friend of minor plaintiff* — It has been held in the under-mentioned cases of the High Court of Madras<sup>32</sup> that if the next friend is absent at the trial, *through whatever cause it may be*, then that *fact alone* is a sufficient reason for setting aside an order of dismissal passed against the minor plaintiff. This view has, however, been held in a later case<sup>33</sup> as being too wide and that unless any concrete fact is alleged from which an inference can fairly be drawn that the failure of the next friend to appear has in any way prejudiced the interest of the minor, the Court is not bound to restore the suit. The Oudh Chief Court<sup>34</sup> has also held that the fact of the minority of a plaintiff is not by itself a sufficient cause for setting aside any order of dismissal that may have been passed owing to the absence of the next friend irrespective of the reasons for such absence.

See also Note 20 to Order 9 Rule 13.

*Absence of pleader*. — In the case of absence of the pleader it should be considered whether there was a *bona fide* and reasonable attempt on the part of the vakil to put in appearance, and due regard must be had to the exigencies of his professional duties<sup>35</sup>. Thus, where the pleader was sitting in the adjoining court room and did not hear the suit being called but soon after dismissal appeared and applied for restoration,<sup>36</sup> or where the pleader was sitting in the bar room and by the time he could come up the case was called and dismissed,<sup>37</sup> or when the suit was called for hearing the party or his agent went to fetch his pleader who was engaged in a different

(20) 1890 Pun Re No 71, page 194

26 (21) AIR 1921 Sind 55 (57) 17 Sind L 1105

27 (18) 19 Ind Cas 294 (294) (Cal)

28 (15) AIR 1915 Cal 539 (541)

29 (80) 13 Bom 12 (14)

30 (98) 2 Cal WN 490 (491)

[See (24) AIR 1924 Pat 271 (272) 2 Pat 784]

[But see (21) AIR 1921 All 264 (265) (Respondent a lady—Her agent failing to attend Court due to illness of daughter—Held sufficient cause—)]

31 (35) AIR 1935 Sind 199 (200) (Party arriving late in Court and finding suit dismissed—Whether suit should be restored on payment of costs depends on facts and circumstances—Party appearing late—No application for restoration filed on same day—Application filed seven days hence—Held that in all the circumstances of the case suit should not be restored)

32 (21) AIR 1934 Mad 616 (617)

(35) AIR 1935 Mad 196 (197)

33 (23) 68 Mad L Jour (Notes of Recent Cases) 16  
[See also (35) AIR 1935 Mad 565 (567) 58 Mad 949 (The principle that where a suit on behalf of a minor has been dismissed owing to the absence of the next friend or that where a suit has been decreed *ex parte* against a minor in the absence of his guardian ad litem, the suit must be restored as a matter of course on application

does not apply to cases where the absence of the next friend or guardian has not been due to *bona fide* negligence but has been due to a manoeuvre to gain some advantage in the litigation)]

34 (89) 1939 O WN 787 (790 791) (The question of what is sufficient cause within the meaning of O 9 R 9 has to be decided with reference to various circumstances and the fact of the minority of the plaintiff is only one of such circumstances to be taken note of)

35 (29) AIR 1929 Lah 66 (100) 10 Lah 370

(34) AIR 1931 Pesh 18 (14) (Application dismissed for default owing to prior evidence case on cause list being postponed at the end of the day—Application should be restored)

(38) AIR 1939 Nag 370 (371) (Clerk left in court-room to watch and inform pleader who was waiting in bar room—Clerk failing to do so—Held sufficient cause for restoring suit)

36 (27) AIR 1927 Sind 223 (229)

[See also (37) AIR 1937 Lah 118 (119) (Dismissal for default—Restoration—Date fixed for payment of adjournment costs—Party ill and his pleader though present in Court failing to hear case being called—Suit dismissed for default—Case not one to which O 9 R 8 applied as the day was not fixed for hearing—Case was one which ought to be restored)]

37 (24) AIR 1924 Oudh 405 (406)

Court and the Court in the meantime dismissed the suit<sup>38</sup> it was held that there was sufficient cause for non appearance. Similarly, when the pleader could not attend owing to illness and had no time to make fresh arrangements<sup>39</sup> or where the pleader who had left the headquarters had entrusted the brief to another pleader who was also unavoidably absent,<sup>40</sup> it was held that there was sufficient cause for non appearance. Where the absence of the vakil is due to a bona fide mistake e.g. where the vakil noted in his diary the date of hearing which was on the 23rd of March as 23rd of April,<sup>41</sup> or where by the mistake of the pleader the party did not get intimation in time<sup>42</sup> the suit was ordered to be restored to file. But the mere absence of a party's pleader<sup>43</sup> or the fact that the pleader was engaged elsewhere<sup>44</sup> does not amount to sufficient cause. The fact that in the District Court pleaders take up cases in different Courts and cannot be present at one and the same time in all the Courts<sup>45</sup> or a mere misjudgment on the part of the counsel who does not state that he was engaged elsewhere<sup>46</sup> or the mere fact that the agent or vakil was negligent<sup>47</sup> will not suffice. It has been held by the Nagpur High Court<sup>48</sup> that if a party does all that he is required to do under the law to retain a pleader and the pleader fails to appear it must be held that there is sufficient cause for the non appearance of the party.

The mere fact that a party is contemplating to file an appeal against the preliminary decree will be no sufficient ground for restoring the final decree passed *ex parte*<sup>49</sup>.

**9 Restoration of suit in favour of one of several plaintiffs — Whether can operate in favour of all** — An order under this rule restoring a suit dismissed for default on the application of one of several plaintiffs may if the Court so directs operate in favour of all the plaintiffs though they have not applied for restoration<sup>1</sup>.

**10 Inherent power of Court to order restoration** — See Note 2 to Section 151, *ante*.

**10a Conditional order of restoration** — An order for restoration of a suit dismissed for default on condition of payment of costs to the opposite party within a time fixed by the order and directing that in case of default the application for restoration is to stand dismissed is legal and valid. The effect of the order on default being made in the payment of the costs is that the application stands dismissed and

38 (23) AIR 1923 All 180 (189)

(32) AIR 1932 All 450 (451)

(26) AIR 1926 Lah 650 (651)

(26) 93 Ind Cr 211 (211) (Mad)

(28) AIR 1928 Lah 454 (454)

39 (90) 1896 Bom P J 422 (423)

40 (07) 11 Cal W N 430 (432) (Proceedings under the Land Acquisition Act)

41 (29) AIR 1922 Lah 69 (69)

(1864) 11 Bom H C 267 (269)

42 (23) AIR 1923 Mad 581 (581)

(37) 1337 Mad W N 976 (976) (Where the counsel for the defendant does not inform him of the posting of the suit to a particular date thinking that the posting was merely formal and not for trial it can fairly be said that the defendant was prevented by sufficient cause from appearing without the means of O. 9 R 13)

(See also (13) AIR 1933 Lah 114 (115) (Case remanded to trial Court — Notice of date of hearing directed to be served both on defendant

and on his counsel—Notice served on the latter and not on former—Counsel believing in good faith that defendant would personally be served and not informing defendant)

43 (21) AIR 1921 Nag 3 (4)

44 (75) 24 Suth W R 141 (141)

(32) AIR 1932 Bom 634 (635) (Held in this case that it should however be restored on terms under Court's inherent powers)

(27) AIR 1927 Lah 791 (791)

45 (27) AIR 1927 Oudh 211 (211)

46 (27) AIR 1927 Lah 224 (224)

47 (29) AIR 1929 Lah 148 (149)

48 (39) AIR 1938 Nag 370 (371) (Held that neither party nor pleader is to be blamed for negligence of clerk of pleader)

(36) AIR 1936 Nag 85 (86)

49 (28) AIR 1928 All 192 (192)

#### Note 9

1 (19) AIR 1919 Oudh 4 (6) — 3 Oudh Cas 18.

**O. 9 R 9** the Court is thereafter *functus officio* and cannot extend the time for payment of the  
**Notes 10a-13** costs<sup>1</sup> See also Notes to Section 148 *ante*

**11 Limitation** — An application for restoration under this rule should be made within 30 days of the order of dismissal for default (see Limitation Act Article 163) The Court has no power inherent or otherwise to extend the period of limitation prescribed therefor<sup>1</sup> and if the Court restores an application presented after time the High Court can interfere in revision as the order is one made without jurisdiction<sup>2</sup> Section 5 of the Limitation Act does not apply to this rule<sup>3</sup> unless the High Court has extended its application by a rule framed under Section 192 The Bombay High Court has added a proviso extending the application of Section 5 to this rule<sup>4</sup>

A mere notice that an application is going to be moved on a future date will not prevent the running of limitation<sup>5</sup>

**12 Appeal** — The dismissal of an application under this rule is appealable under O 43 R 1 clause (c)<sup>1</sup> but no appeal lies from an order granting an application<sup>2</sup> Nor can the propriety of such an order be questioned in the regular appeal preferred against the decree eventually passed as the order does not affect the merits of the case within the meaning of Section 105<sup>3</sup> But the dismissal of an application under this rule need not be on the merits and an appeal will lie also from an order dismissing such an application for non prosecution<sup>4</sup>

An order made by a Judge on the original side of the High Court rejecting an application for restoration is a judgment within the meaning of Clause 16 of the Letters Patent and is appealable<sup>5</sup> whereas an order granting an application has been held not to be a judgment within that Clause<sup>6</sup>

**13 Revision** — A revision lies to the High Court against an order granting an application under this rule<sup>1</sup> Thus where a trial Court found that the grounds alleged were not sufficient but ordered restoration as a matter of grace<sup>2</sup> or where the order is

**Note 10a**  
 1 (36) AIR 1936 All 477 (478)

**Section 141**  
 (33) AIR 1938 Bom 199 (207) (S.D.) (If the Court  
 is the Appr)

**Note 11**

1  
 1 "

(See also (9) AIR 1936 Lah 435 (496) ]

2 (31) AIR 1931 Cal 319 (320)

(

"  
 " L Jour 376 ]

3 (02) 1902 Lun Re No. 83 page 335

(25) AIR 1925 Bom 521 (521) 49 Bom 839

4 (23) AIR 1929 Bom 262 (263) 53 Bom 458

5 (03) 81 Cal 150 (154)

**Note 11**

2

(50) 5 Cal 711 (712)

3 (97 1901) 2 Upp Bur Rul 237

4 (36) AIR 1936 All 737 (739)

5 (16) AIR 1916 Cal 361 (366) 43 Cal 8 7

6 (27) AIR 1922 Cal 407 (407), 49 Cal 616

**Note 13**

1 (15) AIR 1916 All 299 (290)

(33) AIR 1933 Lah 169 (171) (It is not an interlocutory order)

(28) 107 Ind Cas 375 (376) (Lab.) (Do)

(25) AIR 1925 Rang 218 (218) 3 Rang 63

[But see (33) AIR 1933 Oudh 331 (333) (The order can be questioned in appeal under Section 105)]

2 (25) AIR 1925 Cal 209 (210) (11)

(19) 14 Ind Cas 291 (294) (Oudh) (Also application presented out of time)

[But see (19) AIR 1919 Cal 979 (980) ]

made without jurisdiction, or an erroneous refusal to exercise jurisdiction,<sup>3</sup> or the order made summarily without recording evidence<sup>4</sup> or reasons,<sup>5</sup> it has been held that revision lies. The question what is sufficient cause is a matter in the Court's discretion and the High Court will not ordinarily interfere in revision with the exercise of such discretion.<sup>6</sup>

O 9 R. 9  
Note 13

Where an application for restoration of a suit does not fall under this rule, an order refusing such application is open to revision by the High Court, the reason being that such an order is not appealable under O. 43 R. 1, clause (c).<sup>7</sup>

**R. 10. [S. 105.]** Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

O. 9 R. 10

Procedure in case of non-attendance of one or more of several plaintiffs.

[1877, S. 105; 1859, S. 116.]

### Synopsis

#### 1. Non-attendance of plaintiffs. 2. Appeal.

**1. Non-attendance of plaintiffs.**—Under this rule the Court has a discretion to permit the suit to proceed in the same way as if all the plaintiffs have appeared.<sup>1</sup> Where the dismissal is in contravention of this rule a revision lies.<sup>2</sup>

**2. Appeal.**—On the date of hearing, one of the plaintiffs alone appeared and applied for an adjournment. The Court rejected the application and dismissed the suit. It was held that as one of the plaintiffs was present it cannot be said that the order of dismissal was one for default and that it amounted to a decree from which an appeal lay.<sup>3</sup>

**R. 11. [S. 106.]** Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

O. 9 R. 11

Procedure in case of non-attendance of one or more of several defendants.

[1877, S. 106; 1859, S. 116.]

3 (18) AIR 1918 Pat 351 (352) 3 Pat L Jour 147 (1918) 147 (1918) 147

(See (34) AIR 1934 Mad 669 (669) ]

4. (18) AIR 1918 Cal 330 (331)

(18) AIR 1918 Cal 330 (331)

5

1. (21) AIR 1921 Cal 176 (177) : 49 Cal 57.

2. (19) AIR 1919 Pat 36 (37) 4 Pat L Jour 152.

Note 2

1 (18) AIR 1918 Pat 376 (376)

6 (107) 30 M.L. 274 (276)

(33) AIR 1933 All 118 (120)

O. 9 R. 11  
Note 1

**1. Non-attendance of defendants.** — The rule contemplates that a decree may be a contested one as against some of the defendants and *ex parte* as against the rest,<sup>1</sup> but the decree is liable to be set aside on an application by the *ex parte* defendant or defendants.<sup>2</sup> The Court should, under this rule, pass such order as it thinks fit against the absent defendants. Where no such order is passed against them but a decree is passed simply against some defendants, the decree is not *ex parte* against the absent defendants and cannot be re-opened under Rule 13.<sup>3</sup>

The Court should not pass a decree in an *ex parte* case, without any proof whatever by the plaintiff, it should consider the interests of the absent party.<sup>4</sup>

## O. 9 R. 12

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person

**R. 12. [S. 107.]** Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

[1877, S. 107; 1859, S. 117. See Ss. 132, 133, O. 3 R. 1, O. 5, R. 3, O. 10 R. 4 and O. 29 R. 3.]

## Synopsis

1. Scope of the Rule.
2. "Subject to all the provisions of the foregoing Rules"

## Other Topics (miscellaneous)

Non appearance on adjourned date — Effect See Note 1      Sufficient cause for non appearance See Note 1

**1. Scope of the Rule.** — The words "under the provisions of Section 66 or Section 436" after the words "appear in person" which occurred in the old Code<sup>1</sup> have now been omitted. The result is that the rule applies to *all cases* where the Court has ordered a person to appear, whether or not the Court is specifically empowered to do so.<sup>2</sup> Where there is a failure to attend on the part of a party, the fact that his pleader is present<sup>3</sup> or the party ordered to appear happens to be the next friend of a minor plaintiff,<sup>4</sup> will not prevent the Court from acting under this rule. But all the same, the dismissal for non attendance being a highly penal matter, it ought not to be inflicted on a party unless there is a distinct order to attend and upon proof that the party had deliberately disobeyed the same.<sup>5</sup> An opportunity should be given to prove the cause

## Order II Rule 11 — Note 1

1. (197) 6 Cal L Jour 226 (231).
- (19) AIR 1919 Cal 217 (218)
- (69) 12 South W R 876 (877)
2. (71) 15 South W R 210 (210)
- (69) 9 South W R 597 (597).
4. (24) AIR 1924 Cal 617 (617)

## Order II Rule 12 — Note 1

1. (29) G O P L R 83 (83).
2. (12) 17 Ind Cas 762 (762) (Mad).

- (32) AIR 1932 All 505 (596) (Order to appear under O 10 R 4 — Dismissal for default of appearance on his failure to appear)
- (28) AIR 1928 Oudh 262 (263)
- 3 (15) AIR 1918 Mad 1256 (1257). 41 Mad 256
- (32) AIR 1932 Mad 414 (414)
- 4 (20) AIR 19 0 Mad 213 (215)
- [But see (12) 17 Ind Cas 762 (762) (Mad)]
- 5 (72) 17 South W R 141 (142).
- (33) AIR 1933 Mad 821 (822)

of his non-appearance<sup>6</sup> Thus, when plaintiff was ordered to appear on a *particular day* and the case was not taken up that day, the Court ought not to dismiss the suit for failure of the plaintiff to appear on a subsequent day to which the case was adjourned<sup>7</sup> Where one of several plaintiffs fails to appear in obedience to the order of Court, the suit cannot be dismissed as against other co plaintiffs also<sup>8</sup>

O. 9 R. 12  
Notes 1-2

2. "Subject to all the provisions of the foregoing Rules." — These words indicate that the Court can act under the provisions of the foregoing rules, i.e., dismiss the suit for default or proceed *ex parte* The very fact that the Court is empowered to proceed under the foregoing rules also indicates that the party aggrieved has the corresponding right of applying for restoration either under Rule 11 or Rule 13 as the case may be<sup>1</sup>

### SETTING ASIDE DECREES EX PARTE

**R. 13. [S. 108.]** In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the

O. 9 R. 13.

Setting aside decree *ex parte* against defendant

Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[1877, Ss. 108, 109, 588 ; 1859, S. 119.]

### Local Amendments

#### ALLAHABAD

Add the following further proviso

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim "

#### BOMBAY

Re number Rule 13 as Rule 13 (1) and add the following sub rule -

(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule "

<sup>6</sup> (1) AIR 1917 Oudh 127 (128)

<sup>7</sup> (17) AIR 1217 All 95 (96) 32 All 476

<sup>8</sup> (19) AIR 1119 Pat 86 (87) 4 Pat L Jour 152

(One of several plaintiffs ordered to appear in person — On his failure, to appear suit should be dismissed as against him only)

(26) AIR 1926 Lah 577 (578) (Newly added co-plaintiff failing to appear — Suit cannot be dismissed against the original plaintiff)

Note 2

1. (32) AIR 1932 All 595 (596)



## O. 9 R. 13 CALCUTTA

*Re-number* Rule 13 as Rule 13 (1) and *add* the following as sub rule (2)

'(2) The defendant shall, for service on the opposite party, present along with his application under this rule either —

(1) as many copies thereof on plain paper as there are opposite parties or

(2) if the Court by reason of the length of the application or the number of the opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements "

## MADRAS

(1) *Re number* Rule 13 as Rule 13 (1) and *insert* the following as proviso to sub rule (1)

"Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim "

(2) *Add* the following as sub rule (2) to Rule 13

'(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub rule (1) '

## NAGPUR

(1) *Add* the following as an additional proviso

Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim

*Explanation* — Where a summons has been served under O 5 R 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule "

(2) *For* the words "he was prevented by any sufficient cause from appearing," the words "there was sufficient cause for his failure to appear" shall be *substituted*

(3) Existing Rule 13 shall be *re numbered* as Rule 13 (1) and the following shall be *inserted* as sub rule (2) namely

(2) the provisions of Section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub rule (1) "

## N-W F F.

*Add* the following as an additional proviso

"Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim "

## OUDH

*Between* the words "was not duly served or that" and the words "he was prevented by any sufficient cause," *insert* the words "notwithstanding due service of the summons," and *add* the following further proviso

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

*Explanation* — Where a summons had been served under O 5 R 15 on an adult male member having an interest adverse to that of the defendant in the subject matter of the suit it shall not be deemed to have been duly served within the meaning of this rule

**RANGOON**

(1) *Add the following as second proviso*

Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim

(2) *Substitute decree or order for decree wherever this word occurs in Rule 13*

**SIND**

*Add the following further proviso*

Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim

*Synopsis*

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>1 Legislative changes</li> <li>2 Scope of the Rule</li> <li>3 Applicability to execution proceedings<br/>See Note 1 to O 9 General</li> <li>4 Decree passed by the Presidency Court of Small Causes</li> <li>5 Decree passed by the Provincial Court of Small Causes</li> <li>6 When a decree can be said to be <i>ex parte</i></li> <li>7 Where a written statement is filed</li> <li>8 Remedies in the case of an <i>ex parte</i> decree</li> <li>9 Whether the remedies are concurrent</li> <li>10 Hearing of application pending appeal</li> <li>11 Hearing of application after disposal of appeal</li> <li>12 Suit to set aside an <i>ex parte</i> decree — <i>Ex parte</i> decree obtained by fraud</li> <li>13 Application to be made to the Court which passed the decree</li> <li>14 Fresh vakalatnama if necessary</li> </ul> | <ul style="list-style-type: none"> <li>15 Who can apply to set aside</li> <li>16 Application by the legal representative of the defendant</li> <li>17 Grounds for setting aside an <i>ex parte</i> decree</li> <li>18 Summons not duly served</li> <li>19 Sufficient cause</li> <li>20 Minor defendant</li> <li>21 Decree having been satisfied</li> <li>22 Upon such terms as to costs, etc</li> <li>23 Proviso to the Rule</li> <li>24 Inherent power of Court to set aside an <i>ex parte</i> decree See Note 9 to Section 151</li> <li>25 Effect of setting aside the <i>ex parte</i> decree</li> <li>26 <i>Ex parte</i> decree against a firm</li> <li>27 Dismissal of an application to set aside an <i>ex parte</i> decree if can be restored See Note 2 to O 9 General</li> <li>28 Limitation</li> <li>29 Appeal</li> <li>30 Revision</li> </ul> |
|---|--|

*Other Topics (miscellaneous)*

Against him See Note 23  
Applications under this rule how far proceed against the suit See Note 2

Question as to service of summons on defendant decided—Fresh suit attacking it if barred See Note 12

**1 Legislative changes —**

The words *as against him* after the words *shall make an order setting aside the decree* have been newly added with a view to make it clear that the *ex parte* decree can only be set aside in favour of the defendant against whom it has been passed unless it be that the proviso applies<sup>1</sup>

The proviso to the rule is also new

**Order 9 Rule 13 — Note 1**

1 See the Statement of Objects and Reasons



2. Scope of the Rule. — The object of the rule is to ensure, within reasonable limits as to public convenience, that every defendant shall have a hearing, and to place the successful applicant in the same position in which he would have been if no decree had been passed against him. An application under this rule is not strictly speaking an application for a re-hearing although it may result in it. The proceedings contemplated are not merely a branch of the suit which terminated when the *ex parte* decree was passed, the suit itself does not revive until after the proceedings in the application are terminated successfully. The rule applies to suits and not to appeals, inasmuch as separate and corresponding provisions have been made in Order 41 therefor. This rule applies to orders passed *ex parte* in insolvency proceedings under the Provincial Insolvency Act, V of 1920, by virtue of Section 5 of that Act and also to decrees in arbitration proceedings under Schedule II of the Code.

An order setting aside an *ex parte* decree is a judgment within the meaning of Section 2 sub section 9 ante and cannot therefore be altered or added to, save as provided by Section 152 or on review. See Order 20 Rule 3.

Although it is the practice of the municipal Courts to pass an order declaring a defendant *ex parte* the Code does not in terms provide for an application to set aside such order. It is only when a decree has been passed that an application to set aside such decree has been expressly provided for by the Code.<sup>10</sup>

3. Applicability to execution proceedings. — See Note 1 to Order 9, General and also the undermentioned cases.

4. Decree passed by the Presidency Court of Small Causes. — Section 37 of the Presidency Small Cause Courts Act, XV of 1883, declaring the finality of small

- (94) 19 Bom 208 (210)
- 4 (27) AIR 1927 Lah 200 (207) 8 Lah 54
- 5. Proceedings resulting in final decree are continuation of and part of suits governed by this rule. Vide the following cases
- (122) AIR 1929 All 279 (290) 51 All 634
- (12) 13 Ind Cas 374 (374) (Cal)
- (10) 6 Ind Cas 387 (388) (Cal) (Final decree for

by this rule. Vide the following cases

(30) AIR 1930 All 841 (843) 52 All 839

- 9 (33) AIR 1933 Oudh 395 (396)
  - 10. (90) AIR 1930 Muz 385 (385)
  - Note ■
  - 1. (31) AIR 1931 Muz 699 (699) (Muz not
- Note 4
- 1. (92) 17 Bom 597 (603)
  - 2. (95) 8 Cal 1, Jour 193 (201)
  - 3. (93) 30 Cal 589 (592)
- (82) AIR 1932 Lrb 552 (523). (Application is therefore governed by Art 164, Limitation Act)

and is  
judicially  
trial

**O. 9 R. 13**  
**Notes 6-7**

aggrieved party is also entitled in such a case to the remedy provided for by this rule.<sup>6</sup> A decree passed on default of appearance of the defendant at the hearing of a remanded suit is nevertheless an *ex parte* decree.<sup>6</sup> Similarly, a final decree passed in the absence of the defendant is an *ex parte* decree within the meaning of this rule.<sup>7</sup>

A decree cannot be *ex parte* when there is evidence already on record and the Court goes into the *merits* before decreeing the suit.<sup>8</sup> Thus, where both the parties have let in their evidence and nothing remains to be done except arguments the Court ought not to proceed to pass an *ex parte* decree.<sup>9</sup> Similarly, where the defendant who has been summoned as a witness by the plaintiff fails to appear the Court is not justified in passing an *ex parte* decree when the pleader for the defendant is ready to proceed with the case.<sup>10</sup> Where the defendant actually appears, a mere failure on his part to adduce evidence will not make the decree passed an *ex parte* decree.<sup>11</sup> A defendant's pleader on the day fixed for trial filed an additional written statement and applied for a fresh issue being framed. On such issue being framed, he applied for an adjournment and on adjournment being refused, reported no instructions and the trial proceeded. It was held that the acts of the pleader in filing the additional written statement and applying for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing and that they constituted an appearance.<sup>12</sup>

Where a compromise decree is passed in a suit and a party applies to set it aside on the ground that the applicant was no party to the compromise and that he had given no authority to file the compromise, there is a conflict of opinion as to whether the application can be treated as one under this rule, for which see the undermentioned cases.<sup>13</sup>

The recitals on the record are not conclusive as to the character of the decree.<sup>14</sup> and the defendant is entitled to show that the decree is as a matter of fact, *ex parte*.<sup>15</sup>

**7. Where a written statement is filed.**—Where the defendant has filed a written statement in the case but fails to appear when the suit is called on for hearing, the decree passed is nevertheless an *ex parte* decree and can be set aside under this rule.<sup>1</sup>

defendant and pleader present at hearing of suit and not prevented in any way from addressing Court.—Decree is not *ex parte*.)

12 (35) AIR 1935 Mad 210 (211) 58 Mad 817 (A party who has appeared by his pleader cannot be allowed to claim to be *ex parte* from the moment that his pleader when called upon to enter upon his defence or in anticipation of that stage of the trial has reported to the Court that he has no instructions.)

(1903) 4 BOM 111 (1)

(69) 3 Beng L R App 121 (129)

(See also (75) 1 Bom 217 (218) (Issues framed in presence of defendant's pleader—Plaintiff's

**8. Remedies in the case of an *ex parte* decree.** — A defendant against

whom an *ex parte* decree has been passed has four courses open to him, *viz* —

- (1) to apply under this rule to set aside the *ex parte* decree,<sup>1</sup> or
- (2) to apply for a review,<sup>2</sup> or
- (3) to appeal from the decree,<sup>3</sup> or
- (4) to institute a suit on the ground of fraud.<sup>4</sup>

See also Note 12 to Section 96

**9. Whether the remedies are concurrent.** — As to whether and how far the remedies 1 and 3 referred to in Note 8 above are *concurrent* see Note 12 to Section 96

The defendant may apply for a review without applying under this rule<sup>1</sup> or even after an application under this rule has been rejected.<sup>2</sup> According to the High Courts of Calcutta<sup>3</sup> and Madras<sup>4</sup> the fact that an application for a review is made at a time when an application under this rule would be barred by limitation, is no ground for refusing a review. But the High Court of Lahore<sup>5</sup> has held *contra*, namely that no review can be granted in such a case and that the defendant cannot be allowed to evade the law of limitation. It is submitted that the former view is correct. If the party is entitled to a review, he is equally entitled to apply for the same within the period of limitation prescribed *therefor* and not for any other application.

**10. Hearing of application pending appeal.** — As has been seen in Note 12 to Section 96 *ante*, the mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule. In fact, such an application ought to be presented to the Court which passed the decree,<sup>1</sup> for, the decree continues to be the decree of the primary Court until it is reversed, confirmed or varied in appeal.<sup>2</sup> The proceedings under this rule and in an appeal are entirely distinct in their scope and purpose and there is no possibility of any conflict between the judgments to be pronounced in the two proceedings.<sup>3</sup>

Where a decree is *ex parte* against some defendants and contested against the rest, and the contesting defendants alone appeal without impleading the *ex parte* defendants as respondents, the application by the *ex parte* defendants ought to be

(69) 1 N W P H C R 154 (154)  
(71) 1 Beng L R 698 (690-691)  
(25) AIR 1925 Oudh 717 (717-718)  
[But see (69) 11 Suth W R 5 (5)  
(81) 3 Mad 264 (265)]

Note 8

Note 9

1. (12) 15 Ind Cas 554 (554) (Cal)  
2. (78) 20 Suth W R 234 (284) (Without an application being made for review, a Judge has no power to alter or amend his judgment *proprio motu*.)  
3. (12) 16 Cal W N 643 (644)  
4. (20) AIR 1920 Mad 633 (634)  
5. (12) 13 Ind Cas 318 (319) (Lah)  
(20) AIR 1920 Lah 261 (262)

Note 10

1. (21) AIR 1921 Mad 568 (568, 569) 44 Mad 731.  
(09) 32 Mad 416 (420) (FB)  
(11) AIR 1924 Lah 224 (225) (An appeal from the *ex parte* decree does not affect the appeal from an order rejecting an application for setting aside the *ex parte* decree.)  
(09) 3 Ind Cas 468 (469) (Cal) (Mere filing an appeal does not preclude application under this rule.)

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4. (09) 1 Ind Cas 56 (59) (Cal)

**O. 9 R. 8**  
**Notes 7-9**

that the price is Rs 12,000 the Court cannot pass a decree in favour of the plaintiff under this rule for pre-emption on payment of Rs 12,000 but must, on default by the plaintiff, dismiss the suit.<sup>2</sup>

The word 'claim' is not necessarily synonymous with the amount sued for. It may refer to the right claimed irrespective of the amount stated in the relief column.<sup>3</sup> A decree passed on the admission of the defendant is appealable.<sup>4</sup>

**8. Effect of dismissal under this Rule.** — Unlike the dismissal of a suit under Rule 3, a dismissal under this rule precludes a fresh suit on the same cause of action.<sup>1</sup> But two other remedies are open to the plaintiff —

(1) to apply under Rule 9 for restoration of the suit, or

(2) to apply for a review of the order.<sup>2</sup>

It is not necessary that the plaintiff should apply under Rule 9 before applying for a review<sup>3</sup> and there is nothing in the Code to limit the parties to one particular remedy. But a review will not lie except on the grounds mentioned in O 47 R 1. It has been held by the High Court of Bombay in the undermentioned case<sup>4</sup> that where a suit is dismissed under O 9 R 8 there could be no such grounds for review as those mentioned in O 47 R 1 inasmuch as the fact that the applicant was absent when the suit was called on for hearing was neither a discovery of any new and important matter, nor an error apparent on the face of the record nor a ground analogous to any of those specified in the rule. There is a conflict of opinion as to whether a plaintiff who has failed to make an application within thirty days under O 9 R 9 can be allowed to prefer an application for review. The High Courts of Patna<sup>5</sup> and Lahore<sup>6</sup> have held that he cannot be allowed to do so, on the ground that the law of limitation should not be allowed to be evaded in that way. The High Courts of Madras<sup>7</sup> and Calcutta<sup>8</sup> on the other hand, have held that such an application would lie and that the fact that the plaintiff will get a longer period of limitation by the adoption of a particular remedy is no ground for refusing him relief.

It has been held by the Lahore High Court<sup>9</sup> that a Court has inherent power to restore a suit which has been dismissed in default owing to a mistake of the Court itself.

**9. Revision** — Where the Court refuses to act under this rule in a case to which the rule applies<sup>1</sup> or acts under this rule illegally or with material irregularity,<sup>2</sup> a revision will lie.

2. (21) 60 Ind Cas 724 (724) (Lah)

3. (17) AIR 1917 Mad 732 (734)

4. (12) 15 Ind Cas 601 (602) (Cal)

**Note 8**

1. (25) AIR 1925 Mad 996 (998)

(16) AIR 1916 Cal 791 (791, 792)

2. (25) AIR 1925 Lah 517 (518)

(28) AIR 1928 Rang 177 (178) 6 Rang 251

(75) 7 N W P H C R 126 (130)

7. (100) 85 C 128 (129)

8.

9. (17) AIR 1917 Pat 673 (673, 674) 1 Pat L Jour 547

Cal 599)

8. (39) 26 Cal 593 (601)

9. (36) AIR 1936 Lah 759 (760) (AIR 1925 Lah 534 and 6 I C 203, Followed)

**Note 9**

1. (19) AIR 1919 Pat 373 (373) (Process fee not paid but plaintiff appearing and applying for time to file written statement—Plaintiff absent—Court dismissing suit under O 9 R 8 instead of under O 9 R 6—This amounts to refusal to exercise jurisdiction)

2. (21) AIR 1921 Lah 139 (140) (Dismissal of suit for default—Order mentioning that plaintiff was present but that he subsequently went away—Order held improper)

**R. 9.** [S. 103.] (1) Where a suit<sup>4</sup> is wholly or partly dismissed under rule 8, the plaintiff<sup>7</sup> shall be precluded from bringing a fresh suit<sup>5</sup> in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause<sup>8</sup> for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[1877, Ss. 103, 108, 109, 588; 1859, S. 119. See O. 22 R. 9.]

#### Local Amendments

#### BOMBAY

Add the following as sub rule (3)

"(3) The provisions of Section II of the Indian Limitation Act, 1908, shall apply to applications under this rule "

#### CALCUTTA

*Re-number* sub rule (2) as sub rule (3) and *insert* after the words "notice of the application" the words "with a copy thereof (or concise statements as the case may be) "

*Insert* the following as sub rule (2)

"The plaintiff shall, for service on the opposite parties, present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties, or,

(ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements "

#### LAHORE

Add the following proviso to sub rule (1) :

Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default

#### N.-W.F.P.

Same proviso as that added by the Lahore High Court is added

### Synopsis

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Appearance," meaning of.</li> <li>3 Appearance in person See O 3 R 1, Note 4</li> <li>4 Appearance by pleader. See O 3 R 1, Note 6</li> <li>5 Bar of fresh suit.</li> <li>6 "Suit," meaning of.</li> <li>7. Minor plaintiff.</li> <li>8. "Sufficient cause."</li> </ol> | <ol style="list-style-type: none"> <li>9. Restoration of suit in favour of one of several plaintiffs—Whether can operate in favour of all.</li> <li>10 Inherent power of Court to order restoration. See Note 2 to Section 131.</li> <li>10a Conditional order of restoration.</li> <li>11. Limitation.</li> <li>12 Appeal</li> <li>13. Revision.</li> </ol> |
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# O. 9 R. 9

## Notes 1-2

### Other Topics (miscellaneous)

Applicability to other proceedings: See Notes 6 and 8  
 Letters Patent Appeal: See Note 19  
 Rule applicable only when dismissal under R. 8  
 See Note 1  
 Same cause of action: See Note 5

**1. Scope of the Rule.** — The remedy provided for by this rule is not open to a plaintiff whose suit has been dismissed for any reason other than default of appearance under Rule 8<sup>1</sup>. Hence no application lies under this rule where the dismissal is under O. 17 R. 3<sup>2</sup> or O. 11 R. 21,<sup>3</sup> or where the dismissal is due to a failure on the part of the plaintiff to adduce evidence,<sup>4</sup> or where the plaint is rejected under O. 7 R. 11 for failure to pay deficient court fees.<sup>5</sup> The rule applies only to suits and not to appeals.<sup>6</sup> It applies also to suits under Section 9 of the Specific Relief Act, 1877, which are dismissed for default. That Section bars only a review and not an application for rehearing.<sup>7</sup> As to the restoration of appeals dismissed for default of appearance of the appellants, see Order 41 Rule 19.

The Court cannot *suo motu* order a restoration without an application on the part of the plaintiff.<sup>8</sup> The word 'plaintiff' has been held to include his legal representatives who can also therefore apply under this rule.<sup>9</sup> No fresh *vakalatnama* is necessary for an application under this rule.<sup>10</sup>

The effect of restoration under O. 9 R. 9 is to bring the suit as regards parties, to the exact position in which it was at the time of dismissal.<sup>11</sup>

See also Note 6, *infra*.

**2 "Appearance," meaning of.** — The term "appearance" has nowhere been defined in the Code and it must be understood in reference to the particular subject matter to which it relates.<sup>1</sup> Appearance in Order II means either —

(a) by the party in person or

(b) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some other person able to do so.<sup>2</sup>

For a full discussion see Order 3 Rule 1, *ante*.

Order 9 Rule 9 — Note 1	
1 (1884) 1864 Suth W. R. Misc 21 (21)	6 (1884) 1864 Suth W. R. Misc 21 (21)
2 (89) 4 Mad 217 (218)	7 (89) 4 Mad 217 (218)
3 (25) AIR 1925 Rang 18 (218)	8 (25) AIR 1925 Oudh 100 (100) (Plaintiff applied for restoration as against one out of two defendants — The Court also restored the suit against the other defendant and that too beyond the period of limitation — Held order of restoration as against the other defendant was ultra vires)
4 (25) AIR 1925 Rang 18 (218)	9 (25) AIR 1925 Oudh 100 (100) 95 Oudh Cas 67.
5 (25) AIR 1925 Rang 18 (218)	10 (90) 1890 Bom F. J 124 (124) (Plaintiff himself need not make the application — Application by pleader is competent)
6 (25) AIR 1925 Rang 18 (218)	11 (25) AIR 1925 Cal 814 (515)
7 (25) AIR 1925 Rang 18 (218)	12 (19) AIR 1919 Cal 40 (19)
8 (25) AIR 1925 Rang 18 (218)	13 (97) 34 Cal 407 (413) (F. J)
9 (25) AIR 1925 Rang 18 (218)	14 (99) 93 Bom 414 (401 402) (Besides these two modes of appearance there is a third mode of

suit rejected under O. 7 R. 11 — Fresh suit filed on the same cause of action — District Judge holding second suit barred under this rule — Held by High Court that this rule did not apply

3. Appearance in person. — See Order 3 Rule 1 Note 4.

4. Appearance by pleader. — See Order 3 Rule 1 Note 6

5. Bar of fresh suit. — Where a suit is dismissed for default, it cannot be said to have been *heard* and decided on the merits and therefore cannot operate as *res judicata*.<sup>1</sup> But the plaintiff is, under the specific provisions of this rule, barred from bringing a fresh suit on the same cause of action,<sup>2</sup> and the fact that the mode of relief claimed in the subsequent suit is different will not be a ground for not applying the bar under this rule.<sup>3</sup> Thus, a suit on the basis of entries in the plaintiff's account book, in respect of the same sum of money for which a prior suit on a promissory note given therefor had been dismissed for default, will be barred under this rule.<sup>4</sup> Similarly, where a suit filed by the voluntary liquidator of a company against an alleged share holder for the recovery of a sum of money due to the company is dismissed for default under this rule, a subsequent application by the official liquidator to have the name of the defendant placed in the list of contributories in respect of the same claim is barred.<sup>5</sup>

Where the cause of action in the subsequent suit is *different* from that in the first suit, this rule will not apply.<sup>6</sup> Thus, a suit for partition dismissed for default under this rule does not bar a subsequent suit for partition. The reason is that the right to enforce partition is a *continuous* right which is a legal incident of a joint tenancy and which endures so long as the joint tenancy continues.<sup>7</sup> See Note 86 to

appearance viz appearance by a party's recognised agent)  
(29) AIR 1928 Mad 881 (884) (Where attendance of pleader is no appearance")

#### Note 5

1. (10) 5 Ind Cas 298 (300) (Cal)  
(14) AIR 1914 All 222 (223)  
(82) 6 Bom 482 (486)  
(85) AIR 1935 Cal 212 (216, 217) 62 Cal 15  
(Where the suit is dismissed for want of prosecution under the provisions of Ch 10, R 36 of Cutchia High Court Rules and Orders (Original Side) the plaintiff is not barred from bringing a fresh suit)  
See also Note 106 to S 11  
[See also (91) 18 All 53 (54 55, 62) 17 Ind App 250 (P O) (Previous suit dismissed for want of evidence)]

2. (16) AIR 1916 Cal 791 (791) (A Court while dismissing a suit for non prosecution under O 9 R 8 imposed a condition that such dismissal will not be a bar to any fresh suit—Held fresh suit barred under this rule in spite of the condition)  
(83) 8 Cal 426 (429)  
(01) 25 Bom 82 (84, 85)  
(16) AIR 1916 Lah 273 (273, 274) 1916 Pun Re No 11  
(23) AIR 1929 Pat 685 (689, 691) 9 Pat 447  
(Sufficient declaration of title dismissed for default—Subsequent suit for possession on the same facts barred)  
(29) AIR 1933 Nag 145 (146) (Where a plaintiff's suit alleging that defendant had forcibly and illegally taken possession of certain land and

tank, that defendant's possession constituted a trespass and praying that the defendant be ejected from the land and tank is dismissed under O 9 R 8, a subsequent suit alleging forcible and wrongful possession and praying for possession of same land is barred because the cause of action is the same and not a continuing one)

3. (28) AIR 1928 Rang 73 (74) 5 Rang 785  
(26) AIR 1926 Lah 562 (563)  
(88) 15 Cal 422 (430 431) 15 Ind App 60 (PC)  
(In the first suit sub proprietary right claimed while in the second suit superior proprietary right was claimed)

4. (20) AIR 1920 All 340 (341) 42 All 103

■ (20) AIR 1920 Lah 43 (44) 1 Lah 237 (Such application partakes of the nature of suit)

6. (20) AIR 1920 Cal 407 (408)

(83) AIR 1933 Lah 365 (363) 14 Lah 455

rate possession)

(17) AIR 1917 Cal 11 (11)

(14) AIR 1914 All 223 (223)

(27) AIR 1927 Pat 375 (376) 7 Pat 29 (Fresh suit for enhancement of rent of the same tenancy held not barred)

(25) AIR 1925 Nag 200 (200) (If even one different fact makes cause of action different)

(26) 10 Bom 23 (30) (This rule should be strictly construed)

7. (01) 25 All 127 (127)

(26) AIR 1926 Mad 1018 (1015) 49 Mad 192



dismissed for default of appearance can be restored under this rule.<sup>7</sup> But the same High Court has held that an application under Section 292 of the Succession Act of 1925 is in the nature of an execution proceeding and that, therefore, Section 141 does not make this rule applicable to such an application. So, it has been held by that Court that where such an application is dismissed for default, a fresh application can be made.<sup>8</sup>

In the undermentioned case,<sup>9</sup> it was held by the Oudh Chief Court that an application under Section 47 of the Code stands on the same footing as a suit and that where such an application is dismissed for default of appearance, a fresh application on the same allegations is not maintainable.

The bar under this rule does not apply to a fresh application for adjudication as insolvent after the dismissal of a prior application for default.<sup>10</sup> An order of annulment passed under Section 43, sub section 1 of the Provincial Insolvency Act of 1920 cannot be set aside by virtue of the provisions of Order 9.<sup>11</sup> The reason is that Section 10, clause (2) of the Provincial Insolvency Act itself provides for a remedy in such cases.

The rule does not apply to applications under Section 158 of the Bengal Tenancy Act.<sup>12</sup>

See also Note 5 to Section 2, sub clause (2), Note 21 to Section 11, and Order 9, "General."

**7. Minor plaintiff.**—A suit by a minor is liable to be dismissed for default of appearance on the part of the next friend<sup>1</sup> and the provisions of this rule cannot be nullified because the plaintiff happens to be a minor.<sup>2</sup> But where the next friend is guilty of gross negligence in the conduct of the suit, the minor can bring a fresh suit, notwithstanding this rule, either himself after attaining majority or through another next friend.<sup>3</sup> He can also apply under this rule for setting aside the order of dismissal.<sup>4</sup> See also Note 8 *infra* under the sub-heading "Absence of next friend of minor plaintiff."

**8. "Sufficient cause."**—The only ground for restoring a suit under this rule is the existence of a sufficient cause for the non appearance of the party at the time the suit was called on for hearing.<sup>1</sup> The term "sufficient cause" has not been defined

7. ('86) AIR 1936 Lah 863 (864) (17 All 106, AIR 1919 Mad 112 and 20 I O 281, Rehe'd on, AIR 1936 Lah 712, Affirmed.)

8. ('35) AIR 1935 Lah 145 (145)

9. ('37) AIR 1937 Oudh 337 (338) 15 Luck 309 (The combined effect of Ss 2(2) and 47, O P O., is that an application under § 47 stands on the footing of a suit and the determination of such an application is tantamount to a decree.)

10. (27) AIR 1927 Mad 579 (580)

11. (26) AIR 1926 Mad 942 (943) 49 Mad 935

12. ('23) AIR 1923 Pat 581 (582, 584) - 2 Pat 192 (The rule applies only to suits.)

#### Note 7

1. (10) 8 Ind Cas 547 (547) (Lah)

2. (21) AIR 1921 Sind 200 (202) 17 Sind LR 41 (Fresh suit through different next friend held barred.)

3. (95) 22 Cal 8 (14)

4. (15) AIR 1915 Mad 52 (52)

('25) AIR 1925 Cal 1774 (775)

#### Note 8

1. ('10) 4 Low Bur Rul 221 (222)

(33) AIR 1933 Lah 169 (171) (If there is no sufficient cause suit cannot be restored as a matter of grace.)

(33) AIR 1933 Pesh 53 (50) (Suit cannot be restored under inherent powers in the absence of sufficient cause.)

(27) 106 Ind Cas 821 (821, 822) (Lah) (The applicant must however be given opportunity to adduce evidence in support of his allegations.)

(35) AIR 1935 Pesh 145 (146)

(39) AIR 1939 Cal 74 (75) 1 L R (1939) 1 Cal 213 (In an application for restoration under O. 9 R. 9, the plaintiff must show some fact which was either not known to the Court when it dismissed the suit, or at least at that stage lacked satisfactory proof.)

(See ('7) 1576 P. N. R. No. 119, p. 235 (It is enough if he shows sufficient cause for his absence.)

(29) 117 Ind Cas 551 (552) (Lah) (Applicant to restore case dismissed for default—Applicant is bound to explain cause for absence.)

O. 9 R. 9  
Note 8

any where <sup>2</sup> It is a question of fact depending upon the circumstances of each case<sup>3</sup> and is not subject to any hard and fast rule except that the Court must exercise a judicial discretion in the matter <sup>4</sup> In the undermentioned case,<sup>5</sup> the Rangoon High Court held that under this rule if "sufficient cause" is shown, the Court is bound to restore the suit, while if "sufficient cause" is not shown the matter is in the discretion of the Court. It is submitted with respect that the view that the Court has power to restore a suit even where it holds that sufficient cause has not been shown is open to question.

**Absence of party** — A generous construction should be placed on the enactment to restore a suit dismissed for default<sup>6</sup> and a party should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part<sup>7</sup> The test to be applied as a general rule is to see whether the party applying, honestly intended to be present at the hearing of the suit and did his best to do so<sup>8</sup> The High Court of Allahabad has, in the undermentioned case,<sup>9</sup> held that even though the plaintiff was negligent enough to start for the last train and missed it, the suit ought to be restored observing that negligence is human and not irreparable and can be amply compensated by costs. The following grounds have been held to amount to sufficient cause for the absence of the party —

(1) A *bona fide* mistake which is not unreasonable or for which the party is not responsible<sup>10</sup> Thus where the bench clerk gave a wrong date of hearing,<sup>11</sup> or

2 (27) AIR 1927 Lah 622 (634)

3 (27) AIR 1927 Lah 622 (624)

4 (34) AIR 1934 Nag 183 (186) 31 Nag LR 32

5 (70) 2879 Pun Re No 96 p 11

(29) AIR 1922 Pat 485 (488) 1 Pat 188 (Suit to remove the defendant from proprietorship — Court appointing receiver but refusing to direct him to furnish defendant with funds — Held sufficient cause)

(12) 18 Ind Cas 468 (468) (Lah) (Petition dismissed in the early part of the day owing to the temporary absence of the party or pleader — At once explained — Suit must be restored)

(30) AIR 1930 Lah 943 (943) (Suit dismissed in the early part of the day — Party pardanashin lady — Her counsel engaged elsewhere — Court ought to restore suit)

(20) AIR 1929 All 599 (599) 51 All 908 (Plaintiff appearing on same day and satisfying Court for his non appearance is a sufficient cause)

(28) AIR 1928 Nag 75 (76) (Default in appearance owing to party's missing the train is sufficient cause)

(27) AIR 1927 Lah 40 (41) (Late arrival of train is sufficient cause)

(35) AIR 1935 Sind 198 (200)

[See (92) 1822 Bom P J 104 (104) (Misapprehension as to date of hearing — Sufficient cause)]

4 (20) AIR 1939 Lah 96 (93) 100 10 Lah 570

(24) AIR 1924 Oudh 389 (390) 27 Oudh Cas 103 (Court should not surrender its discretion to the dictation of parties)

(29) AIR 1929 Bom 250 (250) (Dissenting from the view expressed in AIR 1925 Bom 423 and AIR 1924 Bom 892 that when a party arrives late on the same day the suit must as a rule of practice, be restored on payment of costs — To the same effect is AIR 1919 Bom 480)

(38) AIR 1938 Bom 199 (204) (S B) (To restore a proceeding is a matter of discretion — It is

undurable for Court to act on precedents in such a matter)

5 (26) AIR 1936 Rang 835 (836)

6 (06) 80 Mad 274 (276)

(15) AIR 1915 Mad 10 (17)

(05) 1900 Lun Re No 72 p 293

(17) AIR 1917 All 290 (290)

7 (23) AIR 1923 Mad 68 (64) 40 Mad 60

(38) AIR 1934 Bom 193 (202) (S B)

(36) AIR 1936 Rang 835 (836)

[See (31) AIR 1931 Nag 101 (102) (Case adjourned for plaintiff's reply — Reply filed and also application for amendment — Court requiring further statements — Pleador unable to make them — Court holding plaintiff at fault and dismissing suit — Order of dismissal held ultra vires and was sufficient cause for restoring case)]

8 (23) AIR 1923 Mad 63 (64) 40 Mad 60 (The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside)

(33) AIR 1933 Cal 73 (74) (Plaintiff's strenuous attempt to get witnesses to Court is sufficient cause)

(36) AIR 1936 Rang 335 (337)

(39) AIR 1939 Bom 199 (201) 202 (S B)

(36) AIR 1936 Rang 204 (206) (Non appearance on account of mixing of train)

[See (34) AIR 1934 Lah 416 (416) (Puncture of tyre on the way to Court is sufficient cause)]

9 (295) AIR 1925 All 601 (601)

[See also (36) AIR 1936 Rang 204 (206)]

10 (26) 23 Cal 991 (995)

(33) AIR 1933 All 276 (276) (Date of adjourned hearing not given to party or his counsel)

(1865) 3 Bom H C R 60 (62)

11 (24) AIR 1924 Rang 271 (272)

(27) AIR 1927 Rang 46 (47) 4 Rang 403

where the suit was dismissed on a date not fixed for hearing<sup>11</sup> or where the day fixed for hearing was a holiday,<sup>13</sup> or where the suit was transferred without notice to the parties<sup>14</sup> or where no proper notice of hearing was served on the party,<sup>15</sup> or where the suit was called on after 5 P. M. on the day of hearing<sup>16</sup> or where the absence was due to some confusion regarding the observance of a local holiday,<sup>17</sup> the suit was ordered to be restored.

(2) Where the plaintiff was prevented from appearing owing to a breach in the railway line<sup>18</sup>

(3) Where the plaintiff was prevented from appearing owing to illness<sup>19</sup>

(4) Where the agent of the plaintiff left the Court after attending to some cases of the plaintiff under the *bona fide* belief that the plaintiff had no more cases that day<sup>20</sup>

(5) Where the plaintiff was present but went away to answer imperative calls of nature<sup>21</sup>

(6) Where the party is prevented from appearing owing to the fraud of the opposite party<sup>22</sup>

(7) Where in a land acquisition case the Collector who was a party admitted receipt of notice of the proceeding but did not attend owing to pressure of work<sup>23</sup>

See also the undermentioned cases<sup>24</sup>

The following have been held not to amount to sufficient cause within the meaning of this rule —

(1) Where the non appearance is wilful and deliberate<sup>25</sup>

12 (60) 12 Suth W R 423 (429)

(80) AIR 1930 Cal 251 (251)

13 (16) AIR 1915 Lah 476 (477)

14 (34) AIR 1934 Lah 91 (91) (Notice of trans for served on counsel but he declining to appear for him any longer)

(83) AIR 1933 Lah 558 (559) 14 Lah 240

(23) AIR 1923 Lah 444 (445)

[See also (83) AIR 1933 Lah 114 (115)]

15 (27) AIR 1927 Lah 865 (365) (Case decided with reference to O 41 R 19)

(26) AIR 1926 Mad 1210 (1211) (Case pertaining to appeal)

(17) AIR 1917 Lah 392 (400) (Notice not duly served—knowledge as to date of hearing of appeal cannot be presumed)

cause—It is not for the Court to argue that there was no hurry for the operation and that the petitioner could have waited for a week more)

(60) 5 Ind Cas 23 (26) 33 Mad 241

[See also (34) AIR 1934 All 163 (164) 56 All 78]

20 (20) AIR 1929 Rang 221 (224)

21 (26) 96 Ind Cas 407 (403) (Lah)

22 (72) 18 Suth W R 457 (457)

23 (27) AIR 1927 Rang 150 (153) 5 Rang 80

24 (36) AIR 1936 Rang 204 (206) (Non appearance on account of missing the train is due to sufficient cause)

(38) AIR 1933 Cal 789 (790) (Thro. suits filed by petitioners—Petitioner taking all necessary

def n't after Court hours—Application for restoration should be granted)

17 (27) AIR 1927 All 543 (540)

18 (23) AIR 1923 All 107 (107) 40 All 60

[See (60) 8 Bom 29 (31) (Said in closing of to com

not in fit condition to attend Court on account of operation having been performed on him is sufficient

25 (65) 190 P. M. L. No 47 (190) 164

(21) AIR 1921 Mad 617 (614)

**O. 9 R. 9** the Court is thereafter *functus officio* and cannot extend the time for payment of the costs<sup>1</sup> See also Notes to Section 148, *ante*

**11. Limitation.** — An application for restoration under this rule should be made within 30 days of the order of dismissal for default (see Limitation Act, Article 163) The Court has no power, inherent or otherwise, to extend the period of limitation prescribed therefor,<sup>1</sup> and if the Court restores an application presented after time the High Court can interfere in revision as the order is one made without jurisdiction.<sup>2</sup> Section 5 of the Limitation Act does not apply to this rule<sup>3</sup> unless the High Court has extended its application by a rule framed under Section 122 The Bombay High Court has added a proviso extending the application of Section 5 to this rule.<sup>4</sup>

A mere notice that an application is going to be moved on a future date will not prevent the running of limitation.<sup>5</sup>

**12. Appeal.** — The dismissal of an application under this rule is appealable under O 43 R 1 clause (c),<sup>1</sup> but no appeal lies from an order granting an application.<sup>2</sup> Nor can the propriety of such an order be questioned in the regular appeal preferred against the decree eventually passed, as the order does not affect the merits of the case within the meaning of Section 105.<sup>3</sup> But the dismissal of an application under this rule need not be on the merits and an appeal will lie also from an order dismissing such an application for non prosecution.<sup>4</sup>

An order made by a Judge on the original side of the High Court rejecting an application for restoration is a "judgment" within the meaning of Clause 15 of the Letters Patent, and is appealable,<sup>5</sup> whereas an order granting an application has been held not to be a "judgment" within that Clause.<sup>6</sup>

**13. Revision.** — A revision lies to the High Court against an order granting an application under this rule.<sup>1</sup> Thus, where a trial Court found that the grounds alleged were not sufficient but ordered restoration as a matter of grace,<sup>2</sup> or where the order is

Note 10a	Section 141 f
1 ('86) AIR 1906 All 477 (478)	(38) AIR 1938 Bom 199 (202) (S.D.) (If the Court

Note 11

1 ('02) 1902 Pan Re No 83 page 335

2 ('20) AIR 1920 Pat 491 (491) (Exercising powers

3 ('97-1901) ■ Upp Bur Rul 237

4 ('36) AIR 1936 All 737 (739)

5 ('16) AIR 1916 Cal 361 (366) 43 Cal 857

6. ('22) AIR 1922 Cal 407 (407), 49 Cal 616

3. ('02) 1902 Pan Re No 83 page 335

('25) AIR 1925 Bom 521 (521) 49 Bom 839

4. ('29) AIR 1929 Bom 262 (263) 63 Bom 458

5. ('03) 31 Cal 150 (154)

Note 12

Note 13

1. ('15) AIR 1915 All 289 (290)

(33) AIR 1933 Lah 169 (171) (It is not an inter

(The order can be questioned in appeal under

O 9 R. 9  
Note 13

made without jurisdiction, or an erroneous refusal to exercise jurisdiction,<sup>3</sup> or the order is made summarily without recording evidence<sup>4</sup> or reasons,<sup>5</sup> it has been held that a revision lies. The question what is sufficient cause is a matter in the Court's discretion and the High Court will not ordinarily interfere in revision with the exercise of such discretion.<sup>6</sup>

Where an application for restoration of a suit does not fall under this rule, an order refusing such application is open to revision by the High Court, the reason being that such an order is not appealable under O. 43 R. 1, clause (c).<sup>7</sup>

O. 9 R. 10

**R. 10. [S. 105.]** Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

[1877, S. 105; 1859, S. 116.]

### Synopsis

#### 1. Non-attendance of plaintiffs. | 2. Appeal

**1. Non-attendance of plaintiffs.**—Under this rule the Court has a discretion to permit the suit to proceed in the same way as if *all* the plaintiffs have appeared.<sup>1</sup> Where the dismissal is in contravention of this rule a revision lies.<sup>2</sup>

**2. Appeal.**—On the date of hearing, one of the plaintiffs alone appeared and applied for an adjournment. The Court rejected the application and dismissed the suit. It was held that as one of the plaintiffs was present it cannot be said that the order of dismissal was one for default and that it amounted to a decree from which an appeal lay.<sup>1</sup>

O. 9 R. 11

**R. 11. [S. 106.]** Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

[1877, S. 106; 1859, S. 116.]

Procedure in case of non-attendance of one or more of several defendants

3 (18) AIR 1918 Pat 351 (352) 3 Pat L Jour 955

{See (31) AIR 1934 M.L. 109 (109) }

4 (18) AIR 1918 Cal 330 (331)

(23) AIR 1923 Mad 177 (178)

5 (31) AIR 1931 All 452 (452) (No proof or finding as to sufficient cause)

{See also (13) 51 Inl Cas 69 (70) (U.P.B.R.) }

6 (07) 30 Mad 274 (275)

(33) AIR 1933 All 118 (120)

#### Order 9 Rule 10 — Note 1

1. (21) AIR 1921 Cal 177 (177) 49 Cal 57

2. (19) AIR 1919 Pat 36 (37) 4 Pat L Jour 132

#### Note 2

1 (19) AIR 1919 Pat 376 (376)



O. 9 R. 11  
Note 1

**1. Non-attendance of defendants.** — The rule contemplates that a decree may be contested one as against some of the defendants and *ex parte* as against the rest<sup>1</sup> but the decree is liable to be set aside on an application by the *ex parte* defendant or defendants<sup>2</sup>. The Court should, under this rule, pass such order as it thinks fit against the absent defendants. Where no such order is passed against them but a decree is passed simply against some defendants, the decree is not *ex parte* against the absent defendants and cannot be reopened under Rule 13<sup>3</sup>.

The Court should not pass a decree in an *ex parte* case, without any proof whatever by the plaintiff, it should consider the interests of the absent party<sup>4</sup>.

## O. 9 R. 12

**R. 12. [S. 107.]** Where a plaintiff or defendant, who has

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person

been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

[1877, S 107; 1859, S 117 See Ss 132, 133, O. 3 R. 1, O. 5, R. 3, O. 10 R. 4 and O. 29 R. 3.]

**Synopsis**

1 Scope of the Rule.

2 "Subject to all the provisions of the foregoing Rules"

**Other Topics (miscellaneous)**

Non appearance on adjourned date — Effect See Note 1

Sufficient cause for non appearance See Note 1

**1. Scope of the Rule.** — The words "under the provisions of Section 66 or Section 436 after the words 'appear in person' which occurred in the old Code<sup>1</sup> have now been omitted. The result is that the rule applies to *all cases* where the Court has ordered a person to appear whether or not the Court is specifically empowered to do so<sup>2</sup>. Where there is a failure to attend on the part of a party, the fact that his pleader is present<sup>3</sup> or the party ordered to appear happens to be the next friend of a minor plaintiff,<sup>4</sup> will not prevent the Court from acting under this rule. But all the same, the dismissal for non attendance being a highly penal matter, it ought not to be inflicted on a party unless there is a distinct order to attend and upon proof that the party had deliberately disobeyed the same<sup>5</sup>. An opportunity should be given to prove the cause

**Order 9 Rule 11 — Note 1**

1. (07) 6 Cal L Jour 226 (231)

(19) AIR 1919 Cal 217 (218)

(69) 12 South W R 576 (577)

2. (71) 15 South W R 210 (210)

3. (69) 9 South W R 597 (597).

4. (24) AIR 1924 Cal 647 (649)

(32) AIR 1932 All 595 (596) (Order to appear under O 10 R 4 — Dismissal for default of appearance on his failure to appear)

(28) AIR 1928 Oudh 262 (263)

256

**Order 9 Rule 12 — Note 1**

1. (98) 6 C P L R 83 (83).

2. (12) 17 Ind Cas 762 (762) (Mad).

5. (72) 17 South W R 141 (149)

(33) AIR 1933 Mad 821 (822)

of his non-appearance<sup>6</sup> Thus, when plaintiff was ordered to appear on a particular day and the case was not taken up that day, the Court ought not to dismiss the suit for failure of the plaintiff to appear on a subsequent day to which the case was adjourned<sup>7</sup> Where one of several plaintiffs fails to appear in obedience to the order of Court, the suit cannot be dismissed as against other co plaintiffs also<sup>8</sup>

2. "Subject to all the provisions of the foregoing Rules." — These words indicate that the Court can act under the provisions of the foregoing rules, i. e., dismiss the suit for default or proceed *ex parte* The very fact that the Court is empowered to proceed under the foregoing rules also indicates that the party aggrieved has the corresponding right of applying for restoration either under Rule 9 or Rule 13 as the case may be<sup>1</sup>

### SETTING ASIDE DECREES EX PARTE

R. 13. [S. 108.] In any case in which a decree is passed

O. 9 R. 13.

Setting aside decree *ex parte* against defendant

*ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the

Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[1877, Ss. 108, 109, 588 ; 1859, S. 119.]

### Local Amendments

#### ALLAHABAD

Add the following further proviso

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim "

#### BOMBAY

Re number Rule 13 as Rule 13 (1) and add the following sub rule -

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule "

( 26 ) AIR 1936 Lah 577 (578) (Newly added complaint failing to appear — Suit cannot be dismissed against the original plaintiff )

Note 2

1. ('32) AIR 1932 All 595 (596)

## O. 9 R. 13 CALCUTTA

*Re number* Rule 13 as Rule 13 (1) and *add* the following as sub rule (2)

"(2) The defendant shall, for service on the opposite party, present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties or

(ii) if the Court by reason of the length of the application or the number of the opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements'

## MADRAS

(1) *Re number* Rule 13 as Rule 13 (1) and *insert* the following as proviso to sub rule (1)

'Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim'

(2) *Add* the following as sub rule (2) to Rule 13

(2) The provisions of Section 5 of the Indian Limitation Act, 1908 shall apply to applications under sub rule (1)'

## NAGPUR

(1) *Add* the following as an additional proviso

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim

*Explanation* — Where a summons has been served under O 5 R 15, on an adult male member having an interest adverse to that of the defendant in the subject matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule"

(2) For the words 'he was prevented by any sufficient cause from appearing, the words 'there was sufficient cause for his failure to appear' shall be *substituted*

(3) Existing Rule 13 shall be *re numbered* as Rule 13 (1) and the following shall be *inserted* as sub rule (2) namely

(2) the provisions of Section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub rule (1)'

## N-W F P

*Add* the following as an additional proviso

"Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim'

## OUDH

*Between* the words "was not duly served or that" and the words 'he was prevented by any sufficient cause," *insert* the words "notwithstanding due service of the summons," and *add* the following further proviso

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

*Explanation* — Where a summons had been served under O 5 R 15 on an adult male member having an interest adverse to that of the defendant in the subject matter of the suit it shall not be deemed to have been duly served within the meaning of this rule

**RANGOON**

(1) *Add the following as second proviso*

Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim

(2) *Substitute decree or order for decree wherever this word occurs in*

**Rule 13**

**SIND**

*Add the following further proviso*

Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim

*Synopsis*

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1 Legislative changes</li> <li>2 Scope of the Rule</li> <li>3 Applicability to execution proceedings<br/>See Note 1 to O 9 General</li> <li>4 Decree passed by the Presidency Court of Small Causes</li> <li>5 Decree passed by the Provincial Court of Small Causes</li> <li>6 When a decree can be said to be <i>ex parte</i></li> <li>7 Where a written statement is filed</li> <li>8 Remedies in the case of an <i>ex parte</i> decree</li> <li>9 Whether the remedies are concurrent</li> <li>10 Hearing of application pending appeal</li> <li>11 Hearing of application after disposal of appeal</li> <li>12 Suit to set aside an <i>ex parte</i> decree — <i>Ex parte</i> decree obtained by fraud</li> <li>13 Application to be made to the Court which passed the decree</li> <li>14 Fresh vakalatnama if necessary</li> </ol> | <ol style="list-style-type: none"> <li>15 Who can apply to set aside</li> <li>16 Application by the legal representative of the defendant</li> <li>17 Grounds for setting aside an <i>ex parte</i> decree</li> <li>18 Summons not duly served</li> <li>19 Sufficient cause</li> <li>20 Minor defendant</li> <li>21 Decree having been satisfied</li> <li>22 'Upon such terms as to costs etc</li> <li>23 Proviso to the Rule</li> <li>24 Inherent power of Court to set aside an <i>ex parte</i> decree See Note 9 to Section 151</li> <li>25 Effect of setting aside the <i>ex parte</i> decree</li> <li>26 <i>Ex parte</i> decree against a firm</li> <li>27 Dismissal of an application to set aside an <i>ex parte</i> decree if can be restored See Note 9 to O 9 General</li> <li>28 Limitation</li> <li>29 Appeal</li> <li>30 Revision</li> </ol> |
|---|--|

*Other Topics (miscellaneous)*

- |   |   |
|---|---|
| <p>Against him See Note 23</p> <p>Applications under this rule how far proceedings in the suit See Note 2</p> | <p>Question as to service of summons on defendant decided—Fresh suit attacking it if barred See Note 12</p> |
|---|---|

**1 Legislative changes —**

The words 'as against him' after the words 'shall make an order setting aside the decree' have been newly added with a view to make it clear that the *ex parte* decree can only be set aside in favour of the defendant against whom it has been passed unless it be that the proviso applies<sup>1</sup>

The proviso to the rule is also new

**Order 9 Rule 13 — Note 1**

1 See the Statement of Objects and Reasons

**O 9 R. 13  
Note 1**



High Court, the *Registrar* of the Court of Presidency Small Causes had no jurisdiction to entertain an application under this rule

O. 9 R. 13  
Notes 4-6

**5. Decree passed by the Provincial Court of Small Causes.** — Section 17 of the Provincial Small Cause Courts Act (IX of 1887) requires the deposit of the decretal amount or the furnishing of security as a condition precedent to the entertaining of an application to set aside an *ex parte* decree<sup>1</sup> Where security is furnished within the period of limitation but on its being found to be insufficient the deficiency is made up after the expiry of limitation, the provisions of Section 17 of the Provincial Small Cause Courts Act should be held to be complied with<sup>2</sup>

Even where the Small Cause Court by which an *ex parte* decree was passed has been abolished, the requirements under Section 17 as to deposit or security should be complied with in the case of an application to set aside the *ex parte* decree<sup>3</sup>

An order setting aside an *ex parte* decree of a Provincial Small Cause Court is one passed under the Code<sup>4</sup>

See also the Authors' Commentaries on the Limitation Act, Article 164, Note 3.

**6. When a decree can be said to be *ex parte*.** — The present rule is limited to decrees made *ex parte* under the provisions of Order 9 and does not govern other decrees, though *ex parte*, unless Order 9 has been extended to those decrees by other provisions in the Code<sup>1</sup> Thus, where a suit is decided under O 17 R 3<sup>2</sup> or O 11 R 21, the decree is not *ex parte* so as to entitle the defendant to apply under this rule The reason is that the Court is not *empowered* under those rules to proceed under Order 9 The decree referred to is clearly a decree passed either at the first hearing under Rule 6 of this Order<sup>3</sup> or at an adjourned hearing under O 17 R 2 read with Rule 9<sup>4</sup> Under O 17 R 2 specific provision is made for the Court to proceed under Order 9 and the

#### Note 5

1. (06) 28 All 470 (472)
- (34) AIR 1934 Nag 48 (48)
- (10) 6 Ind Cas 400 (400) 31 Mad 88
- (04) 8 Cal W N 355 (856)
- (08) 5 All L Jour 295 (297)
- (98) 2 Cal W N 593 (695)
- (17) AIR 1917 All 434 (485) 38 All 425 (Transfer of suit from Court of Small Causes to another Court — The latter is to be deemed Small Cause Court under S 24 C P O)

3. (31) AIR 1931 All 948 (944) (Proceeding for setting aside *ex parte* decree of Small Cause Court is governed by S 17, Provincial Small Cause Courts Act and not by C P O even after Court of Small Causes is abolished)
4. (35) AIR 1935 Mad 380 (381) 53 Mad 687 (FB).

#### Note 6

1. (98) 2 Cal W N 676 (679)

- (18) AIR 1918 Pat 256 (257) 3 Pat L Jour 481.
- (63) 4 Mad H C R 254 (257)
- (68) 4 Mad H C R 56 (59)
- (25) AIR 1925 Mad 316 (317)
- (08) 35 Cal 1023 (1037)
- (35) AIR 1935 Mad 210 (211) 33 Mad 817.
- (36) AIR 1936 All 670 (671)
3. (09) 2 Ind Cas 67 (68) (Cal)
- (96) 111 All 241 (244) (Appearance by pleader with *vakalat* signed by a third person applying for adjournment — Adjournment refused — Decree passed as *ex parte*)
4. (23) AIR 1923 All 551 (552) 45 All 618
- (79) 4 Cal 318 (321)

- tainable)
- (36) AIR 1936 Oudh 407 (409) 12 Luck 287.
- (See also (36) AIR 1936 All 371 (372) (Court ordering deposit of decretal amount—Court can condone delay in making deposit and extend the time)
- (36) AIR 1936 Mad 524 (524) (Delay in furnishing full security due to Court's action—Judgment debtor should not be penalised))

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aggrieved party is also entitled in such a case to the remedy provided for by this rule.<sup>6</sup> A decree passed on default of appearance of the defendant at the hearing of a remanded suit is nevertheless an *ex parte* decree.<sup>6</sup> Similarly, a final decree passed in the absence of the defendant is an *ex parte* decree within the meaning of this rule.<sup>7</sup>

A decree cannot be *ex parte* when there is evidence already on record and the Court goes into the merits before decreeing the suit.<sup>8</sup> Thus, where both the parties have let in their evidence and nothing remains to be done except arguments, the Court ought not to proceed to pass an *ex parte* decree.<sup>9</sup> Similarly, where the defendant who has been summoned as a witness by the plaintiff fails to appear, the Court is not justified in passing an *ex parte* decree when the pleader for the defendant is ready to proceed with the case.<sup>10</sup> Where the defendant actually appears a mere failure on his part to adduce evidence will not make the decree passed an *ex parte* decree.<sup>11</sup> A defendant's pleader on the day fixed for trial filed an additional written statement and applied for a fresh issue being framed. On such issue being framed, he applied for an adjournment and on adjournment being refused reported no instructions and the trial proceeded.<sup>12</sup> It was held that the acts of the pleader in filing the additional written statement in applying for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing and that they constituted an appearance.<sup>13</sup>

Where a compromise decree is passed in a suit and a party applies to set it aside on the ground that the applicant was no party to the compromise and that he had given no authority to file the compromise, there is a conflict of opinion as to whether the application can be treated as one under this rule, for which see the undermentioned cases.<sup>14</sup>

The recitals on the record are not conclusive as to the character of the decree<sup>15</sup> and the defendant is entitled to show that the decree is, as a matter of fact, *ex parte*.<sup>16</sup>

**7 Where a written statement is filed.**—Where the defendant has filed a written statement in the case but fails to appear when the suit is called on for hearing, the decree passed is nevertheless an *ex parte* decree and can be set aside under this rule.<sup>1</sup>

1. 1902-1-100

defendant and pleader present at hearing of suit and not prevented in any way from addressing Court—Decree is not *ex parte* }

in presence of defendant a pleader — Plaintiff a witnesses also cross examined — Decree not *ex*

**8 Remedies in the case of an ex parte decree** — A defendant against whom an *ex parte* decree has been passed has four courses open to him *viz* —

- (1) to apply under this rule to set aside the *ex parte* decree<sup>1</sup> or
- (2) to apply for a review<sup>2</sup> or
- (3) to appeal from the decree<sup>3</sup> or
- (4) to institute a suit on the ground of fraud<sup>4</sup>

See also Note 12 to Section 96

**9 Whether the remedies are concurrent** — As to whether and how far the remedies 1 and 2 referred to in Note 8 above are *concurrent* see Note 12 to Section 96

The defendant may apply for a review without applying under this rule<sup>1</sup> or even after an application under this rule has been rejected<sup>2</sup>. According to the High Courts of Calcutta<sup>3</sup> and Madras<sup>4</sup> the fact that an application for a review is made at a time when an application under this rule would be barred by limitation is no ground for refusing a review. But the High Court of Lahore<sup>5</sup> has held *contra* namely that no review can be granted in such a case and that the defendant cannot be allowed to evade the law of limitation. It is submitted that the former view is correct. If the party is entitled to a review, he is equally entitled to apply for the same within the period of limitation prescribed *therefor* and not for any other application.

**10 Hearing of application pending appeal** — As has been seen in Note 12 to Section 96 *ante* the mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule. In fact such an application ought to be presented to the Court which passed the decree<sup>1</sup> for the decree continues to be the decree of the primary Court until it is reversed, confirmed or varied in appeal<sup>2</sup>. The proceedings under this rule and in an appeal are entirely distinct in their scope and purpose and there is no possibility of any conflict between the judgments to be pronounced in the two proceedings<sup>3</sup>.

Where a decree is *ex parte* against some defendants and contested against the rest and the contesting defendants alone appeal without impleading the *ex parte* defendants as respondents the application by the *ex parte* defendants ought to be

- (69) 1 N W P H C R 154 (154)  
(71) 8 Beng L R 688 (690, 691)  
(25) AIR 1925 Oudh 717 (717, 718)  
[But see (69) 11 Suth W R 5 (5)  
(81) 8 Mad 264 (265)]

**Note 8**

**Note 9**

- 1 (12) 15 Ind Cas 554 (554) (Cal)
- 2 (78) 20 Suth W R 984 (284) (Without an application being made for review a Judge has no power to alter or amend his judgment *proprio motu*.)
- 3 (12) 16 Cal W N 648 (644)
- 4 (20) AIR 1920 Mad 633 (631)
- 5 (12) 13 Ind Cas 318 (319) (Lah)  
(20) AIR 1920 Lah 261 (262)

**Note 10**

- 1 (21) AIR 1921 Mad 568 (568, 569) 44 Mad 731 (09) 32 Mad 416 (420) (PB)
- 2 (24) AIR 1924 Lah 224 (225) (An appeal from the *ex parte* decree does not affect the appeal)



O. 9 R. 13  
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aggrieved party is also entitled in such a case to the remedy provided for by this rule.<sup>5</sup> A decree passed on default of appearance of the defendant at the hearing of a remanded suit is nevertheless an *ex parte* decree.<sup>6</sup> Similarly, a final decree passed in the absence of the defendant is an *ex parte* decree within the meaning of this rule.<sup>7</sup>

A decree cannot be *ex parte* when there is evidence already on record and the Court goes into the merits before decreeing the suit.<sup>8</sup> Thus, where both the parties have let in their evidence and nothing remains to be done except arguments, the Court ought not to proceed to pass an *ex parte* decree.<sup>9</sup> Similarly, where the defendant who has been summoned is a witness by the plaintiff fails to appear, the Court is not justified in passing an *ex parte* decree when the pleader for the defendant is ready to proceed with the case.<sup>10</sup> Where the defendant actually appears, a mere failure on his part to adduce evidence will not make the decree passed an *ex parte* decree.<sup>11</sup> A defendant's pleader on the day fixed for trial filed an additional written statement and applied for a fresh issue being framed. On such issue being framed, he applied for an adjournment and on adjournment being refused, reported no instructions and the trial proceeded. It was held that the acts of the pleader in filing the additional written statement and applying for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing and that they constituted an appearance.<sup>12</sup>

Where a compromise decree is passed in a suit and a party applies to set it aside on the ground that the applicant was no party to the compromise and that he had given no authority to file the compromise, there is a conflict of opinion as to whether the application can be treated as one under this rule, for which see the under-mentioned cases.<sup>13</sup>

The recitals on the record are not conclusive as to the character of the decree.<sup>14</sup> and the defendant is entitled to show that the decree is, as a matter of fact, *ex parte*.<sup>15</sup>

**7. Where a written statement is filed.**—Where the defendant has filed a written statement in the case but fails to appear when the suit is called on for hearing, the decree passed is nevertheless an *ex parte* decree and can be set aside under this rule.<sup>1</sup>

defendant and pleader present at hearing of suit and not prevented in any way from addressing Court.—Decree is not *ex parte*.)

12. (1935) AIR 1935 Mad 210 (211). 58 Mad 817.

that a

1. (1909) 4 Ind Cas 1167 (1167). 31 Mad 505.

8. Remedies in the case of an *ex parte* decree. — A defendant against whom an *ex parte* decree has been passed has four courses open to him, viz —

- (1) to apply under this rule to set aside the *ex parte* decree,<sup>1</sup> or
- (2) to apply for a review,<sup>2</sup> or
- (3) to appeal from the decree,<sup>3</sup> or
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The defendant may apply for a review without applying under this rule<sup>1</sup> or even after an application under this rule has been rejected.<sup>2</sup> According to the High Courts of Calcutta<sup>3</sup> and Madras<sup>4</sup> the fact that an application for a review is made at a time when an application under this rule would be barred by limitation, is no ground for refusing a review. But the High Court of Lahore<sup>5</sup> has held *contra*, namely that no review can be granted in such a case and that the defendant cannot be allowed to evade the law of limitation. It is submitted that the former view is correct. If the party is entitled to a review, he is equally entitled to apply for the same within the period of limitation prescribed *therefor* and not for any other application.

10. Hearing of application pending appeal. — As has been seen in Note 12 to Section 96 *ante*, the mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule. In fact, such an application ought to be presented to the Court which passed the decree,<sup>1</sup> for, the decree continues to be the decree of the primary Court until it is reversed, confirmed or varied in appeal.<sup>2</sup> The proceedings under this rule and in an appeal are entirely distinct in their scope and purpose and there is no possibility of any conflict between the judgments to be pronounced in the two proceedings.<sup>3</sup>

Where a decree is *ex parte* against some defendants and contested against the rest, and the contesting defendants alone appeal without impleading the *ex parte* defendants as respondents, the application by the *ex parte* defendants ought to be

(60) 1 N W P H C R 154 (154)

(71) 6 Bang L R 688 (690, 691)

(25) AIR 1925 Oudh 717 (717, 718)

[But see (69) 11 South W R 5 (5)]

(81) 8 Mad 264 (265)]

**Note 8**

1. (29) AIR 1929 Cal 322 (325) 55 Cal 21

(20) AIR 1920 Lah 408 (403) 1 Lah 344

(74) 22 South W R 213 (214)

(24) 24 Cal 113 (114)

**Note 9**

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*motu*)

3. (12) 16 Cal W N 643 (644)

4. (20) AIR 1920 Mad 633 (634)

5. (12) 13 Ind Cas 318 (319) (Lah)

(20) AIR 1920 Lah 261 (262)

**Note 10**

1. (21) AIR 1921 Mad 568 (568, 569) 44 Mad 731.

(09) 32 Mad 416 (420) (FB)

(24) AIR 1924 Lah 224 (225) (An appeal from

the *ex parte* decree does not affect the appeal

for setting

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If he rule)

O. 9 R. 13  
Note 11

was satisfied as to due service of summons before proceeding *ex parte* <sup>8</sup>

A suit is maintainable notwithstanding the fact that it has not been preceded by an application under this rule<sup>9</sup> or that an application was filed under this rule and proved infructuous<sup>10</sup>. But where the question raised in the suit has already been decided adversely to the applicant in an application under this rule, such decision will operate as *res judicata* and will bar the re opening of the same question in the suit<sup>11</sup>. Further, no suit can be entertained where the only question submitted is one that could and should have been dealt with under this rule<sup>12</sup>. For instance where the only fraud alleged is *bare non service of summons* no suit can succeed<sup>13</sup>. It is quite a different matter however where the *whole suit* is attacked on the ground of fraud and the incident of improper or defective service is relied on as one of the *indicia* of fraud<sup>14</sup>. As the Judicial Committee observed in *Khagendra Nath v Pran Nath* (I L R 29 Calcutta 395) O 9 R 13 assumes the existence of a real suit and has no application where the suit itself is attacked on the ground of fraud and the fraudulent and violent incidents of its progress *e g* at the stage of service are treated as parts and *indicia* of a whole. A fraudulent suppression in the matter of the service of summons can afford a sufficient ground for setting aside the *ex parte* decree<sup>15</sup>. Thus, where the plaintiff got summons served on a wrong person suppressing the father's name of the real defendant and knowing full well that the defendant was not a partner got him impleaded as a partner, it was held that the decree was tainted with fraud<sup>16</sup>. Similarly where the plaintiff falsely and intentionally represented to the Court that the defendant was away in a distant place and got substituted service effected, the decree passed in the case was held to be vitiated by fraud<sup>17</sup>.

8 (93) AIR 1923 Pat 406 (407)

9 (17) AIR 1917 Upp Bur 9 (10) 2 Upp Bur  
Rul 106

— Fraudulent suppression of summons and fraud of defendant must be proved

(37) AIR 1937 Pat 384 (384) (Decree passed by competent Court cannot be set aside by suit

(36) AIR 1936 Pat 195 (186)

14 (1909) 30 Cal 395 (400) 29 Ind App 99 (P C)

(23) AIR 1923 Pat 242 (244) 2 Pat 335

(17) AIR 1917 Pat 161 (168)

15 (10) 5 Ind Cas 198 (199 200) 37 Cal 197

(94) 21 Cal 605 (609)

proper service as required by Section 148 (g) Bengal Tenancy Act — Separate suit to set aside rent decree does not lie unless there is fraud regarding service or Court is kept in ignorance of real state of affairs

16 (22) AIR 1922 Sind 20 (21) 16 Sind L R 109

17 (14) AIR 1914 Lah 450 (452) 1914 Pun Ro No 65

The mere fact that the *ex parte* decree has been procured by *false or perjured evidence* is no ground for setting it aside. Something more should be proved in support of the allegation of fraud.<sup>19</sup>

Where the very question of fraud has been already in issue and agitated between the same parties and decided upon in an application under this rule, the decision will operate as *res judicata* in a separate suit.<sup>20</sup>

The question whether the original suit itself is revived after the *ex parte* decree in that suit has been set aside in a subsequent suit, depends on the issues and the actual decision in the later suit.<sup>21</sup>

If the *ex parte* decree be not set aside it is final and will operate as *res judicata*.<sup>21</sup>

See also Note 19 to Section 11

**18. Application to be made to the Court which passed the decree.** — The rule requires an *application* by the defendant for an order to set aside the decree.<sup>1</sup> The application under this rule ought to be made to the Court which passed the decree though the presiding Judge may be different.<sup>2</sup> Where, however, by reason of territorial re-adjustment, the Court itself becomes different the defendant is not debarred from applying to the Court which is seised of the matter.<sup>3</sup>

According to the undermentioned case of the High Court of Madras<sup>4</sup> an application should be made only to the trial Court even after *disposal* of the appeal against the *ex parte* decree. This view, as has been seen in Note 11 above, cannot be accepted as correct. In an earlier decision of the same High Court<sup>5</sup> it was held that the High Court can in second appeal, entertain an application for setting aside an *ex parte* decree passed by the trial Court.

An application under this rule is not bad merely because it omits to give the names of some of the decree holders.<sup>6</sup>

**14. Fresh vakalatnama, if necessary.** — A pleader who had duly appeared in the suit is not obliged to file a fresh *vakalatnama* for the purpose of an application under this rule.<sup>1</sup>

**15. Who can apply to set aside.** — The application under this rule is not limited to the case of a *sole* defendant who has not appeared or, where there are more defendants than one, none of them had appeared, *any one of several defendants* against

O. 9 R. 13  
Notes 12-15

(20) AIR 1920 Lah 83 (89)

Note 13

1. (20) AIR 1920 Cal 50 (51) 117 510

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2. (68) 10 Sath W R 156 (157)

(90) 1890 Pun Re No 153 page 616

3. (22) AIR 1922 Mad 10 (12) 40 Mad 1

4. (27) AIR 1927 Mad 720 (723 724)

5. (16) AIR 1916 Mad 641 (641)

6. (35) AIR 1935 Cal 506 (507) 62 Cal 1057

Note 14

1. (20) AIR 1922 Bom 207 (209) 47 Bom 11.

**O. 9 R. 13** Notes 15-17 whom the decree is *ex parte* can apply<sup>1</sup> The words "against the defendant" do not necessarily imply that the only defendant against whom relief has been in terms granted by the decree can apply for an order to set it aside, they are comprehensive enough to include a case in which the decree *adversely affects* the rights of a contesting defendant Thus, where the real question is whether the plaintiff or the contesting defendants are really entitled to the claim in suit and an *ex parte* decree is passed, the contesting defendants are competent to apply under this rule<sup>2</sup> But a person who is not a party though he may be interested in the suit is not entitled to apply under this rule<sup>3</sup> Nor can a person who though a formal party but against whom nothing is said in the operative portion of the decree<sup>4</sup> or who has been expressly exempted from the decree, apply under this rule<sup>5</sup> It follows that a person against whom the suit is dismissed cannot apply<sup>6</sup>

The Court cannot *suo motu* set aside an *ex parte* decree without there being an application by the party<sup>7</sup>

**16 Application by the legal representative of the defendant.**—When a defendant dies after an *ex parte* decree is made against him his legal representative can apply under this rule to set it aside<sup>1</sup> The reason is that the legal representative enjoys the same rights and liabilities as the original defendant The contrary view expressed in the undermentioned cases<sup>2</sup> that the provision only authorises applications by the *defendant against whom an ex parte decree was passed* is not correct under the present Code having regard to Section 146

Where proceedings under this rule have been already initiated by the defendant, his legal representative is entitled to continue the same<sup>3</sup> See also Section 146, Notes 2 and 7 for fuller discussion

**17. Grounds for setting aside an ex parte decree.**—In an application under this rule, the Court has to satisfy itself (a) whether the summons has not been duly served or (b) whether the applicant has been prevented by sufficient cause from appearing<sup>1</sup> The words in the rule are imperative and if either of these conditions is satisfied the Court is bound to set aside the *ex parte* decree and cannot refuse it on any other ground<sup>2</sup> Thus the fact that the defendant did not take out summons to his witnesses is no ground for refusing the application if otherwise the conditions of this rule are satisfied<sup>3</sup> Conversely where either of these conditions is not satisfied the Court has *no jurisdiction* to grant the application for any other reason<sup>4</sup> Thus, where a suit

#### Note 15

- 1 { 04) 8 Cal W N 621 (625)
- 2 { 34) AIR 1934 All 163 (164) 56 All 578
- 3 { 26) AIR 1926 Cal 1015 (1015)
- 4 { 04) 1 All L Jour 470 (472)
- 5 { 21) 61 Ind Cas 484 (485) (All)
- 6 { 11) 11 Ind Cas 141 (142) (All)
- { 27) AIR 1927 Mad 227 (228) (Some defendants sailing with plaintiff—Withdrawal ordered in their absence—Petition by them to set it aside and allow them to continue the suit—Not sustainable)

- 7 { 27) AIR 1927 Lah 372 (372)

#### Note 16

- 1 { 23) AIR 1923 All 30 (30)

- 3 { 07) 29 All 574 (575)

#### Note 17

- 1 { 25) AIR 1925 Lah 577 (577)
- { 35) AIR 1935 All 565 (566)

is restored to file under Rule 9, *ante*, and the Court passes an *ex parte* decree on the same day on account of the fact that the defendant was not ready to go on with the trial, it has been held that the decree could not be set aside under this rule.<sup>1</sup> In such a case the decree is however illegal and can be set aside in appeal or revision as the case may be.

The Court should decide upon evidence<sup>6</sup> or proper affidavits<sup>7</sup> and come to a definite finding as to the facts alleged in the application.<sup>8</sup> An application under this rule in rent suits under the Bengal Tenancy Act,<sup>9</sup> and the Orissa Tenancy Act<sup>10</sup> must contain a statement of the injury sustained by the applicant by the *ex parte* decree and must also be accompanied by a deposit in Court of the amount of rent admitted due by the applicant unless the Court otherwise directs.

See also the undermentioned case<sup>11</sup> decided under the further proviso added by the High Court of Allahabad.

**18 Summons not duly served.** — The *onus* of proving that the summons has not been duly served is upon the applicant claiming the benefit of this rule.<sup>1</sup> If he makes out that the necessary proof of due service required by Rule 6 was not given before the Court proceeded *ex parte*, the decree ought to be set aside.<sup>2</sup> But a mere assertion of ignorance on the part of the defendant is not enough to prove want of due service.<sup>3</sup> The Court must decide the matter upon enquiry and upon evidence.<sup>4</sup>

Although in the first instance the *onus* lies on the applicant it will shift to the opposite party where the service is not on the defendant personally but on his *gumasta*, and he must show that the provisions of O 5 R 12 or R 13 were complied with.<sup>5</sup> It is necessary in each case for the Court to see that the serving officer has used

{ 36 } AIR 1936 Mad 49 (49) (If the Court sets the decree aside on terms on the ground that he has a good defence, that order is without jurisdiction.)

{ 38 } AIR 1935 Cal 797 (798) (Defendant served with summons months before suit fixed for *ex parte* hearing — Being absent when suit heard *ex parte* decree passed — Applying same day for time to file statement — *Ex parte* decree held could not be set aside.)

{ 37 } AIR 1937 All 691 (693) (An applicant seeking to avail himself of the rule must comply with the conditions laid down in the rule; i.e., he must satisfy the Court either that the summons was not duly served or that he was prevented by any sufficient cause from appearing in Court when the suit was called on for hearing.) { See { 36 } AIR 1936 Mad 524 (524) (Where a Court decides to set aside an *ex parte* decree under O 9 R 13 although it is not obligatory on the Court to state reasons why *ex parte* decree should be set aside it is most desirable

decree—Irregularity in service of summons—Defendant aware of hearing — No ground for setting aside.)

NOTE 18

{ 75 } 24 Suth W R 262 (262)

{ 28 } AIR 1928 Nag 60 (60) 22 Nag L R 166

2 { 01 } 23 All 99 (100 101)

3 { 26 } AIR 1926 Mad 533 (533)

{ 28 } 108 Ind Cas 753 (754) (Mad)

4 { 11 } 9 Ind Cas 31 (32) (All)

{ 23 } AIR 1923 Mad 27 (28)

{ 74 } 21 Suth W R 212 (213)

{ 66 } 6 Suth W R Misc 96 (37)

<sup>1</sup> The Bengal Tenancy Act (VIII of 1885) Section 153 A.

{ 21 } AIR 1911 at 284 (286)

<sup>10</sup> The Orissa Tenancy Act (II of 1913) S 205

<sup>11</sup> { 33 } AIR 1933 All 165 (166) (*Ex parte* de-

fault which is not a valid plea for setting aside the absent defendant's suit.)

S { 13 } 21 Ind Cas 912 (922 923) (Mad)

**O. 5 R 13**  
**Note 18**

all due and reasonable diligence with a view to find out the defendant before affixing the summons<sup>6</sup>

Although the words duly served would appear to relate to the method of service yet a summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceeding which is contemplated and having no reference to the order ultimately passed because under such circumstances service even if effected is a mere sham<sup>7</sup> Where the summons has not been served because it contained the wrong name of the defendant<sup>8</sup> or where the summons is served not upon the defendant but on his brother<sup>9</sup> or where the service is by registered post and the defendant denies receipt of the same<sup>10</sup> or where in the case of substituted service there is nothing on record to show that the provisions of O 5 R 19 and 20 were complied with<sup>11</sup> or where the order for substituted service was obtained by misrepresentation or fraud<sup>12</sup> or where the defendant is not served in sufficient time to enable him to appear and defend<sup>13</sup> the Court is justified in setting aside the *ex parte* decree The unrebuted oath of the applicant that he was not served has been held to be sufficient proof of non service<sup>14</sup> The affidavit of the serving officer is admissible in evidence to show service of summons But when service is denied it is desirable that the serving officer is put in the witness box so that he can be cross examined by the party denying service<sup>15</sup>

Appearance before the registration of suit in a proceeding for the appointment of a guardian *ad litem* does not dispense with the service of suit summons<sup>16</sup> Where the summons has not been duly served the fact that the defendant *knew* of the suit will be no ground for not restoring the suit<sup>17</sup> Where however the defendant has refused the summons<sup>18</sup> or has wilfully or carelessly failed to appear after due service<sup>19</sup> the *ex parte* decree cannot be set aside Similarly a mere irregularity in service of summons on a co defendant<sup>20</sup> or on the defendant himself where he has waived the irregularity by accepting the summons is not sufficient to set aside the *ex parte* decree<sup>1</sup>

( 94 ) AIR 1924 Lah 191 (191)

( 30 ) AIR 1930 Lah 580 (580)

[See also ( 34 ) AIR 1934 Cal 745 (74 ) ( Even though substituted service may be considered as personal service on the defendants under the provisions of O 5 R 20 this cannot preclude the defendants from afterwards showing that in fact there had been no service on them at all and that the order for substituted service was

make )

( 35 ) AIR 1935 All 660 (662) (Summons intended for a *parda ashim* lady served on a male member when the lady was inside the house—Service not sufficient )

10 ( 22 ) AIR 1922 Bom 377 (377) 46 Bom 180

( 28 ) AIR 1928 P 100 (100) (T. — r

The summons referred to is the first summons issued to the defendant giving him notice of suit and not of any *application* made during the course of the suit<sup>23</sup>

O. 9 R. 13  
Notes 18-20

See also Order 5 generally

**19. Sufficient cause.**—See Order 9 Rule 9 Note 8, "sufficient cause" It may, among other things, include a fraudulent suppression of summons from the knowledge of the defendant<sup>1</sup>

**20. Minor defendant.**—If a minor defendant is properly represented in the suit an *ex parte* decree is as binding upon him as a decree in a contested suit,<sup>1</sup> and cannot be set aside on the ground that he has not been served with the notice of the intention to appoint a court officer as guardian *ad litem*.<sup>2</sup> As to whether a minor can apply to set aside an *ex parte* decree where he has not been properly represented, there is a conflict of judicial opinion. The High Court of Madras<sup>3</sup> and the Judicial Commissioner's Court of Nagpur<sup>4</sup> have held that the minor in such a case cannot be regarded as a party to the suit at all, that the decree passed is in effect a nullity and the Court cannot re open the suit under this rule. On the other hand, the High Court of Allahabad,<sup>5</sup> and the Chief Court of Oudh<sup>6</sup> have held that he is entitled to apply under this rule. In the undermentioned case<sup>7</sup> decided by the Patna High Court the Judges differed on this point

But the mere fact that the guardian did not appear or that the court guardian failed to appear owing to want of instructions,<sup>8</sup> or that there are mere irregularities in the matter of the appointment of a guardian,<sup>9</sup> is not a sufficient ground for setting aside the *ex parte* decree. But it has been held that where the guardian has wrongfully or negligently allowed a claim against a minor to be decreed *ex parte*, the decree can be set aside under this rule.<sup>10</sup> See also Note 8 to Order 9 Rule 9

It is, however, open to the minor to impeach an *ex parte* decree got against him by a *separate suit* in cases where he can show that the guardian has been guilty of fraud or gross negligence<sup>11</sup> and if his interests were prejudiced thereby.<sup>12</sup> The fact that he has not applied under this rule is no bar to the suit.<sup>13</sup>

22 (23) AIR 1923 Nag 13 (15)

Note 19

1 (31) AIR 1931 Pat 204 (207) 10 Pat 516 (FB)

[See also (30) 6 Cal L Rep 69 (70)]

Note 20

(But see (35) AIR 1935 Mad 196 (197) (Suit by minor dismissed for default should be

put forward and the guardian absents himself only on account of his realising that the *ex parte* decree cannot be set aside.)

(36) AIR 1936 Mad 961 (962) (Do)



O. 9 R. 13  
Note 11

all due and reasonable diligence with a view to find out the defendant before affixing the summons<sup>6</sup>

Although the words 'duly served' would appear to relate to the method of service yet a summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceeding which is contemplated and having no reference to the order ultimately passed because under such circumstances service even if effected is a mere sham<sup>7</sup> Where the summons has not been served because it contained the wrong name of the defendant's father<sup>8</sup> or where the summons is served not upon the defendant but on his brother<sup>9</sup> or where the service is by registered post and the defendant denies receipt of the same<sup>10</sup> or where in the case of a substituted service there is nothing on record to show that the provisions of O 5 Rr 19 and 20 were complied with<sup>11</sup> or where the order for substituted service was obtained by misrepresentation or fraud<sup>12</sup> or where the defendant is not served in sufficient time to enable him to appear and defend<sup>13</sup> the Court is justified in setting aside the *ex parte* decree The un rebutted oath of the applicant that he was not served has been held to be sufficient proof of non service<sup>14</sup> The affidavit of the serving officer is admissible in evidence to show service of summons But when service is denied it is desirable that the serving officer is put in the witness box so that he can be cross examined by the party denying service<sup>15</sup>

Appearance before the registration of suit in a proceeding for the appointment of a guardian *ad litem* does not dispense with the service of suit summons<sup>16</sup> Where the summons has not been duly served the fact that the defendant knew of the suit will be no ground for not restoring the suit<sup>17</sup> Where however the defendant has refused the summons<sup>18</sup> or has wilfully or carelessly failed to appear after due service<sup>19</sup> the *ex parte* decree cannot be set aside Similarly a mere irregularity in service of summons on a co defendant<sup>20</sup> or on the defendant himself where he has waived the irregularity by accepting the summons is not sufficient to set aside the *ex parte* decree<sup>21</sup>

P O T D C =

11 864

(24) AIR 1934 Lah 191 (191)

(30) AIR 1930 Lah 660 (660)

[See also (34) AIR 1934 Cal 745 (741) (Even though substitute service may be considered as personal service on the defendants under the provisions of O 5 R 20 this cannot preclude

(A serv co

is made on the basis of the fact that service on other members of the family who are impleaded in suit as they may have their own defence to make)

(35) AIR 1935 All 660 (662) (Summons intended

1 Where the decree is joint and indivisible<sup>4</sup>

Illustration

A, B and C, who are coparceners of a joint Hindu family together execute a mortgage to X and an *ex parte* decree is passed against both B and C alone applies to set aside the decree and shows sufficient cause for his absence. The decree ought to be set aside against C also as the liability of both is based on a common ground.<sup>5</sup>

Where the decree is not joint and indivisible<sup>6</sup> e.g. where the suit is to obtain possession of separate items of properties from separate sets of defendants<sup>7</sup> or where the decree itself is divisible and each of the defendants has separate defence the whole decree need not be set aside.<sup>8</sup>

2 Where the decree proceeds on a ground common to all the defendants<sup>9</sup>

Illustration

A sues B and C on a promissory note. B is the principal debtor and C is the surety. An *ex parte* decree is passed against both. B alone applies to set aside the decree and shows sufficient cause for his absence. The decree ought to be set aside against C also as the liability of both is based on a common ground.<sup>10</sup>

Where however the decree does not proceed on a common ground<sup>11</sup> and the defence of the several defendants is distinct or peculiar to each of them<sup>12</sup> the whole decree ought not to be set aside. Thus where A sues B and C on a promissory note, on the allegation that B is the executant of the promissory note and that B and C (his nephew) are members of an undivided Hindu family of which B is the manager and after the passing of an *ex parte* decree against both C alone applies to set aside the decree. The proper course is to set aside the decree only as against C and not as against B also inasmuch as his liability is based on the ground that he executed the promissory note while the liability of C is based on the distinct ground that the debt was binding upon him and his defence is peculiar and not common to that of B.<sup>13</sup>

3 Where it is necessary that the whole decree should be re-opened in the interests of justice<sup>14</sup> or in other words where the relief which the applicant is entitled to cannot effectively be given except by setting aside the decree against the other defendants also.

Thus in the case of an *ex parte* decree against several mortgagors it has been held that the better course would be to set aside the decree against all the defendants.<sup>15</sup>

Illustration

A files a suit against B, C and D on a mortgage bond and gets an *ex parte* decree against all of them. B alone applies to set aside the decree. Neither in the mortgage bond nor in the plaint nor in the decree is there any specification of the shares and liabilities of the several defendants. The decree ought to be set aside against all the defendants.<sup>16</sup>

the proviso to O. 9 R. 13 set aside the *ex parte* decree against both the firm and C.)  
(7) 6 Cal L Jour 226 (227-231)  
(7) AIR 1907 Mad 550 (550). (The fact that decree is a compromise one makes no difference.)  
(30) AIR 1936 Lah 243 (248). (*Ex parte* decree against Hindu father and son on basis of trust

7 (21) AIR 1901 Mad 451 (451)  
(08) 31 Mad 454 (456-457-458)  
8 (01) 11 Cal W N 109 (110)  
9 (71) 111 Suth W R 371 (371)  
10 (17) AIR 1917 Lah 194 (195)  
(14) AIR 1914 Oudh 220 (220)  
11 (03) 26 Mad 604 (606)  
12 (25) AIR 1925 Oudh 181 (180)  
(07) 6 Cal L Jour 226 (232)

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14  
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(18) AIR 1918 Cal 179 (180)  
16 (30) AIR 1930 Cal 700 (701)

ions will arise at the time of execution and  
ious res ults may follow )  
[See 1,000 5 Cal W N 58 (59)]  
(9) AIR 1913 G Mad 256 (257)



O. R. 13  
Notes 23-25

4 When the suit would result in two inconsistent decrees if the ex parte decree be not set aside against the other defendants also<sup>17</sup>

#### Illustrations

(1) X sues A and B two joint executants of a promissory note for the recovery of the amount due thereunder. B has as a matter of fact paid the amount due to X. B is not served and does not appear and A who is served also does not appear and an *ex parte* decree is passed against both. B applies to set aside the decree. Can the decree be set aside against A also? Yes. The reason is that if B succeeds at the hearing in proving the payment, the result of not setting aside the decree against A also would be two inconsistent decrees.<sup>18</sup>

(2) A sues B and C alleging that they are in joint possession of a certain immovable property and asking for a declaration that he is in joint possession with them. B alone is served but not C and there is an *ex parte* decree against both. C applies for a hearing under this rule. The decree ought to be set aside against B also because if C establishes at the hearing that A has no title whatsoever to the property, the result will be two inconsistent decrees one against B and another against C.<sup>19</sup>

The principle above referred to equally applies to cases where the decree is *ex parte* against some of the defendants and contested against the rest.<sup>20</sup> Thus, where the decree is one and indivisible it can be set aside against all,<sup>21</sup> but where it is divisible it can be set aside only as against the defendant applying.<sup>22</sup> The undermentioned cases<sup>23</sup> which lay down that the whole decree cannot be set aside where some defendants contest the suit are it is submitted, not correct.

See also the undermentioned case.<sup>24</sup>

24. Inherent power of Court to set aside an *ex parte* decree. — See Note 2 to Section 151

25. Effect of setting aside the *ex parte* decree. — The effect of setting aside an *ex parte* decree is to restore the parties to the position they previously occupied<sup>1</sup> and the Court should proceed to decide the suit as it stood before the decree.<sup>2</sup> The trial of the suit should commence *de novo* as against the persons in whose favour the decree was set aside and the evidence that had been taken in the *ex parte* proceedings

17 (1921) 24 All 393 (398) (FB)

(19) AIR 1936 Lah 243 (243)

18 (1921) 24 All 393 (398) (FB)

19 (1921) 24 All 393 (398) (FB)

20 (1921) 25 Cal 155 (156-157) (Decree means

whole decree as can be seen from the word "the Court shall appoint a day for proceeding with the suit.")

24 (1921) 17 Ind 1096 D. No. 9 (1) 18

ground that he had no locus standi to defend

that the order was not proper and that it is

so to allow

when he

*ex parte*

#### Note 25

1 (19) AIR 1918 Cal 893 (893)

ration of title against A and for possession against B)

(34) AIR 1934 Lah 45 (46)

(23) AIR 1924 Mad 909 (911) (Proceedings during non-appearance of defendant are not binding when an *ex parte* decree is set aside)

2. (1921) 17 Mad L Jour 81 (82)

was how  
it apply)

should not be used against them<sup>2</sup> Any attachment that has been issued<sup>4</sup> or any sale that has taken place in pursuance of the *ex parte* decree<sup>5</sup> becomes null and void and the Court can also order restitution<sup>6</sup> except as against a stranger auction purchaser, of anything taken in execution of the decree

But, the setting aside of an *ex parte final* decree does not have the effect of vacating the preliminary decree<sup>7</sup>

**26. Ex parte decree against a firm.** — An *ex parte* decree passed against a firm after it has been served in the manner contemplated by Order 30 cannot be set aside on the application of a partner who alleges that he has not been duly served, it can never be said that a decree against a firm is *ex parte* against one of its partners because he has not appeared<sup>1</sup> Where, however, the applicant denies that he is a partner of the firm along with other defendants, the Court can enquire into the matter and set aside the decree<sup>2</sup> See also the undermentioned case<sup>3</sup>

**27. Dismissal of an application to set aside an *ex parte* decree, if can be restored.** — See Note 2 to Order 9, General

**28. Limitation.** — In an application under this rule the Court has first of all to see that the application is presented within the prescribed period of limitation<sup>1</sup> The Article applicable is 164 of the Indian Limitation Act, IX of 1908, under which the defendant can apply within thirty days from the date of the decree or, where the summons is not duly served, within thirty days from the date of his knowledge of the decree<sup>2</sup> The Court has no power, inherent or otherwise, to enlarge the period of limitation<sup>3</sup> Section 5 of the Limitation Act is not applicable to this rule unless the High Court under its rule making powers extends its application<sup>4</sup> The Bombay, Madras and Nagpur High Courts have added a proviso to this rule, extending Section 5 of the Limitation Act to applications under this rule<sup>5</sup> Section 22 of the Limitation Act does not apply to this rule<sup>6</sup> Nor can the time spent in prosecuting an application

3. (12) 16 Ind Cas 96 (97) (Mad)

(69) 12 Suth W R 180 (181)

4. (66) 29 Mad 175 (176)

(68) 10 Suth W R 99 (99)

5. (98) 25 Cal 175 (178)

(16) AIR 1910 Mad 706 (707)

(17) AIR 1917 Cal 564 (565)

(99) 8 Ind Cas 30 (31) (Cal)

6. (66) 8 Cal L Jour 181 (182)

7. (24) AIR 1924 Mad 890 (891)

(83) AIR 1938 Pat 279 (379) 17 Pat 745 (Apph  
cation is to be filed within 90 days from know

**Note 26**

1 (24) AIR 1924 Bom 866 (867) 47 Bom 778

2. (10) 8 Ind Cas 448 (449) (Low Bur)

3. (38) AIR 1938 Lah 823 (824) (Suit by or  
against firm — Addition of partners' names is

made both against firm and G and not only  
against firm)

**Note 28**

1 (1911) 12 Suth W R 180 (181)

O. R. 13  
Notes 28-29

under this rule be excluded in computing the period of limitation for appeals<sup>7</sup>

The *onus* of proving that the application is within thirty days of the knowledge of the decree is upon the applicant<sup>8</sup> But a *vague* knowledge that some decree has been passed by some Court is not enough to start limitation against the applicant<sup>9</sup> In the case of an application to set aside an *ex parte final* decree, it has been held that limitation starts from the *date of the decree* as it is not necessary to give a fresh notice before the passing of the final decree<sup>10</sup>

"*Duly served*" in Article 164 means served in such a manner as to give the defendant information of the proceedings taken against him<sup>11</sup> In the case of a *substituted service*, time begins to run from the *date of the decree* as the service is deemed to be due service,<sup>12</sup> unless the defendant can show that the circumstances under which substituted service could legally be ordered did not exist<sup>13</sup>

See also the undermentioned cases<sup>14</sup>

**29. Appeal.** — The rule contemplates three classes of orders<sup>1</sup>—

(1) Order *setting aside* the *ex parte* decree

(2) Order *setting aside* the *ex parte* decree on certain terms

(3) Order *rejecting* the application to set aside the *ex parte* decree

No appeal lies from an order falling under class 1<sup>2</sup> As to whether an *error, defect or irregularity* in passing such an order can be made a ground of objection under Section 105 of the Code in an appeal from the final decree see Note 6 to Section 105, *supra* But when the order was passed without *jurisdiction*, it was held in the undermentioned cases<sup>3</sup> under the Code of 1877, that it could be objected to in appeal

In the *second class* of cases where the Court passes a conditional order, *e.g.*, where, on the failure of the applicant to comply with certain terms it is ordered that the petition will stand dismissed, the question arises whether the order by itself is appealable It has been held by the High Courts of Bombay, Rangoon and Madras

7. (90) 23 Cal 925 (327)

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decree holds after the period of limitation  
(35) AIR 1935 Pesh 7 (8) (The summons referred to in Art. 164 is the summons for the first hearing of the case and there is no essential difference between the case where a suit is adjourned owing to the absence of the presiding officer or some other cause and a case in which a suit is remanded for retrial by the Appellate Court)

thereafter to inform themselves of what is being done in the case)

Note 29

word 'duly' is not equivalent to 'personally' ]

12. (125) AIR 1925 Lah 639 (639)

that the rejection referred to in O 43 R 1, clause (d) signifies an *immediate rejection* and not a conditional or prospective rejection<sup>6</sup> and, therefore it is only the *final order* passed on failure to fulfil the conditions imposed that is appealable The High Court of Allahabad<sup>5</sup> has, however, taken a contrary view

In the *third class* of cases the order is appealable under O 43 R 1, clause (d)<sup>6</sup> whether the rejection is on the merits or on default<sup>7</sup> The Appellate Court may in such an appeal remand the application for enquiry<sup>8</sup> The fact that a final decree has been passed in the case is no ground for refusing to entertain an appeal from an order rejecting an application to set aside an *ex parte* preliminary decree as, in the present Code, the two decrees are independent and separate<sup>9</sup> As has been seen in Note 12 to Section 96, *ante*, where an application to set aside an *ex parte* decree has been dismissed on the merits, the propriety of the order of dismissal cannot be questioned in the appeal from the *ex parte* decree itself But such finality of the order dismissing the application under this rule is confined to matters which are within the scope of this rule Therefore, the Appellate Court in hearing an appeal from the *ex parte* decree is not precluded from considering and deciding the question whether under the circumstances of the case it would not have been better, in the interests of justice, for the trial Court

See also the undermentioned cases<sup>10</sup>

**30. Revision.** — An order setting aside an *ex parte* decree not being appealable, a revision will lie therefrom if the conditions of Section 115 of the Code are satisfied<sup>1</sup>

- |   |   |
|---|---|
| <p>{ 71 } 8 Bom H O R A C 44 (47)<br/>         { 74 } 22 Suth W R 5 (6)<br/>         { 75 } 22 Suth W R 147 (148)<br/>         { 71 } 15 Suth W R 315 (317) (But the objection will be too late in special appeal)<br/>         4. (18) AIR 1918 Mad 207 (258) (Setting aside on Letters Patent Appeal, AIR 1917 Mad 596)<br/>         { 33 } AIR 1933 Rang 63 (64)<br/>         { 34 } AIR 1934 Rang 192 (193)<br/>         { 25 } AIR 1935 Mad 1182 (1183)<br/>         { 27 } AIR 1927 Bom 1 (8) 51 Bom 67 (F B) (Overruling AIR 1926 Bom 333)<br/>         5 (14) AIR 1914 All 336 (337) (Case decided under O 9 R 9)<br/>         6. (78) 2 Bom 644 (648, 649)</p> | <p>( 22 ) AIR 1922 All 50 (50) (Small Cause decree <i>ex parte</i>—Successor not empowered—Decree is final)</p> |
|---|---|

Note 30

O 9 R 13  
Notes 28-29

under this rule be excluded in computing the period of limitation for appeals.<sup>7</sup>

The onus of proving that the application is within thirty days of the knowledge of the decree is upon the applicant.<sup>8</sup> But a *vague* knowledge that some decree has been passed by some Court is not enough to start limitation against the applicant.<sup>9</sup> In the case of an application to set aside an *ex parte final* decree it has been held that limitation starts from the date of the decree as it is not necessary to give a fresh notice before the passing of the final decree.<sup>10</sup>

*Duly served* in Article 164 means served in such a manner as to give the defendant information of the proceedings taken against him.<sup>11</sup> In the case of a substituted service time begins to run from the date of the decree as the service is deemed to be due service.<sup>12</sup> unless the defendant can show that the circumstances under which substituted service could legally be ordered did not exist.<sup>13</sup>

See also the undermentioned cases.<sup>14</sup>

**29 Appeal** — The rule contemplates three classes of orders.<sup>15</sup>—

- (1) Order *setting aside* the *ex parte* decree
- (2) Order *setting aside* the *ex parte* decree on certain terms
- (3) Order *rejecting* the application to set aside the *ex parte* decree

No appeal lies from an order falling under class 1.<sup>16</sup> As to whether an *error defect or irregularity* in passing such an order can be made a ground of objection under Section 105 of the Code in an appeal from the final decree see Note 6 to Section 105 *supra*. But when the order was passed without jurisdiction it was held in the undermentioned cases<sup>17</sup> under the Code of 1877 that it could be objected to in appeal.

In the *second class* of cases where the Court passes a conditional order *in case* where on the failure of the applicant to comply with certain terms it is ordered that the petition will stand dismissed the question arises whether the order by itself is appealable. It has been held by the High Courts of Bombay, Rangoon and Madras

7 (196) 23 Cal 825 (82)

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by the defendant;

[See (35) AIR 1935 Pesh 187 (189). (The words "or where the summons was not duly served" connote an inquiry into the due service of the summons which can only be found out by

the decree does not alter the period of limitation. (35) AIR 1935 Pesh 7 (8). (The summons referred to in Art. 164 is the summons for the first hearing of the case and there is no essential difference between the case where a summons is

thereafter to inform themselves of what is being done in the case.)

**Note 29**

- 1 { (7) AIR 1927 Bom 1 (3) 51 Bom 6 (FB)
- 2 { (89) 16 Cal 496 (496)
- (78) 1 All 748 (750) (FB)
- (05) 1900 Pun Re No 103 p 308
- (37) 19 All 355 (356)
- (27) AIR 1927 Lah 775 (776)
- (18) AIR 1919 All 426 (427)
- 3 { (77) 2 Cal 114 (115)
- (71) 15 Buth W R 176 (176)

of any is not equivalent to per sonally.]  
12 (25) AIR 1925 Lah 639 (639)

A dismissal of an application under this rule cannot be said to be a denial of the right of fair trial so as to justify the interference of the High Court under Section 107 of the Government of India Act of 1915<sup>1</sup> (See now Section 224 of the Government of India Act of 1935, under which the revisional powers of the High Court have been taken away)

O. 9 R. 13  
Note 30

No decree to be set aside without notice to opposite party

**R. 14.** [S. 109.] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

O. 9 R. 14

[1877, S 109]

#### Local Amendment

#### CALCUTTA

Cancel the word 'thereof' and substitute therefor the following words  
'together with a copy thereof (or concise statement as the case may be)'

**1. Notice to opposite party.**—The rule is imperative that no *ex parte* decree can be set aside without notice to the opposite party so as to give him an opportunity to be heard<sup>1</sup>. A mere oral notice given to a pleader who appeared in execution proceedings in connection with the same decree but who was different from the pleader who appeared in the suit<sup>2</sup> or a service on plaintiff's pleader in the absence of any order of the Court,<sup>3</sup> or a service on plaintiff's *chela*<sup>4</sup> has been held to be not sufficient.

The words *opposite party* mean such of the parties to the suit as are interested in opposing the application. The words do not include a court auction-purchaser<sup>5</sup> or an attaching decree holder who has attached the *ex parte* decree<sup>6</sup> or a co defendant in a case<sup>7</sup>.

#### Local Amendments

#### BOMBAY

Add the following as Rule 15

"R 15 In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant the word 'defendant' a respondent, and the word 'suit' an 'appeal'."

O 9 R.15  
(Bombay)

#### MADRAS

Add the following

"15 (1) Rules 6, 13 and 14 shall apply *mutatis mutandis* to those proceedings

Setting aside *ex parte* in execution falling within Section 47 of the Code in which orders in execution notice to the opposite party is required under the provisions of the Code

O 9 R.15  
(Madras)

and plaintiff not estopped from applying in revision<sup>1</sup>

11 (26) AIR 1926 Pat 87 (39)

[See also (20) AIR 1920 Pat 568 (570) (The

3. (21) 63 Ind Cas 47 (49) (Pat)

4. (20) AIR 1920 Oudh 220 (220) Oudh Cas 101

5. (99) 26 Cal 267 (770)

(36) AIR 1936 All 410 (410) (Person impleaded as defendant in mortgage suit by reason of being subsequent purchaser of part of mortgaged property is not opposite party—Service of notice on him is not necessary—The mere fact that he subsequently purchases a portion of the property in execution of the *ex parte* decree is no reason for regarding him as a person benefited by the decree itself)

6 (10) 7 Ind Cas 66 (66) (Ma 1)

7. (25) AIR 1927 Cal 692 (693) 53 Cal 74



O 9 R 15  
(Madras)

(2) Subject to the provisions of sub rule (2) of Rule 13 an application under this rule shall be made within thirty days of the date of the order or where the notice was not duly served of the date when the applicant has knowledge of the order

NOTE --The above rule which was made in March 1933 is not retrospective in effect and does not apply to *ex parte* orders passed prior to its coming into force <sup>1</sup>

## ORDER X.

### EXAMINATION OF PARTIES BY THE COURT

O 10 R. 1

**R. 1. [S 117]** At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made The Court shall record such admissions and denials

Ascertainment whether  
allegations in pleadings  
are admitted or denied

[1877, S 114]

### Synopsis

1 ' Shall ascertain

2 Effect of statements by party or his pleader

1 "Shall ascertain"—The powers which this Order vests in the Civil Courts are mainly intended to draw by *viva voce* examination the real points in controversy between the parties and thus prevent the real matter in dispute remaining undecided or left out of consideration <sup>1</sup> The proper way of clearing up the pleadings after the plaint and the written statement are filed is that provided by this rule the provisions of which are peremptory <sup>2</sup> Permitting parties to file a series of written statements against each other is not justified under this rule <sup>3</sup> An examination under this rule is not necessary or proper where the pleadings on the record are complete and clear <sup>4</sup>

2 Effect of statements by party or his pleader —The party or his pleader is bound to answer questions put by the Court but he can properly refuse to make admissions about matters not directly involved in the suit especially when the questions are put at the suggestion of the opposite party whose object is to get useful answers for a contemplated litigation <sup>1</sup>

The admission of a party is conclusive against him <sup>2</sup> but is not evidence against the opposite party <sup>3</sup>

Order 9 Rule 15 (Madras)

1 (35) AIR 1935 Mad 714 (715)

(35) AIR 1935 Mad 585 (586)

Order 10 Rule 1 — Note 1

Note 2

- s made on
- 1 (30) AIR 1930 Lah 299 (2 0)
  - 2 (26) AIR 1926 All 710 (710) 43 All 219
  - 3 (30) AIR 1930 Lah 917 (919)

The Court must *record* the admissions or denials made under this rule<sup>4</sup> but cannot act upon the answers recorded and pass final judgment in the suit without *framing issues* in the case<sup>5</sup>

O. 10 R. 1  
Note 2

As to the effect of admissions by pleader, see Order 3 Rule 4

Where all the defendants confess judgment, it is permissible for the Court to record a joint statement of all the defendants and pass a decree on admission<sup>6</sup>

**R. 2.** [S. 118.] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom

O. 10 R. 2

Oral examination of party or companion of party.

such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

[1877, Ss. 118, 119; 1859, S. 125.]

**1. Oral examination.** — The object of the examination under this rule is to ascertain the *matters in dispute* and not to take evidence or to ascertain what is to be the evidence in the case<sup>1</sup> It is not intended to be a substitute for a regular examination on oath<sup>2</sup> but is intended to help the elucidation of what is *obscure and vague* in the plaint, the allegations of facts contained in the oral examination under this rule cannot be read into the plaint and thus enlarge its scope<sup>3</sup> "The power under this rule is intended to be used by the Judge only where he finds it necessary to obtain from a party information on any *material questions relating to the suit*, and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order 18"<sup>4</sup> A statement made by a party under this rule is binding on him to the same extent as the statement made by his pleader would be binding on him But a statement made by a person who accompanies the pleader to look after the case on behalf of the party would not necessarily bind the party on whose behalf he appears<sup>5</sup>

Where a defendant appears by a pleader the fact that he does not file a written statement does not warrant the trial of the suit *ex parte* The Judge should proceed under this rule and ascertain what are the matters in dispute and then proceed with the suit<sup>6</sup>

See also the undermentioned case<sup>7</sup> under the old Code of 1859

4 (22) AIR 1902 Oudh 178 (188, 189)  
5 (10) 130 All W N 170 (170)  
(8) 13 Cal 1 Rep 266 (271) 10 Ind App 74 (PC)  
(22) 111 N Y 119 (111) 248 (A case under  
Upper Burma Civil Justice Regulation)

6 (34) AIR 1934 Lah 510 (511)

Order 10 Rule 2 — Note 1

1. (26) AIR 1926 All 411 (412)

(05) 2 All L Jour 777 (778)  
2. (26) AIR 1926 All 411 (412)  
(05) 2 All L Jour 777 (778)  
3. (02) 1902 All W N 35 (88)  
4. (31) AIR 1931 P C 175 (176, 177) (PC)  
5. (26) AIR 1926 All 411 (412)  
(05) 2 All L Jour 777 (779)  
6 (1965) 2 Mad H R 311 (312)  
7. (6) 12 Suth W R 207 (208)

O. 10 R. 3

**R. 3. [S. 119.]** The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Substance of examination to be written.

[1877, S. 119; 1859, S. 125.]

<sup>1</sup> This rule does not apply to the Chief Court of Oudh vide Oudh Courts Act (U. P. Act IV of 1925), Section 16 (2)

**1. Applicability to Chartered High Courts.** — This rule does not apply to Chartered High Courts in the exercise of their Ordinary or Extraordinary Original Civil Jurisdiction. See O 49 R 3, clause (2). The applicability of this rule has been excluded by the undermentioned special and local laws<sup>1</sup>

O. 10 R. 4

**R. 4. [S. 120.]** (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

Consequence of refusal or inability of pleader to answer

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

[1877, S. 120; 1859, S. 127. See O. 5 R. 3.]

### Synopsis

- |   |  |
|---|--|
| 1. Scope of the Rule.   | 4 Effect of non-attendance without lawful excuse |
| 2. Order for personal appearance                                  | 5 Effect of dismissal under this Rule.           |
| 3. Refusal or inability of pleader to answer<br>See Notes 2 and 4 | 6 Appeal.  |

**1. Scope of the Rule.** — The intention of the rule is to enable the Court not only to get obscure points cleared up by obtaining information from either of the parties, but also, if possible, to get admissions so as to narrow down the issues<sup>1</sup>

#### Order 10 Rule 3 — Note 1

1. The Oudh Courts Act (IV of 1925), S. 16 The N.-W. F. Province Law and Justice Regulation (VII of 1901), S. 46 (Repealed by Reg. I of 1931, S. 33) The Rangoon Small Cause Courts Act (VI of 1920), S. 111  
See also Order 50, O. P. C., as to Provincial Small Court generally

#### Order 10 Rule 4 — Note 1

1. (193) 5 Bom L.R. 637 (638).  
(33) AIR 1933 All 517 (519) (Pleader or agent

**2. Order for personal appearance.**—An order under this rule directing a party to appear in person can be passed only where the Court finds that there is a *material question* relating to the suit that has to be answered by such party or his pleader, and the pleader refuses or is unable to answer such question<sup>1</sup>

**O. 10 R. 4  
Notes 2-4**

The order should be specific and sufficiently explicit<sup>2</sup> and must state the reasons therefor. A mere statement that "it is necessary that the defendant should appear in person" is not sufficient<sup>3</sup>. The Court has, however, a discretion to decide which of the parties ought to answer the question<sup>4</sup>.

**3. Refusal or inability of pleader to answer.**—See Note 2 above and Note 4 below

**4. Effect of non-attendance without lawful excuse.**—Where the party directed to appear by the Court under this rule fails to appear in person *without lawful excuse*, the Court may pronounce judgment against him<sup>1</sup>. Where one party has failed to appear without lawful excuse but others have appeared, the Court cannot pronounce judgment against the persons who have so appeared<sup>2</sup>. It has been held by the High Court of Madras that this rule is a self contained one applicable to all cases where a party has been ordered to attend for his examination under this rule and that where a judgment is pronounced against a party for failure to attend as directed, the order must be taken to have been made only under this rule, and not under the provisions of O 9, even though the Court purported to pass the order under those provisions<sup>3</sup>. On the other hand the High Court of Allahabad has held that where the party directed to appear and his pleader are both absent on the day appointed, the Court dismissing the suit must be taken to have acted only under the provisions of Order 9, even though it purported to act under this rule<sup>4</sup>. The reason given is that where the party and his pleader are both absent it could not be said that the party failed to attend *without lawful excuse*, and unless it could be said so, the Court cannot act under this rule<sup>5</sup>.

A person exempted under the Code from appearance in Court has a lawful excuse for not appearing in Court as directed<sup>6</sup>.

The Court is not bound to pass a decree against the defaulting party but may pass any order in relation to the suit as it deems fit<sup>7</sup>.

In a suit for rent, defendant pleaded discharge but was prepared to withdraw the plea if the plaintiff would himself depose that there was no discharge. The Court ordered her appearance under this rule. It was held that the proper procedure would

#### Note 1

1. (18) AIR 1918 Oudh 429 (429) 21 Oudh Cas 252  
(99) 23 Bom 318 (320)  
(74) 22 Suth W R 270 (271)

#### Note 4

1. (1865) 2 Suth W R 161 (161)

(33) 5 Bom L R 687 (688, 689)

(33) AIR 1933 Lah 922 (924)

2. (1864) 1 Suth W R 25 (25) (Case decided under S 170 of the Code of 1859 corresponding to O 16 R 20)

(1864) 1 Suth W R 168 (169 170)

3. (21) AIR 1921 Mad 417 (418)

4. (17) AIR 1917 All 136 (136)

[See also (32) AIR 1932 All 595 (596) (Court can dismiss suit for default of plaintiff's appearance under this rule—Such suit can also be restored under O 9 R 9)]

5. (96) 1888 Bom P J 629 (629)

6. Marsh 627

7. (70) 2 N W P H C R 67.

O. 11 R. 1  
Notes 2-5

opposite party to obtain such information by *discovery*. Under the present Code, however, it has been held that in view of the fact that the present Order is now the same as Order 31 of the Rules of the Supreme Court, interrogatories can be administered in the same manner as is done in England, even for discovering the *nature* of the opponent's case <sup>4</sup>

**3. Interrogatories and pleadings.** — From what has been said before, it is clear that interrogatories as to the truth or untruth of statements of facts made in the pleadings are admissible <sup>1</sup> A party is entitled to interrogate his opponent with a view to ascertain what case he has to meet and the facts relied on, and to limit the generality of the pleadings and find out what is really in issue <sup>2</sup> But the interrogatories are not like pleadings confined to the material facts on which the parties intend to rely. Either party may interrogate as to any link in the chain of evidence necessary to support his own case, inasmuch as the question is relevant as lending up to a matter in question in the suit <sup>3</sup> Thus, if a defendant denies that he wrote a material document, he may be asked if other documents produced to him are not in his handwriting, though such documents have nothing to do with the suit but will be used for comparison of handwriting <sup>4</sup> Similarly, a defendant is entitled to ask the plaintiff in a suit on a *hundi* which the defendant denies to state in what form the consideration for the *hundi* was paid, the particulars of the place where the defendants drew or accepted the *hundi* and where and by whom the *hundi* was presented for payment <sup>5</sup> But, where in a suit on a promissory note the defendant pleads want of consideration, the onus of proof lies on him and he cannot escape from the onus of proof without laying any evidentiary basis, by seeking to get admissions from the plaintiff by interrogatories <sup>6</sup>

**4. Interrogatories and cross-examination.** — Interrogatories can be allowed only where they relate to any *matters in question in the suit*. Interrogatories, therefore, which are really in the nature of cross examination, such as questions put only to test the credibility of the party interrogated, will not be allowed <sup>1</sup>

**5. Interrogatories must be as to relevant facts.** — Interrogatories must be confined to facts which are relevant to the matters in question in the suit. They are not confined to facts *directly in issue* <sup>1</sup> Where, however, the issue was on what terms the defendant and A had purchased certain properties, interrogatories as to the terms on which they had purchased *other properties* are irrelevant and will not be allowed <sup>2</sup> Similarly, in a suit seeking to charge defendants as agents, where the existence of the agency is the real issue, interrogatories as to *private transactions* are irrelevant <sup>3</sup> So

(95) 23 Cal 117 (124 125)

4. (14) AIR 1914 Cal 767 (767) 41 Cal 11

## Note 3

1. (1892) 20 Ch D 519 (527) Attorney General v

askil

35) 29 Ch D 29 (42) Bidder v Bridges

35) 29 Ch D 29 (42) Bidder v Bridges

1. 1. 1.

(1892) 20 Ch D 513 (526), Attorney General

askil

(1895) 15 Q B D

, Jones v Richards

(14) AIR 1914

, 41 Cal 6

(95) AIR 1933

## Note 4

1 (12) 17 Ind Gas 152 (154) 37 Botm 947

(1895) 1 Ch 334 (338) Kennedy v Dodson

(1879) 5 C P D 47 (49, 50) Sheward v Lons-

dale

(1878) 3 Q B D 654 (656) Allhuson v Labou

chose

(1881) 18 Ch D 477 (486) Parker v Wells

## Note 5

1 (1896) 17 Q B D 154 (160) Marriott v Cham

berlain (Cited in 12 Cal L Jour 505)

(1911) 2 Ch 71 (76 83) Nash v Lagdon

(1914) 11 Ch 129 (130) Oskam Lamp Works Ltd

v Gabriel Lamp Co

2. (1895) 1 Ch 334 (338) Kennedy v Dodson

3. (1874) 9 Ch 376 (378), Great Western Colliery

Co v Tucker





grounds for refusing to answer them or some of them<sup>2</sup> He has a right to come into Court and ask that the order be re considered, and, if found to have been wrong, set aside If the interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court may interfere at any stage In other cases, the party might omit to answer the interrogatories to which he objects at his peril, or he may file his affidavit in answer, stating in it his objections to answer such questions as he objects to, and in such a case an interrogating party, if dissatisfied, can apply under Rule 11, *infra*<sup>3</sup>

**13. Impleading party for discovery.**—A person should not be made a party to an action merely for the purpose of getting discovery, however important the discovery might prove to be<sup>1</sup>

**14. Probate proceedings.**—This Order applies to probate proceedings by virtue of Section 266 of the Succession Act, XXXIX of 1925 The Judge can direct an executor on delivery of interrogatories to make a full discovery of the assets of the deceased Strictest relevancy may not be required and the Judge has got power to exclude anything which is offensive or improper<sup>1</sup>

**15. Land acquisition and other proceedings.**—This Order applies to proceedings under the Land Acquisition Act, I of 1894, by virtue of Section 53 of that Act<sup>1</sup> and to enquiries into election matters by commissioners under the Indian Elections Offences and Inquiries Act, XXXIX of 1920 (Section 5) Some of the rules of this Order have been excluded from application to proceedings under the undermentioned Local Acts<sup>2</sup>

## R. 2. [New.] On an application for leave to deliver

Particular interrogatories to be submitted interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

[R. S. C., O. 31 R. 2.]

2. (191) III Cal 420 (421)

3. (80) 5 Cal 707 (710)

Note 13

Note 14

1. (116) AIR 1916 Cal 953 (954) 43 Cal 300

Note 15

1. (10) 8 Ind Cas 107 (113) . 38 Cal 230 (An order for discovery of documents made)

2. The Bengal Tenancy Act (VIII of 1845) § 143 (Suits for recovery of rent) the Orissa Tenancy Act (II of 1913), § 193 (Do), the Madras State Land Act (I of 1905) § 192



O. 11 R. 2  
Note 1

1. "As the Court shall consider necessary." — The Court under this rule has no power to *settle* the interrogatories but to state merely *what interrogatories* should be administered<sup>1</sup>

The practice in England is that it is obligatory to draw up the proposed interrogatories and to deliver a copy of them to the opposite party with notice. It is necessary also to give a copy for the Master to consider and initial. The Judge or the Master has a discretion to allow or refuse leave to interrogate,<sup>2</sup> and the Master's discretion will not be interfered with unless he acts on a wrong principle.<sup>3</sup> He will also consider any offer to deliver particulars or to make admissions or produce documents that may be made. If he decides to allow interrogatories at all, the Master will consider the particular interrogatories sought to be delivered and will hear arguments on both sides for and against allowing any particular question. Leave should be given as to such only of the interrogatories as the Court considers necessary either for disposing fairly of the suit or for saving costs. Interrogatories as to the contents of documents cannot be said to be necessary either for disposing fairly of the suit or for saving costs.<sup>4</sup> The reason is that under the Evidence Act, the contents of a document may not, except when secondary evidence is admissible, be proved by oral evidence. In running down cases, interrogatories relating to the details of the accident are not ordinarily necessary and will not be allowed except under special circumstances for the purpose of disposing fairly of the suit or for saving costs.<sup>5</sup> The opposite party need not be served personally,<sup>6</sup> it is sufficient if his solicitor is served.<sup>7</sup>

The grant of leave to one party to deliver interrogatories to another does not, as has been seen in Note 12 to Rule 1 *ante*, amount to an order requiring the other party to answer them. It is not a decision which has to be obeyed. The party may have good grounds of objections under Rule 6.<sup>8</sup>

An order disallowing interrogatories is not a decree and is not open to appeal. The Judicial Commissioner's Court of Nagpur has held that it is a "case decided" and is open to revision, provided the conditions of Section 115 are satisfied.<sup>9</sup> According to the Judicial Commissioner's Court of Sind the order is not revisable inasmuch as the party adversely affected has another remedy by way of appeal from the final decision of the Court.<sup>10</sup>

## O. 11 R. 3

## R. 3. [S. 123] In adjusting the costs of the suit inquiry

## Costs of interrogatories

shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either

## Order 11 Rule 2 — Note 1

1. (1834) 88 Sol Jo 333, *Toy v Willoughby* (Pcc Chitty J)
2. (1906) 1906 W N 57 (-8), *Codd v Delap*
3. (1920) 1 K B 659 (666), *Griebart v Morris*
4. (34) AIR 1934 Nag 161 (182)
5. (1920) 1 K B 659 (663) *Griebart v Morris*
6. (1883) 1883 W N 196 (196), *Jones v London*

## Road Car &amp; Company

6. (1874) 30 LT 367 *Little v Roberts*
7. (1878) 47 L J Ch 609 (610), *Re Mulcaster*
8. (91) 18 Cal 420 (421)
9. (26) AIR 1926 AH 558 (553)
9. (34) AIR 1934 Nag 181 (182) (Allowing leave to deliver interrogatories which are not necessary is a material irregularity.)
10. (20) AIR 1920 Sind 1 (5) 14 Sind L R 23.

O. 11 R. 3  
Note 1

with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

[R. S. C., O. 31 R. 3.]

**1. Costs.** — Ordinarily the costs of an application will be dealt with on the application and be costs in the suit. This rule makes a special provision for ordering the party at fault to pay costs in *any event* irrespective of the result of the suit See Section 85

The Court has power to order under the corresponding English rule that costs of a *viva voce* examination under R. 11 be paid by the party examined in any event,<sup>1</sup> but the costs of an oppressive *viva voce* examination may be ordered to be paid by the party delivering the interrogatory.<sup>2</sup>

O. 11 R. 4

**R. 4. [New.]** Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

Form of interrogatories

[R. S. C., O. 31 R. 4.]

O. 11 R. 5

**R. 5. [S. 124.]** Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

Corporations

[R. S. C., O. 31 R. 5.]

**1. Corporations and companies.** — The secretary of a corporation or company is, as a rule, the person to be interrogated.<sup>1</sup> But the Court may issue delivery of interrogatories to be answered by any other officer of the company.<sup>2</sup> Before issuing such an order, however, the Judge must be satisfied that the officer selected by the party has a competent knowledge of the facts and the means of answering

**Order II Rule 3 — Note 1**

1. (1842) 9 Q B D 168 (170), *Vicary v G N Ry. Company*

2. (1844) 51 T J Ch 207 (208), *Itchfield v Jones*

**Order II Rule 5 — Note 1**

1. (1850) 16 Ch D 59 (59), *In re Alexandra Palace*

**Company**

2. (1896) 2 Q B 153 (156) *Chaddock v British South Africa Co* (Form of the order under this rule)

(1892) 3 Ch 70 (74), *Attorney-General v North Metropolitan Tramways Co*

- O. 11 R. 5** the questions.<sup>3</sup> The officer interrogated is bound to answer only with reference to  
**Note 1** knowledge acquired in the course of his employment and on inquiries of other officers who have acquired their knowledge in the same way.<sup>4</sup> There is no obligation on the part of the officer either to disclose his knowledge or to obtain or disclose the knowledge of other agents or servants of the company acquired by him or them otherwise than in the course of his or their employment.<sup>5</sup>

The answer of the officer is the answer of the company and can be read as admission which binds the company.<sup>6</sup>

A foreign State has been held to be a corporation for the purposes of this rule.<sup>7</sup>

**O. 11 R. 6**

**R. 6. [S. 125.]** Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

[1877, S. 125; R. S. C., O. 31 R. 6.]

### Synopsis

1. Scope of the Rule
2. Scandalous interrogatories
3. Irrelevant interrogatories
4. Not exhibited *bona fide*.

5. "Not sufficiently material at that stage."
6. "Any other ground"
7. Fishing interrogatories.
8. Wagering contracts.
9. Defamation.

**1. Scope of the Rule.** — This rule enables the party interrogated to file his objections, and indicate the grounds of objection which he might take.<sup>1</sup> The party taking such objection is entitled to have it adjudicated upon by the Court and a clear and specific order passed directing him to answer such of the interrogatories as the Court holds to be relevant. The mere fact that he could apply under Rule 7 to have the interrogatories set aside or struck out does not take away his right to have his objection adjudicated upon.<sup>2</sup>

**2. Scandalous interrogatories.** — Questions irrelevant to the matters in issue and taken for the purpose of abusing, insulting or degrading the opposite party are scandalous interrogatories and are not permissible. But nothing can be scandalous

3. (1879) 13 Ch D 97 (99), *Barkely v Standard Dis Co*

4. (1900) 2 Ch 1 (8), *Welsbach Co v New Sunlight Co*

(1878) 3 Q B D 315 (321), *Southmark v Quick*

5. (1900) 2 Ch 1 (10), *Welsbach Co v New Sunlight Co*.

6. (1896) 2 Q B 153 (158), *Chaddock v. British South Africa Co*.

7. (1875) 1 Ch D 171 (174), *Republic of Costa Rica*

v *Erlanger* (Referred to in 22 Cal 757, 16 All 239)  
 Order 11 Rule 5 — Note 1

1. (80) 5 Cal 707 (710)

(80) 5 Cal L Rep 171 (171). (Where interrogatories have been administered for the examination of a witness by one party, the other party, if he objects to any of the questions, must make his objections on the face of his cross interrogatories.)

[See (96) 23 Cal 117 (124)]

2. (18) All 1918 All 303 (304, 305).

which is *relevant*<sup>1</sup> even though tending to criminate the person interrogated<sup>2</sup>

O. 11 R. 6  
Notes 2-6

**3. Irrelevant interrogatories** — As a general rule the question taken must be *relevant* to the matter in issue<sup>1</sup> though it need not be *confined* to the *facts in issue*<sup>2</sup> Thus interrogatories asking plaintiff whether similar charges as that made in the suit had not been made against him previously in a newspaper and whether he had contradicted them or taken any notice of them on that occasion are clearly *irrelevant*<sup>3</sup> Similarly, in a suit by A for a declaration that he and the defendant purchased a certain land as co partners interrogatories relating to the arrangements under which *other purchases* had been made by them together are *irrelevant*<sup>4</sup> In no case will interrogatories be allowed if the defence at which they aim would be no defence in law to the suit<sup>5</sup>

**4. Not exhibited bona fide.** — Where the questions though relevant, are not put *bona fide* for the purposes of the present action but for other and ulterior objects, e.g., in view of a future litigation they will be disallowed by the Court<sup>1</sup>

**5. "Not sufficiently material at that stage."** — The word '*material*' means more than relevant A fact may be *relevant* but not *material at a particular stage*<sup>1</sup> The question of materiality must be tested by reference to the case made by the pleadings and to what will be in issue at the hearing Generally, "the Court is unwilling before the *right to relief* is established to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief"<sup>2</sup> Similarly the Court is not justified in ordering a plaintiff to answer interrogatories which are in the nature of eliciting evidence before the defendant has filed his written statement<sup>3</sup> Compare Rule 20 which makes a provision for the postponement of discovery till after determination of issue or question Nevertheless the Court has a discretion to order discovery at once on other grounds<sup>4</sup>

**6. "Any other ground"** — These words mean grounds *ejusdem generis* with those specified<sup>1</sup> They will include the following grounds —

(a) that the questions are *criminating*,

(b) that they relate to privileged communications between the party and his legal advisers

#### Note 2

1 (1894) 10 T L R 254 (371) *Hemble v Hope*  
(1878) 8 Ch D 645 (653) *Fisher v Owen* (Referred  
in 14 Cal W N 153)

2 (1878) 8 Q B D 654 (660) *Althusen v Labou*  
*chere*

(1906) 1906 A M 431 (437) *National Association*  
*v Smiths*

(1878) 8 Ch D 645 (653) *Fisher v Owen* (Refer  
red in 14 Cal W N 153)

(1884) 10 F M 122 (130) *Harvey v Lovekin*

(1875) 10 Q D 217 (218) *Greenfield v Reay*

#### Note 3

1 (1895) 1 Ch 331 (338 340) *Kennedy v Dod*  
*son*

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3 (1886) 2 T L R 682 *Pankhurst v Hamilton*

4 (1895) 1 Ch D 334 (338) *Kennedy v Dodson*  
(1917) 1917 W N 519 (519) *Blair v Haycock*  
*Cadle Co*

5 (1890) 24 Q B D 578 (577) *Rogers & Co v*  
*Lambert & Co*

#### Note 4

1 (1905) 2 K B 523 (526) *Edmundson v Birch*  
*& Co Ltd*

(1875) 44 L J Ch 305 (303) *Heugh v Garrett*  
(1920) 1 K B 336 (339) *Chapman v Leach*

#### Note 5

1 (87) 14 Cal 703 (706)

2 (1881) 18 Ch D 477 (486) *Parker v Wells*.  
(Suit for breach of trust—Denial of trust—Ques-  
tion as to account of profits of trust premature)

(1898) 37 Ch D 184 (187) *Tennessy v Clark*  
(Amount of damages)

3 (37) AIR 1937 Med 316 (317)

4 (84) 10 Cal 803 (814)

(02) 4 Dom L R 312 (319)

#### Note 6

1 (1875) 8 Ch D 615 (65) *Fisher v Owen* (Cited  
in 14 Cal W N 153)

**O. 11 R. 5** the questions<sup>3</sup> The officer interrogated is bound to answer only with reference to  
**Nota 1** knowledge acquired in the course of his employment and on inquiries of other officers who have acquired their knowledge in the same way<sup>4</sup> There is no obligation on the part of the officer either to disclose his knowledge or to obtain or disclose the knowledge of other agents or servants of the company acquired by him or them otherwise than in the course of his or their employment<sup>5</sup>

The answer of the officer is the answer of the company and can be read as admission which binds the company<sup>6</sup>

A foreign State has been held to be a corporation for the purposes of this rule<sup>7</sup>

**O. 11 R. 6**

**R. 6. [S. 125]** Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

[1877, S. 125; R. S. C., O. 31 R. 6.]

### Synopsis

- 1 Scope of the Rule
2. Scandalous interrogatories
3. Irrelevant interrogatories
- 4 Not exhibited *bona fide*

- 5 "Not sufficiently material at that stage."
- 6 "Any other ground"
7. Fishing interrogatories.
8. Wagering contracts.
- 9 Defamation.

**1. Scope of the Rule.** — This rule enables the party interrogated to file his objections and indicate the grounds of objection which he might take<sup>1</sup> The party taking such objection is entitled to have it adjudicated upon by the Court and a clear and specific order passed directing him to answer such of the interrogatories as the Court holds to be relevant The mere fact that he could apply under Rule 7 to have the interrogatories set aside or struck out does not take away his right to have his objection adjudicated upon<sup>2</sup>

**2. Scandalous Interrogatories.** — Questions irrelevant to the matters in issue and taken for the purpose of abusing, insulting or degrading the opposite party are scandalous interrogatories and are not permissible But nothing can be scandalous

3 (1879) 18 Ch D 97 (99), *Barkely v Standard Dis Co*

4 (1900) 2 Ch 1 (8), *Weisbach Co v New Sunlight Co*

(1878) 3 Q B D 315 (321), *Southmark v Quick*  
 5 (1900) 2 Ch 1 (10), *Weisbach Co v New Sunlight Co*.

6. (1896) 2 Q B 153 (159), *Chaddock v British South Africa Co*.

7. (1875) 1 Ch D 171 (174), *Republic of Costa Rica*

v *Exlanger* (Referred to in 22 Cal 757 16 All 259)  
 Order 11 Rule 11 — Note 1

1 (80) 5 Cal 707 (710)

(80) 5 Cal L Rep 171 (171) (Where interrogatories have been administered for the examination of a witness by one party, the other party, if he objects to any of the questions, must make his objections on the face of his cross interrogatories)

[See (96) 23 Cal 117 (121)]

2. (18) All 1915 All 903 (904, 905)

which is *relevant*<sup>1</sup> even though tending to criminate the person interrogated<sup>2</sup>

O. 11 R. 6  
Notes 2-6

**3. Irrelevant interrogatories** — As a general rule the question taken must be *relevant* to the matter in issue<sup>1</sup> though it need not be *confined* to the *facts in issue*<sup>2</sup> Thus, interrogatories asking plaintiff whether similar charges as that made in the suit had not been made against him previously in a newspaper and whether he had contradicted them or taken any notice of them on that occasion, are clearly *irrelevant*<sup>3</sup> Similarly, in a suit by A for a declaration that he and the defendant purchased a certain land as co partners interrogatories relating to the arrangements under which *other purchases* had been made by them together are irrelevant<sup>4</sup> In no case will interrogatories be allowed if the defence at which they aim would be no defence in law to the suit<sup>5</sup>

**4 Not exhibited bona fide** — Where the questions though relevant, are not put *bona fide* for the purposes of the present action but for other and ulterior objects *g*, in view of a future litigation they will be disallowed by the Court<sup>1</sup>

**5. "Not sufficiently material at that stage."** — The word "*material*" means more than relevant A fact may be *relevant* but not *material at a particular stage*<sup>1</sup> The question of materiality must be tested by reference to the case made by the pleadings and to what will be in issue at the hearing Generally, the Court is unwilling before the *right to relief* is established to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief<sup>2</sup> Similarly, the Court is not justified in ordering a plaintiff to answer interrogatories which are in the nature of eliciting evidence before the defendant has filed his written statement<sup>3</sup> Compare Rule 20 which makes a provision for the postponement of discovery till after determination of issue or question Nevertheless the Court has a discretion to order discovery at once on other grounds<sup>4</sup>

**6 "Any other ground"** — These words mean grounds *ejusdem generis* with those specified<sup>1</sup> They will include the following grounds —

(a) that the questions are *criminatory*

(b) that they relate to privileged communications between the party and his legal advisers.

#### Note 2

1 (1894) 10 T L R 254 (371) *Kemble v Hope*  
(1878) 8 Ch D 645 (653) *Fisher v Owen* (Referred  
in 14 Cal W N 153)

2 (1878) 3 Q B D 654 (660) *Allhusen v Labor*  
*chere*  
(1906) 1906 A C 434 (437) *National Association*  
*v Smiths*

(1878) 8 Ch D 645 (653) *Fisher v Owen* (Refer  
red in 14 Cal W N 153)  
(1894) 10 P D 122 (130) *Harvey v Lovekin*  
(1875) 10 Q B 217 (218) *Greenfield v Reay*

#### Note 3

1 (1895) 1 Ch 334 (335, 310) *Kennedy v Dod*  
*son*

2 - - - - -

- - - - -

3 (1894) 2 T L R 682 *Pankhurst v Hamilton*

4 (1895) 1 Ch D 334 (335) *Kennedy v Dodson*  
(1917) 1917 W N 319 (319) *Blair v Haycock*  
*Cadle Co*

5 (1890) 24 Q B D 573 (577) *Rogers & Co, v*  
*Lambert & Co*

#### Note 4

1 (1905) 2 L B 523 (526) *Edmundson v Birch*  
*& Co Ltd*

(1875) 44 L J Ch 305 (303) *Heugh v Garrett*  
(1920) 1 K B 336 (339) *Chapman v Leach*

#### Note 5

1 (87) 14 Cal 703 (706)

2 (1881) 18 Ch D 477 (496) *Parker v Wells*.  
(Suit for breach of trust—Denial of trust—Ques-  
tion as to account of profits of trust premature)

(1888) 37 Ch D 194 (187) *Tennessee v Clark*  
(Amount of damages)

3 (90) AIR 1932 Mad 316 (317)

4 (84) 10 Cal 603 (814)

(0) 4 Lon L R 312 (315)

#### Note 6

1 (1878) 8 Ch D 615 (657) *Fisher v Owen* (Cited  
in 14 Cal W N 153)

- (c) that they relate to a party's evidence, and  
(d) that they are injurious to public interests

In general, questions excluded by Sections 121 to 129 of the Evidence Act and which could not be asked if the party were in the witness box cannot also be taken as interrogatories.<sup>2</sup> Questions relating to communications made for the purpose of litigation between third persons and the legal adviser of a party or between third persons and the party for the purpose of submission to the adviser,<sup>3</sup> or questions offending against a rule of public policy may also be objected to.<sup>4</sup> Similarly, it is open to an assessee of income tax to object to answering interrogatories on statements made by him in income tax proceedings on the ground that they are privileged.<sup>5</sup> But even if no objection is taken by the party it is the duty of the Court to consider whether a rule of public policy does not prevent the disclosure of the documents or of the information sought.<sup>6</sup>

**7. Fishing interrogatories.** — The questions asked must not be "fishing," that is to say they must refer to some definite and existing state of circumstances and must not be put merely in the hope of discovering some flaw in the opponent's case<sup>1</sup> or with the object of filling up blanks in the interrogator's own pleadings.<sup>2</sup> Thus, where the plaintiff was charged with having used certain blasphemous words in interrogatories tending to show that if he did not use those words on the particular occasion, still he had on other occasions said something very much like it are merely "fishing" interrogatories and will be disallowed.<sup>3</sup>

**8. Wagering contracts.** — In cases where the defence of wagering is set up, the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit, the reason is that it will be "manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case."<sup>1</sup>

**9. Defamation.** — Where, in a plaint in an action for slander, publication to one named person and also to various other persons unnamed is alleged, it is not permissible to ask the defendant whether he spoke the words complained of to any person or persons other than the person named and the names of other persons if any. Such an interrogatory is a fishing interrogatory the object of which is to find out some cause of action or defence other than that specifically alleged.<sup>1</sup> So also the defendant in a libel case will not as a rule be allowed before he has given particulars to interrogate or get discovery for the purpose of finding out whether he has a defence or not.<sup>2</sup>

- 2 (90) 15 Bom 7 (10)  
3 (85) 7 Com L R 709 (711, 712)  
4. (1888) 21 QBD 809 (521) *Hennessy v Wright*  
(Cited in 27 Bom 189)  
5 (34) AIR 1934 Nag 181 (182)  
6 (02) 4 Bom L R 342 (850)  
Note 7

- 1 (90) 17 Cal 840 (919, 849)  
(1888) 21 QBD 445 (448) *Hennessy v Wright*  
(1913) 2 K B 193 (197, 199), *Burham v Lord*

- Huntingfield  
2 (14) AIR 1914 Cal 767 (768) 41 Cal 6  
3 (1886) 2 T L R 692, *Pankhurst v Hamilton*,  
Note 8  
1 (13) 17 Ind Cas 152 (154) 37 Bom 347.  
Note 9

1. (1913) 2 K B 193 (199) *Burham v Huntingfield*  
2. (1893) 2 Q B 163 (188), *Tuerlenery v Labou-*  
*chere*  
(1908) 2 K B 151 (161), *Arnold v Bottomley*.

**R. 7. [New.]** Any interrogatories may be set aside on O. 11 R. 7

Setting aside and striking out interrogatories.

the ground that they have been exhibited unreasonably or vexatiously, or struck out

on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

[R. S. C., O. 31 R. 7. (Annulled in 1917).]

**1. Setting aside or striking out interrogatories.** — Interrogatories must not be oppressive or exceed the legitimate requirements of the particular occasion<sup>1</sup> Thus, interrogatories as to profits requiring a search through business books of several years when it is absolutely irrelevant in a suit for a declaration,<sup>2</sup> or as to an *innuendo* and the names of all the persons to whom the libel had been published in a libel action,<sup>3</sup> or as to a secret manufacturing process, have all been held to be vexatious and oppressive<sup>4</sup> The mere *irrelevancy* of the interrogatory is no ground for setting aside the interrogatory under this rule The party has to proceed under Rule 6

**R. 8. [S. 126.]** Interrogatories shall be answered by O. 11 R. 8

Affidavit in answer, filing.

affidavit to be filed within ten days, or within such other time as the Court may allow.

[1877, S. 126, R. S. C., O. 31 R. 8. See R. 9 below.]

**1. Matters within the knowledge of party's agent or servant.** — The party interrogated cannot escape giving an answer by saying that he has no *personal* knowledge as to matters inquired into<sup>1</sup> He is bound to obtain the information from his agents or servants, if such knowledge has been acquired by them in the ordinary course of their employment He can, however, show that it would be unreasonable to require him to do so in any particular case, as for instance, where either his agents or servants have left his employment or where it would occasion unreasonable expense or an unreasonable amount of delay or the like to get such information<sup>2</sup> A party's broker or solicitor is his agent within the meaning of this rule<sup>3</sup> As has been seen in the Notes to Rule 5 *ante*, a party need not disclose matters that have come to the knowledge of his agents or servants otherwise than in the ordinary course of their employment<sup>4</sup>

**Order 11 Rule 7 — Note 1**

1. (1893) 1 Q B 5 (13) *Oppenheim v Sheffield*

2. " " " " " "

3. " " " " " "

4. " " " " " "

**Order 11 Rule 8 — Note 1**

1. (1894) 29 Ch D 247 (240), *Fookes v Webb*.

(1878) 3 Q B D 815 (321), *Southwark & Vauxhall Water Co v Quick* (Cited in 15 Bom 7)

2. (1892) 10 Q B D 161 (171), *Bokkew Vaughan & Co v Fisher*

(1893) 24 Ch D 110 (113), *Rastotham v Shropshire Union Railway and Canal Co*

3. (1895) 3 Ch 111 (114), *Allott v Smith*.

4. (1900) 2 Ch 1 (10, 11) *Welsbach Incandescent Gas Light Co v Sunlight Incandescent Co*.



- O. 11 R. 12 discovery is not necessary, or not necessary at that stage of the suit or make such order, either generally or limited to certain classes of documents,<sup>1</sup> as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

[1877, S 129; R. S. C, O 31 R 12]

O. 11 R. 13

**R. 13.** [S 129, para 2.] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No 5 in Appendix C, with such variations as circumstances may require

[R S C, O 31 R 13]

## RULES 12 & 13.

### *Synopsis*

- |  |  |
|--|--|
| 1 Scope of the Rules   | 13 Against whom order for discovery may be made              |
| 2 Application for discovery of documents may be made without affidavit           | 14 Any party   |
| 3 Grounds of objection to discover documents                                     | 15 Benamidar   |
| 4 Professional or legal privilege  | 16 Corporation   |
| 5 Documents relating solely to the case of the party giving discovery            | 17 Crown   |
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| 7 Documents held in possession as agent of third party                           | 19 Several defendants and plaintiffs See Note 11             |
| 8 Documents incriminating party  | 20 Next friend of minor or lunatic                           |
| 9 Where production of public official documents is injurious to public interests | 21 Advocate General  |
| 10 Court may inspect a privileged document                                       | 22 Official Liquidator                                       |
| 11 Contents of affidavit of documents  | 23 Marine insurance  |
| 12 Sufficient description of documents   | 24 Affidavit of documents, if conclusive — Further affidavit |
|  | 25 Effect of non disclosure of documents                     |
|  | 26 Right to seal part of documents                           |

### *Other Topics (miscellaneous)*

- |   |  |
|---|--|
| Affidavit in the case of several plaintiffs or defendants See Note 11                                     | Document meaning of See Note 11                                      |
| Court's discretion under the rule See Note 2  | Duties of attorneys in respect of affidavit of documents See Note 11 |
| Discovery from a co-defendant or co plaintiff See Note 13   | Matter in question meaning of See Note 11                            |
| Documents in possession of a party either jointly with others or with no proprietary interest See Note 11 | Possession of agent See Note 6                                       |
|   | Production of documents See Note 1                                   |

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Notes 1-3

**1. Scope of the Rules.**—These rules deal with the second branch of discovery, viz., the discovery of *documents*. They enable a party to apply to the Court for the purpose of compelling his opponent to disclose the documents he has in his possession or power,<sup>1</sup> and the object of this procedure is two fold: (1) to secure as far as possible that all material documents are disclosed by putting the opposite party on oath as to the documents in his possession or power with the consequent penalties attaching to a false oath, and (2) to put an end to what might otherwise lead to a protracted inquiry as to the material documents actually in the possession or under the control of the opposite party.<sup>2</sup>

The right to have the *existence* of a document disclosed in the affidavit of documents under these rules does not necessarily involve any right to have it produced for *inspection*, nor is a protection from *production for inspection* a sufficient reason for not disclosing its *existence*. The rule does not alter the principles relating to the production of documents but gives the Court a discretion to refuse the discovery of documents when there is no reasonable prospect of its being of any use,<sup>3</sup> or to limit the nature and extent of the discovery.<sup>4</sup>

These rules do not preclude an application under Rule 18, sub rule 2.<sup>5</sup>

**2. Application for discovery of documents may be made without affidavit.**—An application under Rule 12 need not be supported by an affidavit as is generally required in the case of other applications.<sup>1</sup> The Court has power either to refuse or adjourn the application and, in exercising its discretion, it is guided by the pleadings and the nature of the action. The party who applies must, where there is contest show that he has a good cause of action and that the documents are relevant to the case.<sup>2</sup>

**3. Grounds of objection to discover documents.**—A party against whom an order for discovery of documents has been made by the Court cannot object to *specify* the existence of the documents.<sup>1</sup> He is also, as a general rule, bound to *produce* every document in his possession or power which is material or relevant to the suit, unless it is covered by some established privilege.<sup>2</sup> The fact that a document was written on a privileged occasion, in the special sense in which that term is used in actions of defamation is no reason for refusing to produce it. It is not, on that ground, privileged from inspection.<sup>3</sup> But there are several classes of documents which have been recognized as being privileged from production. These may be dealt with in the following order—

- (1) Documents protected by professional or legal privilege
- (2) Documents relating solely to the case of the party giving discovery
- (3) Documents not in the sole possession of the party giving discovery
- (4) Documents in the possession of a party only as agent or on behalf of another

#### Order 11 Rules 12 & 13 — Note 1

1 (95) 23 Cal 117 (125)

2 (95) 23 Cal 117 (125)

3

4

5

#### Note 2

1. (95) 23 Cal 117 (125)

1 (1891) 45 Law Times 360 (361) *Swanton v. Listman*

2. (157C) 2 Ch D 644 (CSC) And see *Bank of British Columbia* (Cited in 6 L.R. 572)

3 (157C) 2 L.R. 103 (112) *Wells v. East*

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(5) Documents tending to criminate or expose to forfeiture

(6) Documents protected on the ground of public policy

**3 Professional or legal privilege** — A communication between parties and their legal advisers has always been protected from disclosure even at the risk of the possibility of truth being concealed thereby<sup>1</sup> The object of the rule is to enable persons to obtain legal advice safely and effectually<sup>2</sup> A party is thus not bound to produce any confidential communication between him and his legal advisers<sup>3</sup> It is necessary however to distinguish between documents and communications that are privileged irrespective of whether litigation was contemplated or was pending and those that are privileged only where litigation was contemplated or was pending at the time when they came into existence The first class of cases will cover the following documents —

(1) Letters and communications passing between a party or his predecessors in title and his or their legal advisers provided they are *confidential* and written to or by the solicitor or legal adviser in his professional capacity for the purpose of getting legal advice or assistance<sup>4</sup> If the communications are not made *confidentially* there is no privilege<sup>5</sup>

(2) Such letters and communications made *through a clerk or agent* employed by the legal adviser or the client for the purpose of conveying information to or from the legal advisers<sup>6</sup>

(3) Letters and communications between a solicitor and his partner or professional agent<sup>7</sup> but not between solicitors for opposite parties<sup>8</sup>

(4) Instructions and briefs to counsel and counsel's briefs and notes<sup>9</sup>

The second class of documents will cover the following —

(1) Communications between a solicitor and a *non professional agent* or a third party directly or through an agent and made with a view to pending or contemplated litigation and for the purpose of getting or giving advice or for obtaining or collecting evidence<sup>10</sup>

(2) Communications between the client and a *non professional agent* or third party, which are made in answer to inquiries made by the party as the agent for or at

#### Note 4

1 Halsbury Vol II page 72

2 (1881) 17 Ch D 675 (681 682) Wheeler v Le

Marchant

(1901) 1901 App Cas 196 (200) Bullant v

Attorney General

3 (91) 15 Bom 7 (10)

(27) AIR 1927 Bom 367 (367 368)

4 (1891) 1891 P 236 (289) O Shea v Wood

(1878) 4 Ex D 42 (53) Gardner v Irvin

(1883) 23 Ch D 837 (404) Kennedy v Lyell

(1878) 3 Q M D 815 (318) Southwick & Vauxhall

Water Co v Quick (Statement of facts drawn

up by the client for submission to his solicitor

and documents prepared by him for the purpose

of providing the solicitor with evidence and

information for the conduct of his case)

(1913) 3 K B 850 (856) Birmingham and Mid

land Motor Omnibus Co v London & North

Western Ry Co (No)

(1913) 2 K B 565 (568) Featherhead v London

General Omnibus Co (Do)

(80) 4 Bom 576 (592) (Statements laid by

clients before counsel for the the purpose of ob-

taining legal advice)

(1883) 3 Times Rep 578 Ward v Marshal

(Entries in the solicitor's diary of communica-

tions between himself and his client)

5 (1874) 30 Law Times 535 Original Hartlepool

Collieries Co v Moon (Affirming 30 Law Times

193)

(79) 3 Bom 21 (93)

(91) 18 Bom 263 (272)

(93) 5 Bom L R 122 (123)

6 (1891) 17 Ch D 675 (692 694) Wheeler v Le

Marchant

7 (1876) 34 Law Times 531 Mostyn v West

Mostyn Coal & Iron Co

(1827) 4 Russ 190 (191) Hughes v Riddalgh

8 (1851) 21 L J Ch 10 Core v Harris

(1862) 32 Beav 162 (166) Ford v Tennant

9 (1876) 34 Law Times 531 Mostyn v West

Mostyn Coal Co

(1911) 1911 P 181 (184) Curtis v Deane

10 (1876) 2 Ch D 644 (650) Anderson v Bank

of British Columbia (Cited in 6 Bom 572)

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the request or suggestion of his solicitor or without any such request but for the purpose of being laid before the legal adviser for the purpose of advice in respect of a pending or contemplated litigation<sup>11</sup> But a mere communication between a principal and agent though confidential is not privileged<sup>12</sup> even after litigation has commenced and legal advice has been taken as to its course<sup>13</sup> Similarly the reports made by a servant to his master are not privileged though they may relate to the subject matter of the suit<sup>14</sup>

(3) The correspondence between co defendants after the institution of a suit is not as a general rule privileged from production but where one of the co defendants is agent or solicitor for the other co defendant the communications between them are privileged<sup>15</sup> Where one of the trustees of a will is a solicitor and acts as a solicitor for the trustees communications between him and his co trustees which would be privileged if he were not a co trustee are privileged<sup>16</sup>

No privilege attaches to communications between a client and his legal adviser made in furtherance of a fraudulent or illegal purpose which is definitely alleged in the pleadings or in the affidavits<sup>17</sup> The privilege is confined to legal advice and does not extend to communications between a party and his medical<sup>18</sup> or spiritual<sup>19</sup> adviser or non professional friend or adviser<sup>20</sup> See Sections 126 to 129 of the Evidence Act

### 5 Documents relating solely to the case of the party giving discovery

—A party will not be compelled to produce for inspection documents which he swears relate to his own case and do not relate to or tend to support the case of his opponent and do not impeach his own case<sup>1</sup> Thus he need not produce any document which he can swear relates solely to his own title to any real property and to contain nothing which tends to establish the title of his opponent<sup>2</sup>

*Documents disclosing party's evidence* — A party cannot be compelled to produce documents which form the exclusive evidence of his own case or title<sup>3</sup> But they must not in any way tend to prove or support the adversary's title<sup>4</sup> if they are necessary to support the adversary's case<sup>5</sup> or may be evidence for the adversary as well<sup>6</sup> their production cannot be refused In order to claim this privilege the party may state in his affidavit that the document constitutes evidence of his own case or title that they contain nothing supporting or tending to support the adversary's case or title and that they contain nothing impeaching his own case or title<sup>7</sup> But a party =

11 (1876) 1 Ch D 644 (648 650) *Anderson v Bank of Br Columb* (Cited in 6 Bom 572)

(Cited in 4 Bom 576)

Note 3

12 (1878) 11 Bom 453 (456) *Wallace v Jefferson* (85) 11 Cal 635 (637)

13 (91) 15 Bom 7 (10)

(95) 22 Cal 105 (111)

14 (27) AIR 1927 Bom 367 (367 368)

15 (1873) 16 Eq 112 (115) *Hamilton v Nott* (Co-defendant)

3 (1893) 2 Q B 432 (435) *Budden v Wilkinson* (1897) 2 Q B 62 (65) *Frankenstein v Gavin & Co* (27) AIR 1927 Bom 367 (367)

4 (93) 17 Bom 591 (594)

5 (84) 10 Cal 803 (914)

6 (1842) 1 Y & O Ch Cas 631 (651) *Combe v London Corporation*

(1913) 1 Ch 30 (335 339) *Whitworth In re*

17 (1841) 17 Ch D 675 (681) *Wheelwright v Le Marchant*

18 (1866) 2 Ch D 644 (650) *Anderson v Bank of Br Columb* (Cited in 6 Bom 572)

20 (1874) 19 Eq 649 (654) *Smith v Daniel*

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not confined to the affidavit in which the claim is first set up he is entitled to put in and use a further affidavit in support of his claim of privilege<sup>6</sup>

Opinions upon or steps taken in reference to a suit in which the plaintiff and defendant are putting forward opposing contentions cannot be said to relate solely to the case of the plaintiffs<sup>7</sup>

**Documents not in the sole possession of the party** — The rule of the Court of Chancery in England is thus laid down by Lord Cottenham in *Taylor v Rundell*<sup>1</sup>

If a defendant has a joint possession of a document with somebody else who is not before the Court the Court will not order him to produce it and this for two reasons the one is that a party will not be ordered to do that which he cannot or may not be able to do the other is that another party not present has an interest in the document which the Court cannot deal with

Thus it was held that a partner or his agent cannot be asked to produce documents belonging to partnership where the other partners are not before the Court<sup>2</sup> But in a similar case in the High Court of Bombay<sup>3</sup> Sir Charles Sargent C J held that the case before him did not fall within either of the reasons mentioned above that the defendants (partners) physically speaking could produce the document and that legally speaking they represented the other partners for the purpose of production of documents as there was no other person having an interest distinct from the own interest

For the purpose of the disclosure of the existence of documents possession includes possession by an agent of the party giving the discovery<sup>4</sup>

**Documents held in possession as agent of third party** — No party can be compelled to produce documents of which he is not the owner but of which he has the custody as the agent of a third party who is not a party to the action as where the documents are in the possession of a party as a trustee or as a mortgagee regarding title deeds of mortgagor etc<sup>1</sup>

**Documents incriminating party** — It is a good ground of privilege that the document if produced would tend to criminate the party producing them But this objection does not apply to the discovery of the documents<sup>1</sup>

See however Section 132 of the Evidence Act

**Where production of public official document is injurious to public interests** — Public official documents need not be produced when an objection is taken in the affidavit of documents by the head of the department or by some responsible officer<sup>1</sup> the mere fact that the documents are official or confidential is not enough to protect them in case of doubt the Judge may in his discretion adjourn

8 (94) 29 Cal 105 (110) *Citrus* (1876) L R 1 C.P.D. 471 *McQuinn v Bell*

9 (91) 15 Bom 7 (11) (1876) 1 Q.B.D. 423 (427) *Bustros v White*

(Cited in 15 Bom 7)

(1887) 10 Q.B.D. 191 (201) *Attorney General v Ennison* (Cited in 15 Bom 7)

Note 6

1 (1841) 5 Jur 1129 [Cited in 1 Bom 196] [See also (1871) 7 Ch App 312 (313) *Hadley v McDougall*]

2 (1841) 5 Jur 1129 *Taylor v Rundell* (Cited in 1 Bom 496)

(1849) 14 Jur 467 *Reid v Langlois* (Cited in 1 Bom 496)

3 (76) 1 Bom 496 (493 499)

4 (1861) 45 L.T.360 (361) *Swanston v Lushman*

Note 7

1 (1836) 18 Beav 457 (461) *Few v Guppy*

Note 8

1 (1897) 2 Q.B. 124 (130) *Spots v Grosvenor Hotel & Co*

(1906) 1906 App Cas 434 (437) *National Association of Operative Plasterers v Smith & Co*

Note 9

1 (01) 21 Bom 167 (216)

(1899) 2 Q.B.D. 509 (521) *Hebbessey v Wright*

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the question to the trial.<sup>2</sup> But, as a general rule, if the objection is taken by the proper person the Court will not go behind it, the foundation of the rule being that the information cannot be disclosed without injury to the public interest. See also the Evidence Act, Sections 123 and 124 and the undermentioned case of the Privy Council.<sup>3</sup>

**10. Court may inspect a privileged document.** — Where privilege is claimed by a party, the Court may inspect the document to decide whether the privilege claimed is proper and valid.<sup>1</sup> See Rule 19, sub rule (2)

**11. Contents of affidavit of documents.** — A party who is ordered under Rule 12 to make discovery on oath should set forth in his affidavit all documents which are or have been in his possession or power relating to the matter in question.<sup>1</sup> A document may be described as writing or printing capable of being read, no matter what the material upon which it is impressed or inscribed.<sup>2</sup> The expression "matter in question" means a question or issue in dispute in the action, and not the thing about which question or issue arises. Thus, in an action to recover possession of land, it means the plaintiff's alleged title and not the land.<sup>3</sup> Every document which will throw any light on the case is a document relating to a matter in dispute in the suit.<sup>4</sup> It is not confined to such as would be admissible in evidence<sup>5</sup> but includes all documents containing information which may either directly or indirectly enable the party seeking discovery, either to advance his own case or damage that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences.<sup>6</sup> Every such document must be included in the affidavit of documents even if the party is in possession thereof jointly with others or even if he has therein no property at all, provided they are in his corporeal possession. As regards documents which are not, but had been in the party's possession, he must state what has become of them. It is always desirable to adopt the form given in the Code as otherwise an affidavit may be regarded as insufficient.<sup>7</sup> When the affidavit is insufficient, a summons may be taken to consider its sufficiency.<sup>8</sup>

Ordinarily, an affidavit of documents must be made by the party himself, but the Court may in special cases allow the affidavit to be made by the agent of the party.<sup>9</sup> Where there are several plaintiffs all of them must ordinarily join in the affidavit.<sup>10</sup> It is possible on a proper case being made out that the order may be limited to a particular party.<sup>11</sup> In the case of a *pardanashin* lady it is doubtful if a verification is necessary.<sup>12</sup> It is the duty of an attorney to be very careful in ascertaining from his client, who has to make an affidavit of documents, exactly what materials and documents are in his possession. It is further his duty the moment he finds that there are other documents which have not been disclosed, at the very earliest moment, to bring those documents to the notice of his opponent and give him an opportunity of inspecting them.<sup>13</sup>

<sup>2</sup> (1916) 1 K. B. 822 (830) *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.*

<sup>3</sup> (31) AIR 1931 P. C. 254 (257, 258) (PC)

Note 10

<sup>1</sup> (1900) 1 Ch. 876 (883) *Millbank v. Millbank.*  
(31) AIR 1931 P. C. 254 (259, 261) (PC)

Note 11

<sup>1</sup> See p. 1

<sup>2</sup> See p. 1

<sup>3</sup> See p. 1

<sup>4</sup> See p. 1

<sup>5</sup> See p. 1

<sup>6</sup> See p. 1

<sup>7</sup> See p. 1

<sup>8</sup> See p. 1

<sup>9</sup> See p. 1

<sup>10</sup> See p. 1

<sup>11</sup> See p. 1

<sup>12</sup> See p. 1

<sup>13</sup> See p. 1

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**12. Sufficient description of documents.** — It is necessary that there should be a sufficient description of documents in the schedule annexed to the affidavit of documents. It is sufficient, however, if the documents are described in such a manner as to enable enforcement of production, if ordered.<sup>1</sup> Where a party claims to withhold documents or letters on the ground of privilege, a less degree of particularity will suffice, it is not necessary to give such description as will enable the opponent to know its contents.<sup>2</sup>

If the documents are not numerous the most advisable course is to set out each of them separately and number them in the margin of the schedule. But if there are numerous documents of the same class or description, it is not necessary to number each of them separately, it will be proper to tie them up in bundles and number the documents or otherwise earmark them in such a way that the other party may ask for those which he wants to inspect.<sup>3</sup>

**13. Against whom order for discovery may be made.** — As a general rule, discovery is confined to the parties only<sup>1</sup> and does not apply to third parties.<sup>2</sup> The words 'my party and any other party' in Rule 12 contemplate opposite parties within the meaning of Rule 1.<sup>3</sup> See Note 11 to Rule 1, and Notes 14 to 21 below.

**14. Any party.** — In a suit brought by a nominal plaintiff, the persons really interested may be ordered to give discovery and the suit may be stayed unless they give such discovery.<sup>1</sup> So also where a principal residing abroad is the real plaintiff, but is suing through his agent, the defendant is entitled to have the action stayed until such discovery is made as the real plaintiff would have been obliged to make, had he been the plaintiff on the record.<sup>2</sup>

**15. Benamidar.** — Where a person uses the name of another as a nominal plaintiff only for the purpose of bringing an action in which he alone is really interested, the real plaintiff may be called on to give discovery.<sup>1</sup> But the nominal plaintiff also will be liable to make an affidavit of documents.<sup>2</sup>

**16. Corporation.** — The Court has power to order an officer of a company or corporation to give discovery.<sup>1</sup> A public body cannot burke discovery on the ground that there are a large number of papers, the production of which would flood the Court.<sup>2</sup>

**17. Crown.** — The Crown has a right of discovery as against a subject but cannot be compelled to give discovery,<sup>1</sup> though as a matter of practice it does give

#### Note 12

1. (1906) 2 K B 217 (224), *James Nelson & Sons v Nelson Line*
2. (1900) 16 T L R 434 (451), *Williams v Ingram* (Affirmed in 16 T L R 451)
3. (32) AIR 1932 Cal 72 (72, 73) 58 Cal 1091 (No contest between co defendants—Not opposite parties)

#### Note 14

1. (1906) 2 K B 217 (226, 227), *James Nelson & Sons v Nelson Line*
- (1892) 2 Q B 324 (326) *Willis v Baddeley*
2. (1892) 2 Q B 324 (326, 327), *Willis v Baddeley*

#### Note 15

1. (1892) 2 Q B 324 (326) *Willis v Baddeley*
2. (1881) 7 Q B 553 (553) *Willson v Raffalovitch* (Cited in 15 Bom 7)

#### Note 16

1. (1875) 1875 W N 220 (220) *Cooke v Oceanic* (1885) 30 Ch D 180 (191) *Dykes v Stephens* (The case of a company is not the same as that of an infant)
2. (22) AIR 1922 AH 1 (4) 44 All 202

#### Note 17

1. (1897) 2 Q B 384 (398), *Attorney General v. Newcastle Corporation*

discovery by way of a list of documents in the same way as a subject would be bound to give, unless some principle of public interest is involved<sup>2</sup>

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**16. Foreign Prince or State.** — A foreign Sovereign or State is also bound to give discovery like any other suitor<sup>1</sup> and the suit will be stayed until a proper person is named to give it<sup>2</sup>

**19. Several defendants and plaintiffs.** — See Note 11

**20. Next friend of minor or lunatic.** — The next friend of a minor or lunatic may be called upon to file an affidavit of documents see Rule 23, *infra*

**21. Advocate-General.** — The Advocate-General cannot be called upon to make discovery on oath in a suit filed by him at the instance of relators under Section 92, Civil Procedure Code But an affidavit of documents may be required from the latter<sup>1</sup>

**22. Official Liquidator.** — As an officer of the Court, the Official Liquidator must not ordinarily be compelled to make an affidavit of documents in his possession. The proper course is to apply to him for inspection in the first instance, and on his refusal, to apply to the Court<sup>1</sup> The same rule would seem to apply to the Official Receivers and Assignees under the Insolvency Act

**23. Marine insurance.** — In actions on policies of marine insurance, the defendant underwriters are entitled to apply for and obtain, as a matter of course, an order for the production of all material documents and papers relating to the insurance, not only from the *plaintiff* and all persons interested in the proceedings but *all other persons* who are in possession of such documents or papers<sup>1</sup> This does not, of course, include the underwriters themselves but in an action brought by a mortgagee of a ship on a policy of marine insurance a mortgagor who has sailed the ship as the managing owner has been held to be a person who should produce the ship's papers<sup>2</sup> The practice extends to all actions on policies which are substantially marine policies whether on a ship or cargo<sup>3</sup>

**24. Affidavit of documents, if conclusive, if conclusive — Further affidavit.** — The affidavit of documents filed by a party against whom an order for discovery has been passed is conclusive, and must be accepted by the party seeking discovery as true, both with regard to the documents that are, or have been, in the possession or power of the party making discovery,<sup>1</sup> and as to their relevancy,<sup>2</sup> unless there is something like an answer in cross examination or some other documentary evidence showing

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|   | 1. (1883) 22 Ch D 714 (730) Mutual Society<br>In re   | Note 22            |
|   | 1. (1893) 2 Q B 167 (191 192 193) China Traders<br>Insurance Co v Royal Exchange Assurance<br>Corporation | Note 23            |
|   | (1924) 1 K B 79 (86), Tenaris Moderna Franco<br>Espa Nola v New Zealand Insurance Co                      |                    |
|   | 2. (1877) 2 Fx D 472 (473) West of England<br>Bank v Canton Insurance Co                                  |                    |
|   | 3. (1893) 2 Q B 187 (191) China Traders Insur<br>ance Company v Royal Exchange Assurance<br>Corporation   |                    |
|   |   | Note 24            |
|   |   | Irwin.]<br>Henson. |
| Note 18   |   |                    |
| 1. (1875) 1 Ch D 171 (174) Costa Rica Republic<br>v Frangier    |   |                    |
| (1875) 20 Lj 140 (141), Peru Republic v.<br>Weguelin            |   |                    |
| (1867) 2 Ch App 582 (590), United States of<br>America v Wagner |   |                    |
| Note 21   |   |                    |
| 1. (1866) 30 Bom 474 (476)                                      |   |                    |



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conclusively that there are other documents. It is also conclusive as to the grounds stated in support of a claim for privilege from production.<sup>2</sup> The party seeking discovery cannot for the purpose of obtaining a further affidavit or inspection of documents for which privilege is claimed, adduce evidence or otherwise show that the affidavit of documents is insufficient or untrue.<sup>4</sup> Nor, as a rule, can he interrogate with a view to show that the affidavit is untrue.<sup>5</sup> There are two cases, however, where the affidavit of the document can be controverted—

(1) Where from the affidavit itself, or from the documents referred to therein or from admissions made either in pleadings or otherwise it appears that the party making discovery has or has had other relevant documents in his possession or power.<sup>6</sup>

(2) Where the basis on which the first affidavit has been made turns out to have been wrong in other words where the party making the affidavit has misconceived his case so that the Court is practically certain that if he had conceived properly and acted on a correct view of the law he would have disclosed further documents.<sup>7</sup>

In a suit for ejectment the Court will not as a rule go behind the affidavit and where in such a suit either party claims to refuse production on the ground that the documents relate solely to his own title and do not in any way tend to prove or support the title of the opposite party, the Court cannot go behind the affidavit and enquire whether his statement is true or not.<sup>8</sup> But in a suit for the recovery of the price of materials supplied to the defendant in which the defence was that the materials were defective the Court ordered the production of the engineer's report referred to in his pleadings where his statement showed that the report was not of the character described by the defendant.<sup>9</sup>

**25 Effect of non-disclosure of documents** — Where no application is made under this rule a party is not bound to produce any document. He is entitled to refrain from producing any document which he considers irrelevant and no adverse presumption can be drawn against the party from its non production<sup>1</sup> except where from the nature and circumstances of the case it is the imperative duty on his part to produce them<sup>2</sup> but where an order is made against a party for discovery and he alleges as to some of the documents that they have been destroyed or may have perished he is bound to give evidence of diligent search for them. In the absence of such evidence a presumption that if produced they will be unfavourable to that party will arise.<sup>3</sup>

Edwards

Video Gas Co

(1882) 11 Q B D 55 (59) Compagnie Financiere v

(1863) 39 L J Ch 616 (677) Noel v Noel (Case of reasonable suspicion)

(75) 1 Cal 178 (179)

on (93) 17 Bom 881 (888) (Where suspicion not sufficient)  
(1910) 1 K B 901 (912 913) Kent Coal Concessions v Duguid  
7 (1912) 1 K B 369 (376) British Association of Glass Bottle Manufacturers Ltd v Nettlefold (Affirmed in (1912) AC 709)  
(97) 2 Cal W N 17 (17)  
8 (93) 17 Bom 581 (583 584)  
(1889) 23 Q B D 287 (290) Morris v Edwards (Affirmed in (1890) 15 App Cas 309)  
9 (95) 22 Cal 105 (110 111)

Note 25

(Refer

1 (15) AIR 1915 P C 96 (98) 37 All 537 42 Ind App 202 (PC)

2 (17) AIR 1917 P C 6 (8) 40 Mad 407 41 Ind App 93 (PC)

3 (17) AIR 1917 P C 1 (4) (PC)

**26. Right to seal part of documents.** — A party may seal up such portions of the documents produced by him as he swears are privileged. He must, however, specify what parts of the documents referred to he claims to seal up and the grounds upon which the claim is based.<sup>1</sup> The rule is the same with regard to portions of documents which do not relate to the matters in question.<sup>2</sup> The party making discovery has the option either to disclose such portions in his affidavit or to disclose the whole and state that such portion alone is relevant and to seal up the rest.<sup>3</sup> When the right of the party to seal up parts of the document is contested, the Court will appoint an officer to whom the party desiring inspection is to state in confidence why he wants to inspect any portion of the documents sealed, and the officer, after looking at the documents as to whether and in what way the part noted or desired to be noted is material to the case, should make a report for the orders of the Court.<sup>4</sup> The Court can also order the sealed parts to be unfastened for its personal inspection.<sup>5</sup>

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Note 26

**R. 14. [S. 130.]** It shall be lawful for the Court, at any O. 11 R. 14

**Production of documents.** time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

[1877, S. 130, R. S. C., O. 31 R. 14.]

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Possession or power."</li> <li>3. "Relating to any matter in question in such suit."</li> <li>4. Effect of Sections 163 and 164 of the Evidence Act.</li> </ol> | <ol style="list-style-type: none"> <li>5. Waiver of privilege.</li> <li>6. Partner.</li> <li>7. Copies of documents produced, if can be taken. See Rule 15.</li> <li>8. Revision.</li> </ol> |
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### Other Topics (miscellaneous)

Court's powers as to production. See Note 1.	"Production" distinguished from "discovery or inspection." See Note 1.
Effect of non production. See Note 4.	
Mere production not evidence. See Note 1.	Third person not a party to the suit. See Note 1.

**1. Scope of the Rule.** — An order for production of documents under this rule is quite different from an order for discovery under Rule 12 or an order for inspection under Rule 18, *infra*,<sup>1</sup> or for an order for answering interrogatories under Rule 11, *ante*.<sup>2</sup> A party must set out every document in his possession or power where an order

#### Note 26

1. (33) 20 Cal 557 (59J)
2. (17) 3 Cal W N 435 (497)
3. (1871) 7 Ch 582 (591) *Kettlewell v Burrows*, (1883) 2 Ch 217 (213) *Pickering v Pickering* (1884) 54 L T 601 *Jones v Andrews*
4. (15) 23 Cal 117 (124)
- (73) 4 Cal 135 (80G)

#### 5. (01) 25 Cal 424 (126)

#### Order 11 Rule 18 — Note 1

1. (24) AIR 1924 Mad 582 (583) (Rule 21 inapplicable)
- (23) 112 Ind 1 Cas 255 (2-5) (All)
- (12) 114 Ind 31 (52) (All).
2. (22) AIR 1922 All 233 (237) 44 All 546 (1922) 21 inapplicable and defence not to be struck off)

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Notes 1-2

for discovery has been pressed against him, but he is not bound to produce them unless an order for production has been pressed against him.<sup>2</sup> An order for production can only be made after an order for discovery has been made under Rule 13.<sup>4</sup> The mere production of the documents does not give an immediate and indefensible right of inspection to the other party.<sup>5</sup> Nor does such document become *ipso facto* a piece of evidence in the case.<sup>6</sup>

Under this rule the Court acts of its own motion and not on the application of any party.<sup>7</sup> It cannot, however, delegate the exercise of the power under this rule to a commissioner.<sup>8</sup> No order should be made against a party unless he has directly or indirectly admitted the document to be in his possession or power<sup>9</sup> and unless such documents are in existence.<sup>10</sup> The words "at any time during the pendency of the suit" show that an order for production can be made even before the issues are framed.<sup>11</sup>

It was held in the undermentioned case<sup>12</sup> of the Bombay High Court that a Court has no discretion to refuse production unless the documents are privileged. But in a later case of the same High Court<sup>13</sup> it has been held that the Court has a discretion in compelling production of documents even though they are privileged. An order for production must be a written summons on the party for such production and not a mere verbal order.<sup>14</sup> It must not be a general order that all the documents in the defendant's possession should be produced<sup>15</sup> except where the general description is sufficient for the identification of the documents or books sought to be produced.<sup>16</sup>

Where the documents are produced in obedience to the order of the Court, the Court can deal with them in such manner as appears to it to be just.<sup>17</sup>

The power to compel the production of documents has been extended to tribunals acting under various local Acts.<sup>18</sup>

2. "Possession or power." — The words "possession or power, as a general rule mean exclusive possession."<sup>1</sup> They also mean legal possession,<sup>2</sup> i.e., a right and power to deal with the documents.<sup>3</sup> There is no power to compel a party to produce documents not in his control or possession, or documents the possession of which he has parted with before the date of the application. A person who claims a lien upon a deed has generally the right to refuse production thereof.<sup>4</sup> Where a Collector acts as

3 (1881) 451 730 (362) Swanton v. Lishman

4 (28) AIR 1928 Pat 397 (398)

5 (24) AIR 19 4 Vid 846 (846 847) 47 Mad 934

6 (21) AIR 1971 Loh 328 (330)

7 (20) AIR 1923 111 83 (83)

(69) 1889 Pun Re No 80 page 800

8 (09) 4 Ind Cas 364 (367) (Cal)

9 (20) AIR 1930 Pat 131 (135) 5 Pat L Jour 500

10 (12) 1892 Pun Re No 59 page 216

11 (07) 4 Ind Cas 364 (367) (Cal)

12 (78) 2 Ion 458 (456)

13 (05) 7 Bom L R 709 (711)

14 (1864) 1864 Suth V R (Qap No) 164 (165)

(98) 1898 Pun Re No 58 page 191

15 (98) 1898 Pun Re No 58 p 191

16 (22) 65 Ind Cas 661 (664) (Lab)

17 (07) 30 Mad 280 (280)

(98) 1898 Pun Re No 58 page 191

18. See Bengal Land Registration Act (VII of

1976) S 53 Bengal Sanitary Drainage Act

(VIII of 1905) § 23 Bengal Survey Act (V of

1875) S 50, the Calcutta Improvement Act (V

of 1911), § 71 (c) the Chota Nagpur Tenancy

Act (Bengal Act, VI of 1909), § 265 (3) the

Breach and Kaira Incumbered Estates Act

(Bombay Act VII of 1931) S 85, the Bombay

Local Boards Act (VI of 1903) S 123 (2), the

Sind Incumbered Estates Act (Bombay Act VI

of 1906) S 37 the Burma Boundaries Act

(V of 1880) S 15 the Burma Forest Act (IV of

1902) S 3 (b) the Orissa Tenancy Act (II of

1913) S 67 (10) the Oudh Taluqdars Relief

Act (XXIV of 1870) S 14 the Sikh Gurdwaras

and Shikses Act (Punjab Act VI of 1922) S 24

(4) the Bundelkhand Incumbered Estates Act

(U P Act I of 1903) S 34 the U P Town

Improvement Act (II of 1911) S 58 (c)

#### Note 2

1 (1872) 7 Ch App 312 Hadley v Macdougall

2 (1849) 1 Mac & G 697 (636) Reid v Langlois

(Cited in 1 Bom 496)

3 (1893) 10 QBD 465 (467) Kearsley v Phillips

(Cited in 9 Bom L R 569)

(1893) 1893 Cr J Ph 114 (125) Murry v Walker

(Cited in 1 Bom 496)

4 (1846) 7 Hare 299 (301 305) Griffith v Ricketts

(Cited in 5 B H C R (OC) 152)

(1869) 5 Bom H C R (OC) 152 (155)

the agent of the Secretary of State for India in Council in a particular suit, it cannot be said that every document in the possession of the Collector in one capacity or other is in his possession in his capacity as agent of the Secretary of State for India in Council in such suit. No order can therefore be made for the production of documents which are not in the possession of the Collector in his capacity as the agent of the Secretary of State for India in Council in the suit.<sup>6</sup> Documents filed in Court are not in the possession or power of a party, they are in the possession and power of the Court.<sup>6</sup>

3. "Relating to any matter in question in such suit." — The order under this rule is to be limited to such documents alone as relate to the *matters in dispute* and the Court must, before it makes the order, determine, for the purpose thereof, what are the matters in question in the suit.<sup>1</sup> Every document which will throw any light on the case comes within the meaning of these words.<sup>2</sup> Where, in a suit on a promissory note the defendant puts in no defence, it is impossible to say whether it is necessary to examine the plaintiff's accounts or not and hence, in such cases, there is no justification for an order directing the plaintiff to produce his accounts.<sup>3</sup> In a suit for accounts the Court cannot under this rule call upon the defendant to show in detail the income and expenditure of the estate in suit until the decision of the suit. In other words a Judge cannot invoke the aid of this rule for the purpose of *bringing into existence* a document which may be useful for the case.<sup>4</sup> Copies of income tax returns cannot be ordered to be produced under this Section as such returns are confidential documents under Section 54 of the Income tax Act.<sup>6</sup>

4. Effect of Sections 163 and 164 of the Evidence Act. — These Sections appear in the chapter dealing with the examination of witnesses at the trial of the suit. Under Section 163 when a party calls for a document which he has given the other party notice to produce and such document is produced and inspected by the former party, he is bound to give it as evidence if the latter party requires him to do so. Under Section 164, when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court. In the undermentioned case<sup>1</sup> the High Court of Madras raised, but did not decide, the question whether Section 163 was applicable to documents produced under the discovery procedure enacted in this rule or whether it only applied to documents produced after the trial had begun.

5. Waiver of privilege. — A party may waive his privilege and produce the documents for which he can claim exemption.<sup>1</sup> Such waiver may be either with reference to the *whole* document or to a *portion* thereof.<sup>2</sup> Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit and then sets up these facts by way of answer to the plaintiff's claim he cannot afterwards contend that the documents are confidential and intended

5. (37) AIR 1939 Mad 52 (52, 53)

II (36) AIR 1936 Nag 190 (191) I L R (1936) Nag 142

**Note 3**

1 (OJ) 4 I L R 361 (366) (Cal) (Relating to matters in question in such suit)

(1884) 11 Q B D 55 (62) Compagnie Financière Péruvienne et du Chili

(12) 11 L R 51 (57) (Cal)

(1884) 11 Q B D 55 (62) Compagnie Financière Péruvienne et du Chili

3 (37) AIR 1937 Nag 13 (137) I L R (1937)

Nag 266 (Until it is known what the plea is and what the points at issue are it is impossible to say that the plaintiff's accounts are relevant)

4 (19) 14 Ind Cas 51 (52) (Cal)

5 (35) AIR 1933 Lang 276 (77) 1933 Rang. L R 211

**Note 4**

1 (23) AIR 1923 Mad 607 (608)

**Note 5**

1. (1884) 11 Q B D 55 (62) Compagnie Financière Péruvienne et du Chili

2. (1884) 11 Q B D 55 (62) Compagnie Financière Péruvienne et du Chili

O. 11 R. 14  
Notes 5-8

merely for his legal advisers or for the purpose of evidence in the case,<sup>3</sup> but the fact that a portion of a privileged document is read to the plaintiff's solicitor by the defendant's solicitor does not amount to a waiver of the privilege as regards the parts not so read.<sup>4</sup>

**6. Partner.** — One partner of a firm represents the other partners for the purpose of production of documents<sup>1</sup> and a notice to one is notice to all the defendants when they are sued as a firm.<sup>2</sup>

**7. Copies of documents produced, if can be taken.** — See Rule 15 below

**8. Revision.** — Orders granting<sup>1</sup> or refusing<sup>2</sup> production are discretionary orders which will not be interfered with in revision except where the lower Court has not understood the provisions of the rule<sup>3</sup> or has acted on an erroneous assumption<sup>4</sup> or makes the order without jurisdiction<sup>5</sup> or under such circumstances as are likely to cause irreparable injury to one of the litigants.<sup>6</sup>

## O. 11 R. 15

**R. 15.** [S. 131.] Every party to a suit shall be entitled

Inspection of documents referred to in pleadings or affidavits.

at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

[1877, S. 131; R. S. C., O. 31 R. 15. See R. 16.]

*Synopsis***1. Scope of the Rule.****2. "At any time"****3. Documents referred to in the pleadings or affidavits**

3. (95) 22 Cal 105 (111)

4. (180) 4 Bom 681 (684)

**Note 6**

1. (176) 1 Bom 496 (499)

(22) 15 Ind Cas 661 (661) (Lah)

2. (22) 15 Ind Cas 661 (664) (Lah)

**Note 8**

1. (86) 9 Mad 246 (257)

(11) 12 Ind Cas 506 (507) (Lah).

**4. Who can inspect under this rule.****5. Copies of documents produced, if can be taken.**

2. (11) 2 Ind Cas 672 (672) (Mad)

(07) 30 Mad 230 (230)

3. (24) AIR 1924 Mad 846 (846) 47 Mad 934

4. (189) AIR 1939 Mad 52 (53)

5. (134) AIR 1938 Rang 276 (277) 1938 Rang L R 243 (Order for obtaining and producing copies of income-tax returns—Order is without jurisdiction)

6. (03) 4 Ind Cas 364 (367) (Cal)

*Other Topics (miscellaneous)*

Order not revisable See Notes 1 and 2

Right to seal a portion See Note 3

O. 11 R. 18  
Note 1~

**1. Scope of the Rule.**— Rules 15 to 18 deal with inspection of documents. Documents may, for the purposes of inspection, be divided into two classes —

- (1) Documents *referred to in the pleadings or affidavits* of the parties
- (2) Other documents in the possession or power of the party but *not so referred to*

As regards the *first* class of documents a party may, without the intervention of the Court, give notice to the party in whose pleadings they are referred to, to produce such documents for his inspection (Rule 15). The party to whom such notice is given should, within ten days from the receipt of such notice, give notice to the party claiming such inspection stating the time and place at which the documents may be inspected and stating his objections, if any, to the production of any of the documents (Rule 17). If he fails to do so in the manner required by Rule 17, the other party may apply to the Court for an order for such inspection [Rule 18, sub rule (1)], and the Court should grant such inspection unless the documents are privileged in law or relate exclusively to the case of the party producing them and contain nothing supporting or tending to support the opponent's case<sup>1</sup>.

As regards the *second* class of documents the party desiring the inspection can only proceed by way of an *application to the Court* along with an *affidavit showing the relevancy of the documents*<sup>2</sup>.

A Court has no jurisdiction to order inspection of documents except as provided in Rules 15 to 18<sup>3</sup>. The privilege of inspection by a party of his adversary's documents is not a matter of routine but is to be permitted or refused only on *judicial considerations* and so as to result in as little harm as possible to the parties who are entitled to have the protection of the Court in carrying on their lawful pursuits<sup>4</sup>. The object of the rule is to give the opposite party the same advantage as if the documents had been fully set out in the pleadings<sup>5</sup>.

By referring to a document in his pleadings a party does not lose the privilege that he might have claimed in respect of the document. The only result of such reference is that, if the party referring to it fails to produce it for inspection to the other side on notice, he cannot use it in evidence at the trial. Even in such a case, the Court may, if sufficient cause is shown by the defaulting party, allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit<sup>6</sup>. Where documents are objected to on the ground of immateriality the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality<sup>7</sup>. A party who fails to comply with a notice under this rule is not absolved from the penalty prescribed thereby merely because the party giving the notice has not proceeded to apply to the Court for an order for inspection under Rule 18 *infra*<sup>8</sup>.

**Order 11 Rule 18.—Note 1**

1 (07) 30 Mad 230 (230) (Order refusing inspection)

2 (1) 111 Cal 18

3 (38) AIR 1934 Nag 239 (240)

4 (See O.S. 3, 14, 15, 154)

5 (0) 41 Cal 312 (30)

6 (21) AIR 1911 Mad 184 (147) 47 Mad 931

7 (41) 10 Cal 204 (215)

8 (162) 11 Bom HC R 114 (117) (Case of next

of him entitled to succeed but for the will)

1 In 1 Jur (NS) 873

2 (35) AIR 1935 Mad 231 (236) (Object of the rule is that a party is not to have accounts sprung on him at the time of trial the contents of which he had no opportunity to acquaint himself with beforehand)

3 (71) 17 Bom 291 (351)

4 (01) 3 Cal 474 (47)

5 (25) AIR 1935 Mad 231 (237)

D. 11 R. 17

**R. 17. [S. 132.]** The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

[R S C, O 31 R 17]

*Synopsis*

1 Scope of the Rule

2 "Usual place of custody."

3 Bankers' books. See Order 7 Rule 17 and Rule 18 of this Order

**1. Scope of the Rule.** — This rule only comes into operation after a notice under Rule 15 has been given. It applies to all documents mentioned in Rule 15<sup>1</sup>. In *Diary v. Lim Pershad* it has been held by the High Court of Calcutta that the correct rule of procedure is that if a party does not desire to produce documents he should refrain from delivering the notice under the rule but wait to see if the plaintiff applies under Rule 18. It has also been held that, when the notice was served at a time when the suit was stayed the ten days time begins to run only from the date the suit is revived.

**2. "Usual place of custody."** — This rule clearly specifies the place of inspection with regard to bankers' books and business books. The words in the old Code "some other convenient place" gave room for discussion and controversy which has now been removed. Where, in a suit instituted in Bombay for breach of a contract to gin cotton in the defendant's mill at Broach, the plaintiff applied for inspection of the defendant's account books in Bombay but the defendant offered to give inspection in Broach it was held that the latter place was the place where the books were kept and was the proper place for inspection<sup>2</sup>. The Court is not a proper place to offer the inspection of account books<sup>3</sup>.

**3. Bankers' books.** — See Order 7 Rule 17 and Rule 18 of this Order

D. 11 R. 18

**R. 18. [Ss. 133, 134]** (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the

Order for inspection.

Order 11 Rule 17 — Note 1

1. (1897) 1 QB 667 (669, 670), *Re Fumner and Lord*  
2. (87) 14 Cal 769 (777)

Note 2

1. (61) 5 Bom 467 (469)  
2. (35) AIR 1935 Mad 231 (235)

Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

O. 11 R. 18  
Note 1

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[1877, Ss. 133, 134; R. S. C., O. 31 R. 18.]

### Synopsis

- |                                     |                                 |
|-------------------------------------|---------------------------------|
| 1. Scope of the Rule.               | 4. Appeal.                      |
| 2. Discretion of Court              | 5. Bankers' Books Evidence Act. |
| 3. Convenient place for inspection. |                                 |

### Other Topics (miscellaneous)

Denial of possession or power conclusive See Note 1  
Notice prior to order under sub rule (2) See Note 1

**1. Scope of the Rule.** — Sub rule 1 of this rule deals with inspection of documents referred to in the pleadings or affidavits of the parties. Sub rule 2 deals with inspection of documents other than those mentioned in sub-rule 1. The difference between the two cases is that, in the case of documents not mentioned in the pleadings or the affidavits, an affidavit has to be filed by the applicant satisfying the Judge that the document is relevant to the case<sup>1</sup>. In the case of documents so mentioned, the relevancy is admitted while in the other case, the relevancy has to be proved<sup>2</sup>. The filing of the affidavit under sub rule 2 is, however, not always necessary, when the Judge is satisfied as to the relevancy of the document, at any rate, the want of an affidavit cannot invalidate an order passed under this rule<sup>3</sup>. On the other hand, the filing of an affidavit does not entitle a party immediately to an order for inspection<sup>4</sup>. The Court should give the opposite party an opportunity of replying by an affidavit the application for inspection, and if the opposite party swears an affidavit that the documents are not in his possession or power, the Court will regard this as final and conclusive<sup>5</sup>. This is in consonance with the general rule that the Courts will not go

### Order 11 Rule 18 — Note 1

1. (31) AIR 1331 All 221 (222) 53 All 442  
(8) 21 Cal 117 (125)  
[See also (0) 11 Q5 All W N (2) (22)]  
2. (31) AIR 1331 All 221 (222) 53 All 442  
3. (31) AIR 1331 All 221 (222) 53 All 442



behind the oath of the party against whom inspection is sought<sup>6</sup>

An order under sub rule 1 cannot be made unless notice has been given under the provisions of R 15<sup>7</sup> and no party is entitled to an inspection of documents not referred to in the pleadings or affidavits without an order under sub-rule 2<sup>8</sup>. Nor is he entitled to a roving commission into papers belonging to the other side, the inspection must be restricted to such specific documents as the applicant names and which are relevant to his case<sup>9</sup>. A party who fails to comply with a notice under Rule 15 above incurs the penalty prescribed thereby. The fact that the party giving the notice has not proceeded to apply to the Court under sub-rule 1 of this rule for an order for inspection does not negative the liability for the penalty laid down by Rule 15<sup>10</sup>.

Where parties require the inspection or production of telegraphic messages, it is for them and not the Court to obtain the necessary sanction from Government.<sup>11</sup>

**2. Discretion of Court.** — Under sub rule 1, the Court has a discretion limited to the terms of the proviso in making an order for inspection and the onus rests on the party requesting in order to show that it should not be made in the special circumstances of the case but it would not be a proper exercise of discretion to refuse inspection on the general ground that it was sought before the written statement was filed nor on the mere number of the documents afford any guide to the exercise of discretion<sup>1</sup>.

**3. Convenient place for inspection.** — In deciding a question as to the place where the inspection of documents is to be given, the Court should be guided by the balance of convenience<sup>1</sup>. See also Order 11 Rule 17 and Notes thereto.

**4. Appeal.** — No appeal lies under the Code from an order for inspection under this rule nor does it lie under Clause 15 of the Letters Patent, as an order directing inspection to be given is not a judgment<sup>2</sup>.

**5. Bankers' Books Evidence Act.** — The main object of this Act is to enable evidence to be procured and given<sup>1</sup> and to relieve bankers from attendance in Court with their books<sup>2</sup>. The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted<sup>3</sup>.

(24) AIR 1924 All 510 ('11) 31 All 417 ('11) 12 Ind Cas 12 ('13) 38 Cal 429 (But he can not merely rely on his previous affidavit if documents in answer to an application under this sub rule.)

[See also (98) 2 Cal W N 17 (18) (Falsity of denial of possession can be elicited at trial and then inspection ordered)]

6. (1890) 21 Q B D 537 (541), Wiedeman v Walpole

7. (26) AIR 1926 Sind 272 (272) 20 Sind L R 309 ('87) 14 Cal 768 (776, 777)

(84) 10 Cal 56 (58)

8. (12) 14 Ind Cas 51 (52) (All)

9. (28) AIR 1928 Mad 1093 (1094) ('17) 14 Ind Cas 371 (372) (Lah) (Exposure of trade secrets)

10. (35) AIR 1935 Mad 234 (235) (There is absolutely nothing in Rule 18 to suggest that it is a pre-requisite to Rule 15)

11. (70) 2 N W P H C R 210 (314)

NOTE 2

1. (31) AIR 1931 Mad 825 (828) 55 Mad 421 [See also (32) AIR 1932 Mad 254 (255, 256, 257) 55 Mad 704 (Inability to particularise instances of fraud or error under O G R 4 is no ground for refusing inspection of accounts of opposite side—Nor lateness of application which can be met by order for costs if there is no prejudice)]

NOTE 3

1. (35) 39 C W N 667 (668) 164 Ind Cas 701

NOTE 4

1. (72) 9 Bom H C R 394 (408, 412) (93) 2 Ind Cas 167 (167) (Bom)

NOTE 5

1. (1892) 72 L J Q B 77 (77), Fmott v. Star Newspaper Co

(1913) 29 F L R 635 R v Bona

2. (1892) 19 J P 127 (139) Parwell v Wood (Cited in 5 Bom L R 855)

3. (1924) 2 K B 759 (763), Waterhouse v Barker (1924) 2 K B 759 (764), Waterhouse v Barker.

**R. 19.** [New] (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original

Verified copies

books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations. Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them

[R S C, O 31 R 19A.]

*Synopsis*

- 1 Scope of the Rule
- 2 Inspection by the Judge — Sub rule (2)
- 3 Specific documents — Sub rule (3)

1 Scope of the Rule — Sub rule (1) applies particularly to bankers' books<sup>1</sup>

2 Inspection by the Judge — Sub-rule (2) — This rule gives the Court power to inspect any document for which privilege is claimed so as to decide whether the claim is justified, the object being that such claims ought to be decided at once in

Order 11 Rule 19—Note 1

Note 2

<sup>1</sup> 11th Edition of Laws of England Vol 11  
page 1

<sup>1</sup> (1915) 34 B & C 111 (n) 111 etc., M. 100  
Oren 1915 C. 111 111 etc.

O. 11 R. 19  
Notes 2-3

proper cases<sup>2</sup> The power exists even in respect of state documents and official communications and notwithstanding a certificate from a Minister of State claiming protection, provided of course that such power be exercised so as not to destroy the protection of the privilege in any case in which it may be found to exist<sup>3</sup> The word "document" includes also a sealed-up portion of a document<sup>4</sup>

**3. Specific documents — Sub-rule (3).**—The rule enlarges the power to order discovery<sup>1</sup> In order to justify an application under this sub rule, the affidavit must name and specify the documents in such a manner as to identify them, an affidavit in a general form containing an argument that the document must be in the possession or power of the opposite party is not sufficient<sup>2</sup> A *prima facie* case of relevancy and possession of the specific document is, however, sufficient to entitle the applicant to the order<sup>3</sup>

O. 11 R. 20

**R. 20. [S. 135.]** Where the party from whom discovery

Premature discovery.

of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

[1877, S. 135; R. S. C., O. 31 R. 20.]

**1. Scope of the Rule.** — The general principle of discovery is that discovery should not be granted beyond the exigency of the question in issue It is also desirable to obviate the necessity of a troublesome inspection and discovery which would very much increase the costs of the suit This rule empowers the Court to determine an issue for the exclusive purpose of deciding the right to discovery of documents which is to be used at the trial<sup>1</sup> The Court has also a discretion to postpone discovery or inspection until some issue in the suit is determined<sup>2</sup> The rule, however, does not apply where discovery is wanted for the determination of the issue in the suit<sup>3</sup> An order under this rule is not a 'judgment'

2 (1892) 2 Q B 200 (Q B)

3

4

1. (1910) 1 K B 904 (915) Kent Coal Concessions v Duguid

2. (1901) 2 KB 241 (245) White v Spaffora & Co (1901) 18 T L R 115, Graves v Heinemann and Armstrong

(1911) 1911 W N 34 (34) Huntly v Backworth Collieries

3. (1907) 95 L T 694, Ormerod v St George's Iron Works (A case of a letter produced referring to another letter)

**Order 11 Rule 20—Note 1**

1. (82) 6 Bom 572 (578)

(1881) 18 Ch D 477 (483), Purkar v Wells.

2 (1892) 2 Q B 200 (Q B)

3 (1884) 26 Ch D 717 (721) Whyte v Ahren

3 (1886) 31 Ch D 374 (377) Letch v Abbott

4 (1892) 2 Q B 200 (Q B)

5 (1901) 2 KB 241 (245) White v Spaffora & Co

6 (1901) 18 T L R 115, Graves v Heinemann and Armstrong

7 (1911) 1911 W N 34 (34) Huntly v Backworth Collieries

8 (1907) 95 L T 694, Ormerod v St George's Iron Works

9 (A case of a letter produced referring to another letter)

10 (82) 6 Bom 572 (578)

11 (1881) 18 Ch D 477 (483), Purkar v Wells.

12 (1892) 2 Q B 200 (Q B)

13 (1884) 26 Ch D 717 (721) Whyte v Ahren

14 (1886) 31 Ch D 374 (377) Letch v Abbott

15 (1892) 2 Q B 200 (Q B)

16 (1901) 2 KB 241 (245) White v Spaffora & Co

17 (1901) 18 T L R 115, Graves v Heinemann and Armstrong

18 (1911) 1911 W N 34 (34) Huntly v Backworth Collieries

19 (1907) 95 L T 694, Ormerod v St George's Iron Works

20 (A case of a letter produced referring to another letter)

**R. 21. [S. 136.]** Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly. **O. 11 R. 21**

Non-compliance with order for discovery.

any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

[1877, S. 136; R. S. C., O. 31 R. 21. See Rr. 11, 12 and 18.]

### Synopsis

- |                            |  |
|----------------------------|--|
| 1. Scope of the Rule.      | 4 Review.  |
| 2. Committal for contempt. | 5. Order, if can be set aside under O 9 R. 9 or Rule 13. |
| 3. Appeal.                 |  |

### Other Topics (miscellaneous)

Conditions needed for order under this rule See Note 1  
 Leave under R 2 not an "order to answer" See Note 1  
 Non applicability of the rule to production of documents See Note 1

**1. Scope of the Rule.**—There are only three grounds upon which a trial Court is justified, under this rule, in striking off the defence of the defendant or dismissing the suit of a plaintiff, namely—

- (1) the refusal to answer interrogatories under R 11,
- (2) the refusal to make discovery of documents under R 12, and
- (3) refusal to permit inspection of documents under R 18.

In the absence, therefore, of an order under Rules 11, 12 or 18 and the disobedience thereof by the party against whom the order is made, the Court cannot act under this rule<sup>1</sup>. An order for *production* of documents under Rule 14 is not one of the orders mentioned in this rule, the word "production" which occurred after the word "discovery" in Section 136 of the old Code having been omitted in the present rule. There is, however, a difference of opinion as to whether a disobedience of an order for *production* under Rule 14 would empower the Court to take action under this rule. The High Court of Allahabad,<sup>2</sup> Madras<sup>3</sup> and Lahore<sup>4</sup> have held that the Court has no such

### Order 11 Rule 21 — Note 1

65

Failure

under Rule 2 is not an order to answer)  
 (15) AIR 1915 All 196 (196) (Suit can be dismissed for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleading or affidavit.)

2. (22) AIR 1922 All 235 (237) 41 All 563  
 (24) 112 Ind Cas 285 (2-5) (All)

(29) AIR 1929 All 53 (54)

3. (21) AIR 1924 Mad 582 (5-3)

(33) AIR 1933 Ma 1 670 (1-0)

4. (33) AIR 1933 Lah 213 (210)

(Do)

O. 11 R. 21  
Note 1

power, while an opinion in the nature of *obiter dictum* has been expressed by the High Court at Lahore in the undermentioned case<sup>5</sup> that the Court has such power. The Court cannot strike out the defendant's defence for his failure to file a *written statement* as directed by the Court<sup>6</sup> or to appear for examination as a witness for the opposite side.<sup>7</sup> Nor can it be struck off for failure of the legal representative of a deceased defendant to comply with an order against the said defendant.<sup>8</sup>

The Court cannot, under this rule, act of *its own motion*, but can only do so on the application of the parties.<sup>9</sup> And even where the parties apply for an order under this rule the Court should not impose the penalty except in extreme cases and as a last resort.<sup>10</sup> It should be ordered only where the Court is satisfied that the party is avoiding a fair discovery<sup>11</sup> or is guilty of wilful default.<sup>12</sup> The word "wilfully" means that the act is done deliberately and intentionally and not by accident or inadvertence.<sup>13</sup> Thus, where the time allowed by law to answer interrogatories (ten days) has not expired and the defendant asks for further time, an order striking off the defence is improper.<sup>14</sup> Similarly the failure to produce one out of many books ordered to be produced,<sup>15</sup> or the non production of account books by a minor defendant,<sup>16</sup> or the failure to produce documents by a *pardanashin* lady,<sup>17</sup> or where the plaintiff is not in a position to make an affidavit of documents as ordered, the Court should not inflict the penalty under this rule.<sup>18</sup> An order for giving inspection "forthwith" must be complied with within a reasonable time after the order.<sup>19</sup>

Order 11 Rule 14 contemplates an order for the production of documents which are in the possession or power of the party ordered to produce them. Where the documents have been filed in Court, they cannot be said to be in the possession or power of the party. Hence in respect of such documents, the Court has no power to take action under Rule 14 and this rule.<sup>20</sup>

On an application made for taking action under this rule, the Court should give an opportunity to the other side to put in his reply, an order dismissing the suit or striking off the defence without giving such opportunity is improper.<sup>21</sup>

The terms of the rule contemplate *two* orders, *first* an order under Rr 11, 12 or 18, and *secondly*, upon the failure to comply therewith a *further* order dismissing the suit or the striking off the defence.<sup>22</sup> But a conditional order for dismissal of the suit or for striking off the defence on failure to comply with the orders for interrogatories discovery or inspection cannot be said to be without jurisdiction.<sup>23</sup> Where

5 (22) 65 Ind Cas 661 (664) (Lah)

6 (92) 1892 Pun Re No 59, page 216

7 (11) 12 Ind Cas 719 (719) (Mad)

8 (25) AIR 1925 Bom 386 (387)

9 (89) 1889 Pun Re No 50 page 300

(92) 1892 Pun Re No 59 page 216

(10) 11 Ind Cas 215 (245) (Lah)

10 (83) 9 Cal 923 (925)

(98) 1898 Pun Re No 50 page 164

(22) 65 Ind Cas 661 (664) (Lah)

(20) AIR 1920 Pat 131 (135) 5 Pat L Jour 530

(80) 5 Cal 707 (710)

vitch

19 (39) AIR 1915 Cal 343 (356) I L R (1915) 2 Cal 14

20 (36) AIR 1936 Nag 130 (131) I L R (1936) Nag 142

21 (24) AIR 1924 All 510 (511) 46 All 417

(25) AIR 1925 Bom 386 (387)

(21) AIR 1924 Cal 606 (608)

22 (25) AIR 1925 Cal 166 (168)

23 (83) 9 Cal 923 (925)

the defendant fails to comply with an order for discovery, an order allowing him to defend the suit but shutting out all his evidence is not a proper order, the case should be dealt with under this rule and the defence struck out.<sup>24</sup> The infliction of the penalty imposed by this rule after the *whole trial is closed* is improper,<sup>25</sup> nor can a Court of appeal punish a party under this rule where the Court of first instance has not taken any action thereunder.<sup>26</sup> Where a suit has been referred to arbitration and the arbitrators call upon a party to produce certain documents, the proper remedy of the party seeking discovery is to apply to the Court to have the proceedings stayed or the suit dismissed or the defence struck out; the arbitrators are not bound, of their own initiative to refuse to proceed until the order is complied with.<sup>27</sup>

The last paragraph of Section 136 of the old Code which made the defaulting party liable to a prosecution under Section 188 of the Penal Code<sup>28</sup> has now been omitted. A disobedience of an order for production or inspection can now be dealt with only in the manner prescribed by this rule and is not punishable under the Penal Code.<sup>29</sup>

A Registrar of the High Court has no power under the High Court Rules to dismiss a suit under this rule.<sup>30</sup>

**2. Committal for contempt.** — The Chartered High Courts have, under powers conferred on them by the Letters Patent, power to commit a party to a suit filed in such High Court who has failed to obey an order for discovery or inspection, for contempt of Court.<sup>1</sup> According to the High Court of Bombay an appeal lies from an order of committal for contempt.<sup>2</sup> According to the High Court of Allahabad no such appeal lies.<sup>3</sup>

**3. Appeal.** — Under the old Code, an order under this rule was appealable as a decree.<sup>1</sup> Under O 43 R 1 (f) of the present Code such an order is appealable only as an order.<sup>2</sup> An order under this rule includes an order dismissing a suit or striking off a defence as well as an order refusing to dismiss the suit or to strike off the defence in either case it is open to appeal.<sup>3</sup> But where the Court acts without jurisdiction in passing an order under this rule as where it dismisses a suit for failure to comply with an order to produce documents under Rule 14, the order cannot be said to be one passed under this rule, the dismissal in such a case will be a decree and will be appealable as such.<sup>4</sup> Again, where an order, though purporting to be passed under this rule is really and in substance one under O 6 R 5, no appeal lies therefrom.<sup>5</sup>

2 (83) 7 Bom 5 (12, 15)

3 (90) 27 All 990 (331)

Note 3

1 (93) 1899 Pun Re No 43 page 151

(90) 19 Bom 307 (303)

(85) 7 All 159 (160)

2 (25) AIR 1925 Rang 219 (216) 3 Rang 63

(32) AIR 1933 Mad 316 (316-317) (Appeal against the order under Order 43 will lie no with standing that it has resulted in the dismissal of the suit)

3 (30) AIR 1930 Cal 470 (427)

4

5

Note 2

1 (28) AIR 1 Cal 117 (118) 55 Cal 1110

(83) 1-1-1 (14)

(83) 1-1-1 (13)

**O. 11 R. 21**  
**Notes 3-5**

Where a party appeals from an order under this rule in ignorance of the fact that a decree has been passed in the suit itself, the proper procedure is to treat the appeal as one from the decree itself<sup>6</sup>

**4. Review.** — Where a suit is dismissed for want of prosecution under this rule, the remedy of the aggrieved party is by appeal or by review under the provisions of Order 47<sup>1</sup> Where, however, the provisions of Order 47 do not apply to the particular order in question, the Court cannot review it under its inherent powers under Section 151 of the Code<sup>2</sup>

**5. Order, if can be set aside under O. 9 R. 9 or R. 13.** — An order under this rule cannot be set aside under the provisions of Order 9,<sup>1</sup> General

**O. 11 R. 22**

**R. 22. [New.]** Any party may, at the trial of a suit, use

Using answers to interrogatories at trial

in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last mentioned answers ought not to be used without them, it may direct them to be put in.

[R. S. C., O. 31 R. 24.]

**1. Using interrogatories at the trial.** — The answers to interrogatories are only affidavits and are not by themselves evidence<sup>1</sup> The party wishing to use them must put them in evidence in the ordinary way<sup>2</sup> They are, when so put, evidence against the party answering them, though great caution should be exercised in using them as such<sup>3</sup>

**O. 11 R. 23**

**R. 23. [New.]** This Order shall apply to minor plaintiffs

and defendants, and to the next friends and guardians for the suit of persons under disability.

[R. S. C., O. 31 R. 29.]

**1. Application of Order to minors and lunatics.** — This rule is new Under the old Code, there was a conflict of decisions as to whether the Sections corresponding

6. (12) 14 Ind Cas 637 (639 639) (Low Bur)  
Note 4

1. (25) AIR 1925 Rang 218 (218) 3 Rang CS  
art

2

1. (25) AIR 1925 Rang 219 (218) 3 Rang CS

(98) 2 Cal W N 676 (679)

[See also (32) AIR 1932 Bom 271 (272) (Court can act under S. 151 of the Code)]

Order 11 Rule 22 — Note 1

1. (79) 4 Cal 836 (837)

2. (80) 10 Dom 167 (171)

3. (18) AIR 1918 Mad 1108 (1107)

(1911) 2 Ch 71 (77), Nash v Layton

to this Order applied to minors and lunatics<sup>1</sup> This rule has now made it clear that the Order does apply to them also Hence, where the guardian of a minor defendant fails to comply with an order for discovery, the Court is competent to pass an order under Rule 21 *ante* against the minor defendant by virtue of this rule.<sup>2</sup>

O. 11 R. 23  
Note 1

## ORDER XII.

### ADMISSIONS

**R. 1. [New.]** Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

O. 12 R. 1

Notice of admission of case.

[R. S. C., O. 32 R. 1.]

### Synopsis

- |                         |                                 |
|-------------------------|---------------------------------|
| 1. Scope of the Rule.   | 4. Withdrawal of admissions.    |
| 2. Kinds of admissions. | See Rule 2                      |
| 3. Admission by minor.  | 5. Costs. See Rules 2, 4 and 9. |

**1. Scope of the Rule.** — Under Section 58 of the Evidence Act, facts admitted need not be proved The adoption of the procedure provided in this Order would result in saving the costs of such proof and in cheapening and shortening litigation<sup>1</sup> Further, admissions are the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission<sup>2</sup>

Admissions must be taken *as a whole* or not at all<sup>3</sup> If made subject to a condition, they must be accepted with that condition<sup>4</sup> But where one portion of a claim is admitted and the other portion denied, the plaintiff is entitled to ask for a judgment on the admitted portion and proceed to trial on the other, there is no rule that he should accept *both* the admission and the denial or must ignore the admission and proceed to trial<sup>5</sup> The value of an admission is, however, limited by its relevancy under the Evidence Act, and a judgment based upon irrelevant material will not be upheld<sup>6</sup> Where the lower Court in its judgment makes a statement that certain admissions were made, the Appellate Court will not lightly doubt the statement<sup>7</sup> The question whether there is a *cause of action* does not depend upon the admission of the defendant, but when the plaint discloses a cause of action, the plaintiff is entitled

{ 80 } 10 Bom 167 (171 172) (No)  
{ 95 } 22 Cal 891 (896, 897) (No)  
2. { 35 } 39 Cal W N 1029 (1030).

{ 30 } 61 Cal L Jour 50 (52)  
{ 30 } 61 Cal L Jour 50 (52) 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

#### Order III Rule 1 — Note 1

1 See Statement of Objects and Reasons.  
2 { 14 } AIR 1914 P C 220 (221) (P C)  
3 { 20 } 71 Ind 270 (271) (Mal)  
{ 30 } AIR 1932 Cal 53 (40)  
{ 24 } AIR 1924 Nag 129 (131) - 20 Nag L R 63  
{ 37 } AIR 1937 Pat 415 (421)  
{ 33 } AIR 1935 Pat 24 (25)

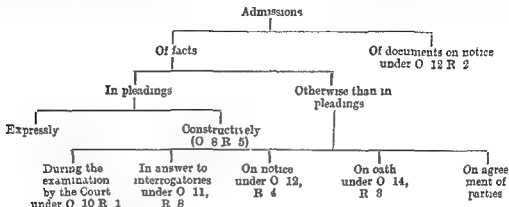
son )  
{ 20 } AIR 1926 M 1 2-2 (253)  
7. { 21 } AIR 1921 Cal 5-4 (5-11)  
8. { 21 } AIR 1921 Pat 2-0 (2-0).



O. 12 R. 1  
Notes 1-5

Section 97 of the Estates Partition Act (Bengal Act V of 1897) renders provisions of the Code as to compelling production of documents applicable to enquiries under the said Act

**2. Kinds of admissions.** — The following tabular statement shows the various kinds of admissions *after* suit that may be made As to admissions *before* suit, see Sections 17 to 31 of the Evidence Act



**3. Admission by minor.** — A minor defendant cannot make a valid admission where a guardian *ad litem* has been appointed for him in the suit<sup>1</sup> In the undermentioned case<sup>2</sup> in which a minor and his father were made co defendants to a suit and an admission was made by the father on a matter on which the father was best qualified to speak and the minor who was represented by a pleader did not deny the admission, it was held that the minor was bound by the admission See also Order 8, Rule 5, Note 3

**4. Withdrawal of admissions.** — See Rule 2, *infra*

**5. Costs.** — See Rules 2, 4 and 9

O. 12 R. 2

**R. 2. [S. 128.]** Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

[R. S. C., O. 32 R. 2.]

### Synopsis

1. Object of the Rule
2. Form of notice. See Rule 3
3. Notice to admit facts See Rule 4

4. Admissions between co-defendants.
5. Withdrawal of admission.

### Note 3

1. (16) 32 Ind Cas 368 (368) (U P B R)
2. (36) AIR 1936 Pat 428 (429).

**1. Object of the Rule.** — The object of the rule is to save the expense of producing, at the trial, evidence as to the documents which are admitted

O. 12 R. 2  
Notes 1-5

**2. Form of notice.** — See Rule 3 below.

**3. Notice to admit facts.** — See Rule 1 below.

**4. Admissions between co-defendants.** — Admissions between co-defendants to which the plaintiff is not a party cannot be used as evidence against the plaintiff, or be included in an order for taxation of the general costs of the action<sup>1</sup>

**5. Withdrawal of admission.** — Leave may be given to withdraw or amend any admissions made by a party, on such terms as may appear just to the Court. Thus, an admission made under a mistake may be allowed to be withdrawn and the plaint amended<sup>1</sup>. But, except under special circumstances, an admission forming the foundation of a judgment should not be allowed to be withdrawn in appeal<sup>2</sup>. An admission on a mixed question of law and fact cannot be allowed to be withdrawn in second appeal<sup>3</sup>.

**R. 3. [New.]** A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

O. 12 R. 3

Form of notice.

[R. S. C., O. 32 R. 3.]

**R. 4. [New.]** Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party

O. 12 R. 4

Notice to admit facts.

to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

[R. S. C., O. 32 R. 4]

Order 12 Rule 2 — Note 4

Barton

1. ('84) 25 Ch D 617 (619), *Dodds v Take*

2. ('25) AIR 1925 P C 150 (154) (P O)

Note E

1. ('92) 3 Ch 226 (236, 237), *Hollis v.*

3. ('35) AIR 1935 Oudh 163 (164)

O 12 R 4  
Notes 1-2

### Synopsis

#### 1 Scope of the Rule | 2 "Any other party"

**1. Scope of the Rule** — This rule provides for notice to admit *facts* as the two previous rules provide for notice to admit *documents*. The penalty for refusing to admit facts pursuant to a notice given under this rule is that the party receiving the notice may be ordered to pay the costs occasioned by proving the facts which ought to have been admitted. A notice to admit facts may be given even before the defence is filed.<sup>1</sup>

**2 "Any other party"** — It is obvious that only opposite parties can be meant.<sup>1</sup> For the meaning of opposite party see Note 11 to Order 11 Rule 1.

O. 12 R 5

**R. 5.** [New] A notice to admit facts shall be in Form No 10 in Appendix C, and admissions of facts shall be in Form No 11 in Appendix C, with such variations as circumstances may require.

[R S C, O 32 R 5]

O 12 R 6

**R. 6.** [New] Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may upon such application make such order, or give such judgment, as the Court may think just.

[R S C, O 32 R 6]

#### Local Amendments

##### MADRAS

1 *Re number* the existing Rule 6 as sub rule 6 (1) and *insert* the following as sub rules (2) and (3)

(2) The Court may also of its own motion make such order or give such judgment as it may consider just having due regard to the admissions made by the parties

(3) Whenever an order or judgment is pronounced under the provision of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced

#### Order 12 Rule 4 — Note 1

1 (1883) 1888 W N 198 (198) Crawford v Chorley

#### Note 2

1 (1853) 16 Q B D 195 (128) Brown v Watkins (Per Mathew J)

PATNA

O 12 R 6  
Note 1*Substitute the following for Rule C in Order 12*

6 Where admissions of fact have been made either on the pleadings or otherwise the Court may at any stage of a suit on the application of any party or of its own motion without waiting for the determination of any other question between the parties make such order or give such judgment as it may think just

RANGOON

*Substitute judgment decree or order for the words judgment or order and and the Court may either upon such application or upon its own motion give such judgment or make such decree or order as the Court may think just for and the Court may just*

*add the following as sub rule (2)*

(2) A decree or order passed under this rule may be executed at any time notwithstanding that other questions between the parties still remain to be decided in the case

*Synopsis*

- |  |   |
|--|---|
| 1 Scope of the Rule                              | 6 Admissions made otherwise than on pleadings |
| 2 At any stage "                                 | 7 English practice                            |
| 3 Admissions on pleadings                        | 8 Co plaintiffs                               |
| 4 Court may make such order as it may think just | 9 Judgment if should be followed by a decree  |
| 5 Orders that may be passed under this Rule      | 10 Appeal                                     |

1 Scope of the Rule — A party can under this rule move for a judgment upon the admissions made by the opposite party and thus get rid of the portion of the action in which there is no dispute<sup>1</sup> The object is to enable a party to obtain speedy judgment at least to the extent of the relief which according to the admissions of the opposite party, he is entitled to<sup>2</sup> But he is not bound to avail himself of this rule and is not precluded by not so applying from relying on such admissions at the trial<sup>3</sup> Nor on the other hand is the Court bound in every case to pass a judgment on the application of a party under this rule the matter is entirely in the discretion of the Court See Note B below

In moving for a judgment under this rule the party applying need not relinquish the rest of his claim<sup>4</sup> But the admission on which a judgment can be claimed must be a clear and unequivocal one<sup>5</sup> Further an admission of a defendant will not necessarily entitle the plaintiff to a judgment where the right asserted by the plaintiff has in fact no existence in law<sup>6</sup> or where he has no cause of action at all<sup>7</sup>

The rule refers only to admissions on points of fact and not on points of law<sup>8</sup>

## Order 12 Rule 6 — Note 1

216

- 1 (1876) 3 Ch D 637 (640) *Throp v Holdi orth*  
(25) AIR 1975 Oudh 486 (487)

- 5 (20) AIR 1920 Cal 163 (165)

- 2 ( '96) AIR 1926 Sind 119 (120) 90 Ind L R 16

- (33) AIR 1933 Lah 403 (403)

- ( '97) AIR 1977 Sin 1 25 (26 27)

- 6 (1878) 7 Ch D 735 (743) *Chilton v Corporation of London* (Cited in 14 Bom 213)

- 7 [See ( '01) AIR 1971 Pat 280 (280)]

- 8 ( '99) AIR 1929 Lah 569 (572)

- (73) 18 Suth W II 359 (567) (P C)

- (1900) 27 Cal 156 (163) 26 Ind App 216 (P C)

- [See a c (1877) 2 Ch D 686 (687) *Gilbert v Smith*]

- 3 (1878) 7 Ch D 403 (407 408) *Tildesley v Harper*

- 4 ( '96) AIR 1926 Sind 119 (120) 20 S Ind L R

O. 12 R. 8  
Notes 2-6

2. "At any stage." — A plaintiff may move for judgment upon admissions on the defence, although he has joined issue on the defence<sup>1</sup>. Similarly, a defendant may apply to have the suit dismissed after he has delivered a rejoinder<sup>2</sup>.

3. Admissions on pleadings. — As has been seen in Note 2 to Rule 1 *ante*, an admission of facts in a pleading may be made either expressly or constructively. Under O 8 R 6 every allegation of fact in the pleadings if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. This is a constructive admission in a pleading. A defendant denying a plaintiff's allegation *evasively* will be deemed not to have denied it at all and will therefore be deemed to have admitted such allegation (see O 8 R 4). Thus, in *Harris v Gamble*<sup>3</sup> the defendant in his defence merely put the plaintiffs to proof of their several allegations in their statement of claim. Defendant failed to appear at the trial and judgment was given for the plaintiffs without calling evidence, on the ground that such a defence was an admission of facts alleged in the statement of claim.

4. Court may make such order as it may think just. — The provisions of this rule are *in the nature of* a discretionary judgment upon admission.<sup>4</sup> If a case involves questions which cannot conveniently be disposed of on an application under this rule, or if the case is such that it is not wise to pass a judgment on admissions, the Court may, in the exercise of its discretion, refuse the motion.<sup>5</sup> Thus in divorce cases a Court will not ordinarily pass a decree for dissolution of marriage on the mere admissions of the parties in view of possible collusion between the parties.<sup>6</sup> Where however the defendant admits the claim but the plaintiff is absent at the trial the suit should not be dismissed; a decree should be passed on the strength of the defendant's admission.<sup>7</sup> Where an application is made under this rule on the basis of a constructive admission, the Court may refuse to pass a decree if, in the circumstances of the case, it is of opinion that the defendant must not be held to have admitted facts not specifically denied in the written statement.<sup>8</sup>

5. Orders that may be passed under this Rule. — As a general rule, a judgment on admissions can be passed in all cases in which under the Code a preliminary decree can be passed. See Order 20 Rules 13, 15, 16 and 18.

6. Admissions made otherwise than on pleadings. — The use of the words "or otherwise without the words in writing which are used in Rule 1 shows that a judgment may be given even upon verbal admission<sup>9</sup> though caution is required in acting upon such admissions." The rule is wide enough to afford relief not only in

## Note 2

1. (1882) 21 Cl. D. 716 (717). *Brown v. Plar on*  
2. (1881) 50 L. T. 33 (338). *Paseco v. Richards*

## Note 3

1. (1878) 7 Ch. D. 877 (577). *Harris v. Gamble*  
[See also (1879) 12 Ch. D. 750 (759). *Butter v. Tregeant*]

## Note 4

1. (19) AIR 1918 Cal 467 (470). 45 Cal 133 (1877) 5 Ch. D. 817 (814). *Mellor v. Sidebottom*  
[24] AIR 1924 Rang 144 (144). 1 Rang 550  
[25] AIR 1931 Oudh 821 (822)  
[26] AIR 1929 Lah 669 (672)  
[27] AIR 1924 Cal 190 (192)  
[28] 10 Ind. Cas 331 (352) (Mad). (Admission in

- evidence by one of the defendants specifically denied by the other defendant in his pleading — First Appellate Court not justified in decreeing on such admission)  
(27) AIR 1927 All 175 (176)  
[29] AIR 1919 Cal 467 (470, 471). 45 Cal 133  
3. (33) 1st Bom 624 (625) (FB)  
4. (34) AIR 1929 Lah 850 (851)  
5. (40) 11 Cal 311 (314). 31 Ind. App 186 (PC)  
See also *Pratt v. O. & R. S.*

## Note 5

1. (1941) 1 Ch. 499 (502). *In re Beany*  
[19] AIR 1914 Cal 477 (478). 45 Cal 133  
(Remarks of Fletcher J. quoted in the judgment)  
2. (84) 6 All 406 (415, 416)

cases of admissions made in the pleadings, but also in the case of admissions *de hors the pleadings*.<sup>3</sup> Thus, admissions contained in letters written before action is brought<sup>4</sup> or in a letter written after action,<sup>5</sup> are sufficient for the purpose of this rule

O. 12 R. 5  
Notes 6-10

**7. English practice.** — See Daniel's Chancery, Form 270 and Seton on Decrees, Vol. I, page 399, Form No. 5. See also Clutton's Forms, 16th Edition, page 310.

**8. Co-plaintiffs.** — An application under this rule for an order against a defendant should, where there are several plaintiffs, be made by *all* of them.<sup>1</sup>

**9. Judgment, if should be followed by a decree.** — According to the Calcutta High Court,<sup>2</sup> there is nothing objectionable to a decree being drawn up on a judgment under this rule and later on to another decree being drawn up after investigation of the claim not admitted. But according to the Sind Judicial Commissioner's Court,<sup>3</sup> it is not necessary to have a decree drawn up on a judgment passed under this rule, it being open to the plaintiff to enforce payment of the amount awarded as an order in execution proceedings by virtue of Section 36.

**10. Appeal.** — An order rejecting an application for a judgment on admissions is a "judgment" within Clause 15 of the Letters Patent and is appealable under the Letters Patent.<sup>1</sup>

**R. 7. [New.]** An affidavit of the pleader or his clerk, of O. 12 R. 7

Affidavit of signature

the due signature of any admissions made in pursuance of any notice to admit documents or

facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

[R. S. C., O. 32 R. 7.]

**R. 8. [New.]** Notice to produce documents shall be in O. 12 R. 8

Notice to produce documents

Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the

pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

[R. S. C., O. 32 R. 8.]

3. (26) AIR 1926 Sind 119 (120) 20 Sind L.R. 216

4. (1884) 27 Ch D 251 (257), Hampden v Wallis

5. (1914) 1 Ch 904 (908, 909), Ellis v Allen

Note 8

1. (1995) 2 Ch 747 (749), Re Wright

Note 9

1. ('18) AIR 1918 Cal 467 (470) 45 Cal 133

2. ('26) AIR 1926 Sind 119 (120) 20 Sind L.R. 216.

Note 10

1. (20) AIR 1920 Cal 163 (164)

O. 12 R. 9

**R. 9.** [New.] If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.  
[R. S. C., O. 32 R. 9.]

Costs.

## ORDER XIII.

### PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

O. 13 R. 1

**R. 1.** [Ss. 138, 140.] (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

Documentary evidence  
to be produced at first  
hearing

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

[1877, Ss. 138, 140; 1859, Ss. 128, 129.]

#### Local Amendments

N.-W.F.P.

*Substitute the following*

"All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in Orders 7 and 8, provided that after the settlement of issues, the Court may fix a date, not being more than 30 days after such settlement, within which the parties may present supplementary lists of documents on which they rely"

OUDH

*Substitute the following*

"1 (1) The parties or their pleaders shall produce or cause to be produced, on the date fixed by the Court, under Order 7 Rule 14, and Order 8 Rule 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court

(3) The Court shall receive the documents so produced, provided that (whenever the documents are produced at any stage of the case) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct

*Explanation* — A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than

the plaintiff or defendant it will not be deemed to be "in the power" of the plaintiff or defendant "

O. 13 R. 1  
Notes 1-2

# PATNA

After the words "at the first hearing of the suit" add the words

"or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit "

# RANGOON

Add the following as sub rule (3)

"(3) The High Court of Judicature at Rangoon directs that such lists shall Judicial

be prepared in form \_\_\_\_\_ which will be given free of charge to parties wishing to

General 23

tender documents in evidence "

## Synopsis

- |  |   |
|--|---|
| <p>1. Scope and object of the Rule</p> <p>2 "Shall produce at the first hearing."</p> <p>3. "First hearing " See O 8 R 1</p> | <p>4. Admission of documents after first hearing See Rule 2</p> <p>5 "In such form as the High Court directs " See Appendix II, Form No 5</p> |
|--|---|

**1. Scope and object of the Rule.** — A Court must secure a fair trial of cases, and to that end obviate the chances for the parties to adduce forged or manufactured evidence This rule, accordingly, enjoins on the parties to lay their documents before the Court at the earliest possible opportunity<sup>1</sup> Where the documents are not in the possession or power of the party, they cannot and therefore need not be produced at the first hearing<sup>2</sup>

The rule is *peremptory* that the documents on which a party intends to rely must be produced at the first hearing<sup>3</sup> But as the object of the rule is not to penalise the parties, the Court is given discretion, under Rule 2, to receive any documents at later stages of the suit if there is no suspicion about their genuineness<sup>4</sup>

The provisions of this Order relating to the production of documents are made applicable to proceedings under the undermentioned local Acts<sup>5</sup>

**2. "Shall produce at the first hearing."** — The procedure under the Code relating to the production of documents by the parties is briefly as follows —

*The plaintiff* shall produce and deliver into Court with the plaint the document on which he sues, if it is in his possession or power (O 7 R 14 sub rule 1) Other documents, whether in his possession or power or not, on which he relies in support of his claim need not, however, be produced with the plaint, but a list thereof shall be filed at the time of the plaint (O 7 R 14 sub rule 2) In that list the plaintiff need mention only those documents on which he relies for his claim He need not *anticipate the defence case* and mention in the list such documents as may form an answer to

### Order 13 Rule 1 — Note 1

- 1 ( 98) 22 Bom 173 (175)  
 ( 07) 6 Cal L Jour 621 (634)  
 ( 08) 8 Cal L Jour 147 (151)  
 ( 28) AIR 1928 Pat 537 (539)  
 ( 31) AIR 1931 Pat 275 (281) 10 Pat 393  
 2 ( 75) 23 Suth W R 29 (30)  
 ( 30) 1930 Mad W N 511 (513) (Rule not applicable to documents which are produced by witnesses on summons)  
 3. ( 31) AIR 1931 Mad 512 (513)

- 4 (18) AIR 1918 P O 11 (14) 45 Cal 878 45 Ind App 73 (PC)  
 ( 26) AIR 1926 Cal 1 (19)  
 (28) AIR 1928 Pat 209 (212)  
 ( 28) AIR 1928 Pat 555 (556) 7 Pat 569  
 ( 08) 9 Suth W R 294 (295)  
 [See ( 33) AIR 1933 Lah 893 (893)]  
 5 The Chota Nagpur Tenancy Act (VI of 190-) S 265 (3), The Bengal Fudbankment Act (VII of 1866) S 3 The Estates Partition Act (Bengal Act 4 of 1897) S 97



☉ 13 R 1  
Note 2

such a defence. Nor need he mention in the list documents to be produced for the cross examination of the defendant's witnesses or for refreshing the memory of a witness (Order 7 Rule 18 sub rule 2)

Where the document referred to in O 7 R 14 is not in his possession or power the plaintiff shall if possible state in whose possession or power it is (O 7 R 15). After the suit is instituted a summons with a copy of the plaint is served on the defendant to appear and answer the plaintiff's claim (O 5 R 1). The summons will also order the defendant to produce all documents in his possession or power on which he intends to rely in support of his case (O 5 R 7). On the day on which the defendant is to appear and answer according to the summons both parties must be present and the Court may hear the parties (O 9 R 1). On that day both the parties shall under this rule bring in all the documents on which they rely and the Court is bound to receive them if they duly put them in (sub rule 2)<sup>1</sup>

The language of this rule may be contrasted with the language used in O 7 R 14 with reference to the production of the document on which the plaintiff sues: *he shall produce it in Court and shall at the same time deliver the document to be filed with the plaint.* Production as such of documents under this rule amounts only to bringing in the documents with the object of leaving them in Court. The non production of the documents by a party as per the terms of this rule is done at his own peril the consequence of such non production being that the Court will not receive them at a later stage except on satisfactory grounds. Accordingly the plaintiff if he desires to avoid the risk of his documents being rejected subsequently and to ensure their being received by the Court must produce under this rule at the first hearing all the documents mentioned in his list filed under O 7 R 14 and also such documents as may be ordered by the Court to be produced under O 11 R 14. But documents of the kind specified in O 7 R 18 sub rule 2 or documents which are not in the possession or power of the plaintiff do not come under this rule<sup>2</sup>. The defendant is bound by the same procedure so far as it may be applicable to him.

Is the Court bound to pass an order fixing a date for the production of documents? Under the corresponding provision of the Code of 1882 the parties were required only to keep their documents in readiness at the first hearing to be produced when called for by the Court<sup>3</sup>. The present rule requires the parties not only to get ready but also to produce *and* to deposit in Court their documents at the first hearing. The terms of the present rule are clear and an order fixing a date for production of documents by the parties is not a condition precedent for their production. But the rule does not preclude a Court from calling on the parties for valid reasons to produce their documents or a list thereof by a specified date<sup>4</sup>. Thus where the Court does not want the production of documents till a particular stage in the suit is reached it may pass an order requiring parties to produce their documents within a specified time<sup>5</sup>. The view however that the Court is bound to receive documents at any stage of the suit if there is no order of the Court for production within a fixed time<sup>6</sup> does not appear to

#### Note 2

- 1 (71) 15 South W R 323 (324). (Though by the inadvertence of Court officer they were not kept in Court record in due time)
- 2 (22) AIR 1922 Pat 569 (571). (Documents

Cal 1003 (FO). (Party and pleader ignorant of the existence of a document)

- 3 (98) 1893 Pun Re No 59 p 191
- (68) 10 South W R 170 (181)

[See also (74) 21 South W R 40 (48)]

- 4 See Madras Rules of Practice R 62

5 (26) AIR 1916 Mad 317 (319)

- 6 (23) AIR 1928 Mad 516 (517) 51 Mad 472
- (25) AIR 1925 Mad 744 (745)

be sound or consistent with the terms of this rule

3. "First hearing" — See Order 8 Rule 1

4. Admission of documents after first hearing. — See Rule 2

5 "In such form as the High Court directs." — See Appendix H, Form No 5

O. 13 R. 1  
Notes 2-5

**R. 2. [S 139]** No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non production thereof; and the Court receiving any such evidence shall record the reasons for so doing

O. 13 R. 2

Effect of non production of documents

[1877, Ss 138, 139; 1859, S. 128]

### Synopsis

- 1 Effect of non production of documents
- 2 "Unless good cause is shown"
- 3 Appeal

**1. Effect of non-production of documents** — The object of the previous rule is to prevent fraud by the late production of suspicious documents, see Note 1 to Rule 1. When, therefore the genuineness of a document is beyond doubt there can be no reasonable objection to its reception even at a later stage<sup>1</sup>. The rule makes the satisfactory explanation for non production at the first hearing a condition precedent for the reception of documents produced out of time. But the rule must be liberally construed so as to advance the cause of justice<sup>2</sup>. No documents whether public<sup>3</sup> or

#### Order 13 Rule 2 — Note 1

1 (18) AIR 1918 P C 11 45 Cal 578 45 Ind App 78 (PC) (Books filed in another Court previously)

(37) AIR 1937 Cal 597 (540) I L W (1937) 2 Cal 661

[See also (30) 1930 Mad W N 511 (513) (Court has no discretion to refuse reception of documents produced by witness on the ground of late production.—O 13 R. 1 and 2 apply only to documents produced by parties.)]

[See however (19) AIR 1919 Cal 600 (601) (The Court has a discretion to refer in proper cases.)]

2 (98) 22 Bom 173 (176)

(26) AIR 1926 Mad 347 (349)

(24) AIR 1924 Pat 208 (208)

[See also (06) 33 Cal 1345 (1348) (Document filed with plaint.—Tendered only at close of plaintiff's case.—Rejection technically correct—

ment)  
(98) AIR 1928 Rang 196 (196) 6 Rang 337  
(28) AIR 1928 Cal 416 (416) (Document pro

3

authority)

O. 13 R. 2  
Notes 1-3

private<sup>4</sup> which are above suspicion should be excluded if they are necessary for the proper decision of the case

The Court of the Judicial Commissioner of Oudh, while disagreeing with the view which gives a liberal construction to this rule has, however, arrived at the same result by granting the application under its inherent powers under Section 151 of the Code<sup>5</sup>

Once a document is received under this rule, no adverse inference can be drawn against the party on the ground of late production<sup>6</sup>

The discretion to reject a document under this rule must be exercised at the earliest possible opportunity after production, for, documents not promptly rejected<sup>7</sup> or ordered merely to be kept on the file<sup>8</sup> will be deemed to have been received

The rule applies only to documents which are in the possession or power of a party. Hence when the documents are in the custody of another Court and are produced after the first hearing, they cannot be rejected under this rule<sup>9</sup>

2. "Unless good cause is shown." — Veracious and dilatory applications for the reception of documents cannot be granted<sup>1</sup>. It is not a good cause for non production that on the day fixed for the production of documents the hearing only resulted in an adjournment. The Court must record its reasons for receiving documents beyond time. Admission of papers after long delay without recording any reasons is wrong<sup>2</sup>. The fact that the documents were in the custody of another Court and that the delay in their production was not due to any fault of the party is sufficient reason for receiving the documents after the first hearing under this rule<sup>4</sup>

3. Appeal. — The admission or rejection of documents under this rule is entirely in the discretion of the trial Court<sup>1</sup> and an Appellate Court will not interfere with it,<sup>2</sup> unless such discretion has been exercised capriciously or improperly.<sup>3</sup> In a case where the trial Court in its discretion received documents produced at a late stage, the Privy Council said "If the sanction of the Court can purge the original defect, it has

(24) AIR 1924 I at 517 (518)

4 (26) AIR 1926 Mad 347 (348) (Unregistered documents)

(30) AIR 1930 Pat 603 (604) (Private documents)

(1864) 1864 Sutr W R Cap No 271 (279) (Document on unstamped plain paper genuine—Received)

[See (32) AIR 1932 Pat 332 (333) (A receipt filed after long delay involving a new case—

not interfere)  
(1861) 1 Sutr W R 193 (198) (Do)

(85) 8 Mad 373 (375)

(60) 11 Agra 143 (148)

(26) AIR 1926 Cal 106 (106) (Discretion refusing to admit a document)

( )

( )

allowing late production)  
3 (26) AIR 1926 Mad 347 (349) (Discretion in

allowing late production)

(33) AIR 1933 Lah 892 (893)

(26) AIR 1926 Cal 1 (19)

(19) AIR 1919 Cal 800 (801)

(25) AIR 1925 Mad 744 (745) (No judicial exercise of discretion)

(08) 8 Cal L Jour 147 (150 151)

(28) AIR 1928 Lah 704 (705) (Non compliance of rule by trial Court — No objection by party in appeal)

been so purged, and held that the late production could not be a ground of appeal from the decision in the suit <sup>4</sup>

O 13 R. 2  
Note 3

**R. 3.** [S 140] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection

O. 13 R. 3

Rejection of irrelevant  
or inadmissible docu-  
ments

[1877, S 140; 1859, S. 129]

### Synopsis

- 1 Scope of the Rule
- 2 Objection to admissibility
- 3 Appeal

**1. Scope of the Rule**—Under Rule 1 the Court receives as it is bound to do, all documents of every description produced by the parties at the first hearing, however numerous they might be. Under Rule 2 again, the Court at its discretion receives documents subsequently produced or rejects them for *late production*. Out of the documents received as aforesaid the Court under this rule, is expected and empowered to exercise discrimination and reject, even *in limine* documents considered *irrelevant or otherwise inadmissible*<sup>1</sup> and retain on the file only such of the documents as may if properly proved be used as evidence at the trial.<sup>2</sup> Rejection under this rule may be at any stage.<sup>3</sup> For the procedure on rejection see Rule 6 below.

**2. Objection to admissibility.**—There is a distinction in this matter between a point of relevancy and a point of admissibility. Whether an objection is raised or not every Court is bound to reject irrelevant documents.<sup>1</sup> But objections to the admissibility of documents for want of proof or any necessary formality must be taken at the trial<sup>2</sup> and should be decided as they arise and not reserved until judgment is given.<sup>3</sup> In case of doubt on a question of admissibility the safer course for the Court in appealable cases is to admit the document.<sup>4</sup>

No objection will be allowed to be taken in appeal to the admissibility of

(80) AIR 1939 Rang 93 (105) 1939 Rang LR 18  
(Documents admitted without recording reasons)  
4 (60) 12 Buth W R 32 (37) (PC)

Order 13 Rule 3 — Note 1

for Court to inspect and consider—Order to file  
the documents—No presumption that docu-  
ments were held admissible )

Note 2

1 (21) AIR 1971 Pat 61 (63)

6 (P C)  
on the

(Formal  
Acquire

ence in admission of evidence which the law  
forbids to be received is no bar to raising  
objection in appeal )

2 (28) AIR 1938 Lah 428 (459)

(05) 9 Cal W N 111 (113)

(78) 6 Cal L Rep 109 (111) (Evidence before  
Commissioner—Objection to document must be  
before him )

(36) AIR 1936 Pat 634 (635)

(36) AIR 1936 Pat 600 (601) (Objection as to  
the formality of comparing copies with the  
originals )

(35) AIR 1935 All 293 (791)

[See also (83) 9 Cal 939 (940 941) (Some  
grounds of objection before Commissioner—  
Others at the trial—Allowed )]

3 [See (90) 17 Cal 1 3 186 187 195]

(98) 25 Cal 401 (403 )

4 (90) 12 All 1 (76) (F B)

[See also (91) 18 Cal 701 (703) 17 Ind App 159  
(P C)]

O. 13 R. 3  
Notes 2-3

a document which was admitted in evidence without objection at the trial.<sup>5</sup> The reason is that if the objection had been taken at the trial the party tendering the document would have taken steps to duly prove it.<sup>6</sup> But this principle does not apply to a document which the law forbids to be received in evidence. Thus where a document which is compulsorily registrable under Section 17 of the Registration Act is not registered, Section 49 of that Act forbids such document to be received as evidence of any transaction affecting the immovable property comprised therein. In the case of such a document the failure to object to the admission of the document in the trial Court is no bar to raising the objection before a superior Court.<sup>7</sup> As to objections on the score of insufficient stamp duty, see Sections 35 and 36 of the Stamp Act (II of 1899) and the undermentioned cases.<sup>8</sup>

**3 Appeal** — There is no appeal from an order rejecting a document under this rule though the order may be challenged in an appeal from the decree in the suit.<sup>1</sup>

O. 13 R. 4

**R. 4. [S 141]** (1) Subject to the provisions of the next

Endorsements on documents admitted in evidence

following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge

[1877, S 141, 1859, S 132]

Rang 309  
in second

1) (Order 13 R. 3 is  
tion 36 of the Stamp

1)

3

511)

148 (108) (PO) (The  
terferes in question of

## Local Amendments

OUDH

In sub rule (1) (a), add "in the Judge's own handwriting" after the word "statement"

RANGOON

Add the following as sub rules (3), (4) and (5)

"(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted, thus, A, B, C, etc., and the documents admitted on behalf of the defendant with figures 1, 2, 3, etc

(4) When a number of documents of the same nature are admitted, as for example, a series of receipts for rent the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series

Judicial

(5) Every document on admission shall be entered in a list in Form \_\_\_\_\_  
General 25

prepared by the Bench Clerk and signed by the Judge"

## Synopsis

## 1. Legislative changes

## 2. Endorsements on admitted documentary evidence

1. Legislative changes. — The words "or initialled" in this rule are new

2. Endorsements on admitted documentary evidence. — There are two stages relating to documents filed in Court — One is the stage when all the documents are filed by the parties in Court — the next stage is where the documents are formally proved and tendered in evidence. It is at this stage that the Court has to decide whether they are to be admitted or rejected.<sup>1</sup> If the documents are admitted and proved then the endorsement containing the particulars referred to in the rule is to be made on them. The endorsement is intended to be a record of the fact that the document has been admitted in evidence after the necessary legal formalities have been complied with.<sup>2</sup> An endorsement, therefore, made before the documents are proved,<sup>3</sup> or the practice of putting a seal on the documents immediately on their production,<sup>4</sup> is not proper

The rule as to the endorsement of the documents must be strictly followed<sup>5</sup> In *Sadik Husain Khan v Hashim Ali Khan*,<sup>6</sup> their Lordships of the Privy Council deprecated strongly the practice of not complying with the provisions of this rule and went on to observe as follows

" Their Lordships, with a view of insisting on the observance of the wholesome provisions of these statutes will in order to prevent injustice be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required "

## Order 13 Rule 4 — Note 2

3 (28) AIR 1928 Lah 432 (434) 9 Lah 221

1 (31) AIR 1931 Lah 546 (550) 13 Lah 126

(87) 1887 Dom P J 384 (385)

(27) AIR 1927 Lah 115 (117) 8 Lah 1

{See (18'9) 11 Ch D 150 (153), Watson v Rodwell (No document is evidence unless it is formally put in at the trial)}

2. (88) 1888 All W N 22 (23)

{18} AIR 1918 All 244 (245)

{12} 16 Ind Cas 634 (331 635) (Lah)

6 (16) AIR 1916 P C 27 (41) 43 Ind App 212

33 All 677 (PC)

**O 13 R 4**  
**Note 2**

In *Secretary of State v. Sarla Devi*<sup>7</sup> in which the provisions of this rule had been completely ignored it was held that the documentary evidence in the case could not be regarded as having been legally brought on the record and as being legally before the Court. In *Imam ud Din v. Sri Ram Perbhu Dasi*<sup>8</sup> there was a controversy whether the documents had been admitted in evidence and as it was impossible owing to the absence of the endorsements under this rule to say whether the documents had in fact been admitted in evidence or not the High Court in appeal found it necessary to remand the case to the lower Court for retrial. But in *Vukhi Ram v. Firm Kamla Prasad*<sup>9</sup> the Patna High Court has distinguished the above Privy Council case on the ground that in it there was a controversy as to whether the documents had been admitted in evidence by the trial Court and it was held that where there was no doubt as to the documents having been admitted as a fact by the trial Court the mere absence of the endorsements under this rule did not make the documents inadmissible in evidence. A similar view was also taken by the Sind Judicial Commissioner's Court in the undermentioned case<sup>1</sup>. The marking of documents for mere identification<sup>11</sup> or a mechanical endorsement without the Judge applying his mind to a consideration as to the admissibility of the document<sup>12</sup> does not amount to an admission in evidence. Similarly where a document tendered in evidence is marked as an exhibit for purposes of reference but the endorsement prescribed by this rule is not made it cannot be said that the document has been admitted in evidence.<sup>13</sup> To such cases the provisions of Section 36 of the Stamp Act will not therefore apply. But where no objection is taken to the admissibility of a document at the time it is let in evidence and the formalities prescribed by this rule are complied with the admissibility of the document on the ground that it is insufficiently stamped cannot be raised at any subsequent stage by virtue of Section 36 of the Stamp Act.<sup>14</sup>

Documents shown to have been regularly admitted in evidence by a commissioner cannot be objected to on the ground of the want of endorsement by the Court under this rule.<sup>15</sup>

**O. 13 R 5**

**R. 5. [S 141A] (1)** Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on

Endorsements on copies of  
admitted entries in books  
accounts and records

7 (21) AIR 1904 Lah 548 (549) 5 Lah 227

8 (28) AIR 1928 Lah 140 (140 143) 9 Lah 4

9 (37) AIR 1937 Pat 200 (200)

1

irregularity)

(27) AIR 1927 Lah 679 (679) (Court induced to endorse behind back of party)

(27) AIR 1927 Lah 45 (45)

13 (23) AIR 1933 Lah 271 (273)

14 (33) AIR 1933 All 621 (621 6 ) 56 All 191

(3) AIR 1930 Mad 693 (696)

(29) AIR 19 30 Mad 600 (603)

15 (29) AIR 1929 Rang 211 (213) 7 Rang 164

(50) 3 Cal L Rep 109 (111 112)

whose behalf the book or account is produced may furnish a copy of the entry. O. 13 R. 5 Notes 1-3

(2) Where such a document is an entry in a public record produced from a public office, or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished —

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

[1877, S. 141; 1859, S. 132.]

#### Local Amendment

#### RANGOON

Add the following to sub rule (3)

"A note of the return should be made in the list in Form \_\_\_\_\_"  
Judicial  
General 25

#### Synopsis

- |  |   |
|--|---|
| 1. Stamps, if necessary on copies furnished under this Rule. | 3. Admission of unregistered documents. |
| 2. Admission of unstamped documents.                         | 4. Admission of altered documents.      |

1. Stamps, if necessary on copies furnished under this Rule. — Copies furnished under this rule need not bear any stamp.<sup>1</sup>

2. Admission of unstamped documents. — See Section 35 of the Stamp Act (II of 1889) and the undermentioned cases<sup>1</sup>

3. Admission of unregistered documents. — See Section 49 of the Registration Act (XVI of 1908) and the undermentioned cases<sup>1</sup>

#### Order 13 Rule 5—Note 1

1. (03) 27 Bom 150 (154)  
{ 02) 26 Bom 522 (526)  
(87) 11 Bom 526 (528)  
[See also (11) 15 Bom 687 (690)]

#### Note II

1. (96) 18 All 295 (298)  
{ 13) 19 Ind C 445 (446) (All)

- (73) 20 Suth W R 63 (63)  
(68) 4 Mad H C R 312 (314)  
(84) 7 Mad 410 (441)  
(94) 17 Mad 473 (476)  
(1900) 23 Mad 49 (54)  
(1865) 3 Bom H C R A C 92 (93)

#### Note 3

1. (96) 18 All 339 (340)  
(81) 5 Bom 143 (161 152)



O. 13 R. 5  
Note 4

4. Admission of altered documents. — See the undermentioned cases<sup>1</sup>

O. 13 R. 6

**R. 6.** [S. 142.] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Endorsements on documents rejected as inadmissible in evidence

[1877, S. 142; 1859, S. 134.]

1. Legislative changes. — The words "or initialled" are new

O. 13 R. 7

**R. 7.** [S. 142 A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

Recording of admitted and return of rejected documents.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

[1877, S. 142; 1859, S. 134.]

#### Local Amendments

##### MADRAS

Add the following proviso to sub rule (2):

"Provided that no document shall be returned which by force of the decree has become wholly void or useless"

##### NAGPUR

The following shall be added as sub-rule (3):

"(3) Every document produced in evidence, which is not written in the Court language or in English, shall be accompanied by a correct translation into English.

(83) 7 Bom 310 (312)  
(94) 18 Bom 13 (17 18)  
(24) 18 Bom 336, (400)  
(96) 20 Bom 538 (556 557)  
(96) 20 Bom 704 (715)  
(1900) 24 Bom 609 (614)

(99) 22 Mad 217 (220)

##### Note 4

1. (1863) 1 Moo Ind App 1 (17) (P C)  
(77) 1 Bom 320 (329 330)  
(82) 6 Bom 371 (374)  
(83) 7 Bom 418 (419)  
(86) 10 Bom 487 (492)  
(91) 15 Bom 44 (45)  
(81) 7 Cal 616 (619)  
(86) 12 Cal 313 (315 316)  
(86) 9 Mad 399 (405) (FB)  
(92) 15 Mad 70 (71, 72)  
(89) 12 Mad 239 (241)  
(1900) 23 Mad 13 (144)  
(99) 12 O P L R 33 (35).

and every document which is written in the Court language but in a script other than Devanagiri shall be accompanied by a correct transliteration into Devanagiri script. If the document is admitted in evidence the opposite party shall either admit the correctness of the translation or transliteration or submit his own translation or transliteration of the document.

O. 13 R. 7  
Notes 1-2

# **RANGOON**

Add the following to sub rule (2)

"who shall give a receipt for them in Col 6 of the list in Form

Judicial

General 23

## *Synopsis*

1 Scope of the Rule-

2. "Shall be returned "

**1. Scope of the Rule.** — Documents admitted in evidence are the only documents that can legally be on record.<sup>1</sup> Other documents cannot be on the record of the suit. Where after a document has been admitted in evidence the Court considers that it is a forged document or that its genuineness has not been satisfactorily established the document should not be rejected but must still form part of the record although the Judge may make an endorsement on the document 'genuineness not established' or words to that effect.<sup>2</sup>

**2. "Shall be returned "** — Documents which do not form part of the record as aforesaid should not be used in the case.<sup>1</sup> They should be removed from the records and returned to the persons producing them.<sup>2</sup>

**R. 8. [S 143]** Notwithstanding anything contained in

O. 13 R. 8

Court may order  
any document to  
be impounded

rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in

any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit

**R. 9. [S 144]** (1) Any person, whether a party to the

O. 13 R. 9

Return of admitted  
documents

suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same, —

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

Order 13 Rule 7 — Note 1

Note 2

1 (99) 14 All 3 G (357 358)

(69) 12 Suth W II 907 (768) (Party relying on document must prove unless admitted by the other side)

2 (36) AIR 1933 Oudh 998 (301 302) 12 Luck 569

1 (80) 5 Cal 317 (3 0)

2 (72) 137 Bom I J 275 (275)

(79) 5 Cal 317 III 0)

(31) AIR 1931 Lah 546 (550) 11 Lah 126

O. 13 R. 10

**R. 10.** [S. 137.] (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

[1877, S. 137; 1859, S. 133.]

#### Local Amendment

#### RANGOON

Sub rule (3) shall be re numbered as (5) and the following shall be inserted in sub rules (3) and (4)

"(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any record keeper, chief clerk, or official of any Court

(4) Whenever a Judge sends for the record of another suit or case, or other official papers, and uses any part of such record or papers as evidence in a trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record and shall further direct at the expense of which party such copy shall be made."

#### Synopsis

- |                                  |   |
|----------------------------------|---|
| 1. Scope and object of the Rule. | 3 "From any other Court"                    |
| 2. Discretion of Court.          | 4. Affidavit in support of the application. |

#### Other Topics (miscellaneous)

Criminal case record See Note 1  
Records from Collector's office See Note 2  
Revision See Note 2

**1. Scope and object of the Rule.** — The power given under this rule may be exercised also by an Appellate Court.<sup>1</sup> A Court is not bound to send for the whole of the records but only such documents will be sent for as are specifically mentioned in the application.<sup>2</sup>

#### Order 13 Rule 10 — Note 1

1. (171) 15 Suth W R 173 (171) (But not where party omitted to use document sent for in the

#### Lower Court)

- (94) 1891 All W N 3 (3) 16 All 126  
2. (1864) 1864 Suth W R 272 (273)

Documents do not become evidence in the case by the mere fact of being received into the Court under this rule. They must be admitted in evidence by the Court like any other document.<sup>3</sup> See sub rule 3.

O 13 R 10  
Notes 1-4

**2. Discretion of Court** — The Court has a discretion to grant or refuse an application under this rule.<sup>1</sup> It should not however refuse to send for necessary documents on a proper application<sup>2</sup> nor having ordered them to be sent for omit to actually send for them to be used by the party as evidence.<sup>3</sup> But a Court is not bound to send for a document when the party neglects or fails to make an application<sup>4</sup> or where he could but would not employ other means of production of the documents under the Code.<sup>5</sup>

An omission to exercise the discretion in favour of a party in a proper case is a good ground in an appeal or revision provided the party has been prejudiced thereby.<sup>6</sup>

**3 "From any other Court"** — The Court from which a document is sent for need not necessarily be a Civil Court.<sup>1</sup> But it must be a Court.<sup>2</sup> A Court from which records are sent for under this rule has no discretion to refuse to send them.<sup>3</sup>

**4 Affidavit in support of the application** — The rule as to the contents of an affidavit under this rule must be strictly complied with. An application without setting forth the necessary grounds satisfactorily in the affidavit will be rejected.<sup>1</sup>

### Local Amendment

#### RANGOON

The following shall be inserted as Rules 10A and 10B

**10A** Exhibits with their accompanying lists shall not be filed with the record until after the termination of the trial.

O 13 R. 10A  
(Rangoon)

**10B** If any exhibit included in the index of contents of the trial record is withdrawn after judgment the fact should be noted in the column of remarks of the index and it should be stated whether a copy has been substituted or not.

O 13 R 10B  
(Rangoon)

3 (27) AIR 1927 Lah 69 (70)

mons for product on )  
(70) 14 Suth W R 302 (303) (Do)  
6 (09) 2 Ind Cas 953 (953) (Cal)  
(72) 18 Suth W R 127 (128)  
(66) 6 Suth W R 79 (79)  
(18) AIR 1918 All 375 (3 6)  
(07) 11 Cal W N 112 (114 116)

[See also (1864) 1 Suth W R 63 (64)]

#### Note 2

- 1 (1864) 1864 Suth W R 177 (178 180) (Flb)
- (07) 7 Suth W R 103 (109)
- 2 (72) 18 Suth W R 127 (128)
- (66) 6 Suth W R 79 (79)
- (89) 7 Cal 560 (563) (Though the documents can not be produced before the termination of the trial)
- 3 (09) 8 C 1 I Jour 43 (46 47)
- (8) 1892 Bom 1 J 163 (16) (Collector's office not a Court)
- 4 (83) 1 Cal 10 (104 205) (P C)
- (79) 18 Suth W R 13 (14)
- 5 (71) 15 Suth W R 150 (151) (Taking on sum

#### Note 3

- 1 (74) 1874 Pun Re No 32 p 147 (Record of a criminal case)
- 2 (71) 15 Suth W R 150 (151) (A Court of Wards is no Court—Note The power to send for documents from Public Offices under S 133 of the Code of 1859 has been taken away from the corresponding provisions of the later Codes)
- [See (71) 15 Suth W R 178 (174) (Record of a case cannot be sent for)]
- 3 (79) 4 Cal I Rep 86 (37)

#### Note 4

- 1 (31) AIR 1931 Lah 119 (120)
- (94) 1994 All W N 3 (3) 16 All 196

O. 13 R. 11

**R. 11.** [S. 145.] The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence

Provisions as to documents  
applied to material objects

### Local Amendment

#### ALLAHABAD

Add the following to the end of Order 13—

O. 13 R. 12  
(Allahabad)

"12 Every document not written in the Court vernacular or in English, which is produced (a) with a plaint, or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character

The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct. In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and transliteration by giving his name and address and stating that he has correctly read out the original document

O. 13 R. 13  
(Allahabad)

13 When a document included in the list, prescribed by Rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in Rule 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants the documents of the first party defendant may be marked A 1, A 2, A 3, etc., and those of the second party B 1, B 2 B 3, etc. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series.

## ORDER XIV.

### SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT

#### ON ISSUES OF LAW OR ON ISSUES AGREED UPON

O. 14 R. 1

**R. 1.** [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

Framing of issues

(2) Material propositions are those propositions of law or

fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

O. 14 R. 1  
Notes 1-2

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

[1877, S. 146; 1859, S. 139. R. S. C., O. 33 R. 1.]

### Synopsis

- |                                  |  |
|----------------------------------|--|
| 1. Legislative changes           | 7. Abandonment of issue  |
| 2. Scope and object of the Rule. | 8. Delay in raising issue.   |
| 3. Issues between co-defendants  | 9. Issue not raised in pleadings but in evidence                             |
| 4. Omission to frame issues      | 10. Variance between pleadings and proof. <i>Vide</i> Note 9 under O. 6 R. 2 |
| 5. Wrong issues                  |  |
| 6. Issues by consent             |  |

### Other Topics (miscellaneous)

- |  |  |
|--|--|
| Court not to frame inconsistent issues. See Note 5                           | Proper issues in suits for damages. See Note 5.                      |
| Issue—Abandonment of, by pleader. See Note 7.                                | Proper issues in suits for malicious prosecution. See Note 5         |
| Issues must be decided. See Note 2   | Proper issues in suits for possession. See Notes 2, 4, 5 and 9       |
| One party. See Note 3  | Proper issues in suits on easement. See Note 2                       |
| Power of appellate Court to frame issues and remand for findings. See Note 4 | Proper issues in suits to recover lands granted in trust. See Note 5 |
| Proper issues in account suits. See Note 5                                   | Suits for rent. See Notes 2 and 5                                    |
| Proper issues in injunction suits. See Note 3                                |  |
| Proper issues in lease suits. See Note 4                                     |  |

1. Legislative changes. — In sub rule (2), the words "or a defendant must allege in order to constitute his defence" are new

2. Scope and object of the Rule. — The plaint and the written statement constitute the pleadings in a case and mark the *first stage* at which the differences between the parties are placed before the Court. The Court itself may also at the *first hearing* examine the parties in order to ascertain with precision, the propositions of law

**O. 14 R. 1**  
**Note 2**

or fact on which the parties are at variance,<sup>1</sup> and on such questions issues have to be framed and recorded.<sup>2</sup>

The framing of issues has a very important bearing on the trial and decision of a case. In the *first place*, it is the issues *fixed* and not the pleadings that guide the parties in the matter of adducing evidence.<sup>3</sup> Thus, when a point has been the subject of an issue, the parties will not be heard to say that the point was not disputed and so required no proof.<sup>4</sup> *Secondly*, the Court *cannot refuse to decide a point* on which an issue has been framed and evidence given by the parties<sup>5</sup> even if the point involved is *not mentioned in the pleadings*.<sup>6</sup> *Conversely*, the Court *should not decide a suit* on a matter on which no issue has been raised.<sup>7</sup> *Finally*, if the case goes in appeal it must be dealt with by the Appellate Court *on the issues settled for trial*<sup>8</sup> and not on a point on which there is no issue.<sup>9</sup> It is therefore essential to the right decision of a case that appropriate issues should be framed and tried.<sup>10</sup>

Sub rule (1) declares that an issue arises when a *material proposition* of law or fact is affirmed by one party and denied by the other,<sup>11</sup> and sub rule (2) defines what material propositions are.

The issues should be confined to points necessary for the proper trial and disposal of the case and should not be framed with respect to points *not so necessary*.<sup>12</sup> No issue need be framed on a point of law which is perfectly clear,<sup>13</sup> nor is the Court bound to grant an issue on a point not arising on the pleadings.<sup>14</sup> But when the pleadings raise points with sufficient clearness, issues should be framed on them though they may not have been put in the pleadings in any particular form.<sup>15</sup> Sub rule (3) declares what each issue should contain. The issues should be so framed as to embrace the *whole dispute* in the suit<sup>16</sup> but to cover only the points in *dispute* and to cover each point *once only*.<sup>17</sup>

It is primarily the *duty* of the Judge to frame the proper issues in a case<sup>18</sup> and

**Order 14 Rule 1 — Note 2**

1 (70) 14 Suth W R 181 (182)  
(90) 17 Cal 840 (848)  
(71) 16 Suth W R 218 (219) (Plaint disclosed no  
cause of action—Pleadings were examined and  
issues fixed)

9 (66) 12 Cal 239 (245 246) 12 Ind App 160 (PC)

10 (66) 30 Bom 173 (188)  
11 (66) 30 Bom 173 (188)

on  
as

(PC)

distinctness

setting out points for decision before trial is to  
enable parties to know what evidence they have  
to produce before the Court)

4 (89) 11 All 326 (328) (PC)

(02) 26 Bom 360 (362)  
(07) 9 Bom L R 1114 (1115) (Where minors are  
concerned)

(38) AIR 1933 Mad 329 (329) (But parties should  
also draw Court's attention to omission in fram-  
ing issues)

the Judge must apply his mind and understand the facts before framing them<sup>19</sup> Where issues have already been framed in a suit the fact that the Judge who framed the issues has been transferred will not make it obligatory on the incoming Judge to frame issues again<sup>20</sup> Where after the filing of a written statement, the Court passes a consent decree on the agreement of the parties, there is no obligation on the Court to frame issues before passing the decree<sup>21</sup>

O. 14 R. 1  
Notes 2-4

Sub rule (6) relates to cases where the defendant makes no defence The Court is not bound to frame and record issues when the defendant is *ex parte* and no written statement has been put in<sup>22</sup> But even in *ex parte* cases if there is any room for doubt about any matter, the Court has been held under certain circumstances to be bound to inform the plaintiff specifically what points he has to prove<sup>23</sup>

As to particular issues arising in certain kinds of suits, see the undermentioned cases<sup>24</sup>

A point alleged by the plaintiff and *admitted* by the defendant cannot be said to be in issue and a decision can be given on the basis of such admission without an issue<sup>25</sup> Averments contained in the plaint which are not traversed in the written statement and as to which no issue has been asked for will be deemed to be admitted<sup>26</sup>

**3. Issues between co-defendants.** — It is contrary to practice to frame and try issues between co-defendants<sup>1</sup> Where, however such an issue is necessary for giving appropriate relief to the plaintiff it should be framed and tried<sup>2</sup>

**4 Omission to frame issues** — A Court commits a grave irregularity in proceeding to the final hearing of a case without settling issues therein<sup>1</sup> But the mere omission to frame issues is not necessarily *fatal* to the trial of the suit<sup>2</sup> It is an

19 (30) AIR 1930 Mad 78 (70)

20 (87) 1887 All W N 247 (249)

21 (38) AIR 1933 Sind 804 (804)

22 (71) 15 Suth W R 145 (146)

(07) 11 Cal W N 871 (872)

(92) 15 Mad 15 (17) (In a suit for declaration that the defendant had no right either to the office of shik or to the properties in question and for an injunction restraining him from interfering with the properties and for further and other relief it was alleged by the defendant that he was in possession and hence the plaintiff could not maintain a suit for declaration without asking for possession — An issue was framed

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24 . . . . .

order granting permission to institute a suit under Cl. 12 of the Letters Patent may form the subject of an issue for trial in the suit so instituted)

(33) AIR 1933 Sind 184 (184) (Suit for dissolution

obstruction to easement)

(81) 6 Cal 812 (814) (Suit to establish an easement by prescription when limitation is pleaded)

(96) 20 Bom 753 (755) (Suits for possession of land on a sale deed by a person who is not defendant)

(08) 32 Mad 255 (256) (Suits based on fraud)

(72) 17 Suth W R 432 (438 439) (Suit by a Hindu wife for declaration of her right to maintenance out of her husband's estate which has been mortgaged to defendant by the husband's heir)

26 (70) 12 Suth W R 46J (469)

(72) 18 Suth W R 237 (237)

(75) 23 Suth W R 158 (159)

(02) 46 Bom 780 (737)

#### Note 3

1 (1865) 2 Suth W R 45 (46)

(67) 8 Suth W R 356 (357 359)

(69) 11 Suth W R 467 (463 461)

2 (See (1300) 27 All 396 (390) (Decision on the point of res judicata)

#### Note 4

1 (83) 12 Cal L R p 169 (174) G Mal 1 9

Ind App 124 (P C)

(17) 11 Moo Ind App 75 (7) (I C)

(70) 2 N W L R 183 (184)

2 (01) 1903 Lun Res No 77 1 321 (Suit summary)



**O 14 R 1**  
**Note 4**

irregularity which may or may not be a *material* one. If such omission has affected the disposal of the case on the merits it will be a ground for remanding the case for a new trial. But if on the other hand parties have not been prejudiced by the omission<sup>3</sup> and *substantial justice* has been done in the case notwithstanding the omission to frame issues<sup>4</sup> the decision will not be set aside or remanded for a new trial. Thus a decision will not be interfered with in the following cases on the ground of issue not having been framed—

- (1) Where the issue omitted relates to a point not necessary for the right determination of the case<sup>5</sup>
- (2) Where in spite of the omission of an issue the parties are alive to the point have adduced evidence on it and have discussed it in the trial Court<sup>6</sup>. Thus in a case where no specific issue was raised on a point but it was treated as if it arose in the suit and it had been put in issue in another suit between the same parties it was held that evidence in that suit could be considered to determine the question where no surprise would be caused thereby<sup>7</sup>
- (3) Where in spite of the omission the party affected had *notice* of the point and had *opportunity* to adduce evidence to meet it<sup>8</sup> or
- (4) Where the omission was due to the *deliberate* conduct of the party affected<sup>9</sup>

On the other hand where there has been no trial at all or only an imperfect trial on the point as a consequence of the omission of an issue on it the decision will be set aside<sup>10</sup>. In such cases the Appellate Court should frame the proper issues and remand the case for re trial on them<sup>11</sup>. Where an issue already framed though in terms covering the main question in the case does not sufficiently direct the attention of the parties to it and may thereby have prevented a party from adducing evidence on it the proper course is to frame fresh issues and to remand the case for re trial on them<sup>12</sup>.

press only one of the issues the Court is not

) 34

issues unless party is prejudiced )

7 (21) AIR 1921 P C 84 (86 87) 44 Mad 963  
48 Ind App 1 (P C)

8 (87) 14 Cal 592 (537)

(87) 24 Cal 306 (309)

(71) 15 Suth W R 145 (146)

9 (80) 5 Cal 233 (286)

(89) AIR 1939 Mad 329 (370 380). (Personal alleging that he is not necessary party but not pressing issue to that effect when issues were being framed — That issue must be held to have been waived by him)

10 (69) 11 Suth W R 366 (367) (Suit on lease.)

(74) 21 Suth W R 59 (60)

(79) 3 Bom 210 (211 213)

(87) 9 All 147 (153)

11 (8) 20 Suth W R 401 (402) (Suit for possession)

(11) 12 Ind Cas 53 (54) (Lab)

(96) 18 All 322 (324 325) (Suit for damages for deficiency in area sold — Proper issues to be framed and tried — Issues accordingly framed by Appellate Court and remanded)

12 (73) 21 Suth W R 359 (358 360) 1 Ind App 268 (P C)

of issues — But where judgment has laid points for determination they may be looked upon as

(75) 23 Suth W R 172 (173)

**5 Wrong issues** — Where wrong issues have been framed in a suit and the suit has been disposed of on the findings on those issues the decision will be set aside in appeal and the suit remanded for re trial after framing proper issues<sup>1</sup> This however, will not be done where in spite of the wrong issues the points have been correctly understood by all the parties<sup>2</sup> or where all the available evidence has been adduced on the necessary points and duly discussed<sup>3</sup>

**6 Issues by consent.**—Where the issues raised in a suit have been *consented* to by a party then the decision cannot be objected to by him on the ground that the issues are wrong or defective or unnecessary<sup>1</sup> Similarly, where the parties affected by the wrong issue have waived their objections thereto the decision will not be interfered with<sup>2</sup>

**7. Abandonment of issue** — It is open to the parties to abandon issues thereby waiving the points raised therein Such abandonment may be express or implied It has been held by the High Court of Madras that Courts are not bound to raise issues *suo motu* on questions of fact where parties do not ask for them that the omission to raise such issues implies an abandonment of such questions by the party interested but that where the question is one of law it is incumbent on the Court to frame proper issues on such questions<sup>1</sup> The High Court of Bombay has on the other hand, broadly held that it would be unsafe to presume from the failure of the Court to raise the necessary issues an intention on the part of the party to admit the fact which the other party was bound to prove<sup>2</sup>

Even on points raised in the pleadings the conduct of a party may in certain circumstances amount to abandonment<sup>3</sup> A pleader duly appointed to conduct a case on behalf of his client has full authority to abandon an issue raised on behalf of his client and the latter will be bound by such abandonment<sup>4</sup>

**8 Delay in raising issue** — Rule 5 gives the Court power to raise issues or amend or strike out issues at any time The mere fact that a particular issue was raised at a late stage of the suit will be immaterial if the parties had sufficient opportunity to

#### Note 5

- 1 (11) 12 Ind Cas 187 (133) (Mad)  
 (69) 12 Suth W R 193 (199) (Suit for damages)  
 (66) 6 Suth W R 57 (57-59) (PC)  
 (69) 12 Suth W R 132 (133) (Suit to recover land granted in trust)  
 (69) 12 Suth W R 460 (461) (Suit for possession)  
 (70) 14 Suth W R 149 (149-150) (Rent suit —

- 2 (08) 32 Bon 356 (361)  
 (21) AIR 1921 Sind 159 (164) 16 Sind L II 207  
 3 (75) 21 Suth W R 275 (276)  
 (97) 21 Bom 323 (327)

#### Note 6

- 1 (69) 11 Suth W R 277 (278)  
 (69) 10 Suth W R 339 (339)  
 (69) 11 Suth W R 70 (81)  
 (70) 13 Suth W R 205 (205)  
 (70) 14 Suth W R 466 (466)  
 (73) 20 Suth W R 377 (379) Ind App Sup Vol 212 (PC)  
 (26) AIR 1926 Nag 164 (167) Marsh 519

- 2 (01) 3 Bom L R 535 (537-538)

#### Note 7

- 1 (19) AIR 1919 Mad 693 (699)  
 (02) 26 Mad 363 (363)  
 2 (07) 26 Bom 360 (362)  
 3 (25) AIR 1925 Mad 427 (429)  
 4 (02) 25 Mad 367 (377) 29 Ind App 76 (PC)  
 (16) AIR 1916 Oudh 195 (197)  
 (35) AIR 1935 Lah 71 (74) 16 Lah 323

- (72) 17 Suth W R 149 (150) (Suit for accounts)  
 (72) 17 Suth W R 359 (360) (Suit for injunction)  
 (72) 17 Suth W R 501 (505) (Suit for rent)  
 (72) 18 Suth W R 297 (297)

**O. 14 R. 1**  
**Notes 8-10**

adduce evidence and the Court was in a position to pronounce judgment on it<sup>1</sup> See also the undermentioned decision<sup>2</sup>

**9. Issue not raised in the pleadings but in evidence.**— A relief not founded on the pleadings should not ordinarily be granted. But as has already been pointed out, there is nothing irregular in a Court granting relief on matters not set forth in the pleadings where they are comprised in the issues and have been put into evidence<sup>1</sup>

Where a material point has not been raised in the pleadings and is not comprised in the issues originally framed, but appears for the first time in evidence, the Court may frame an issue on it and decide it<sup>2</sup> after giving the party affected an opportunity to meet it<sup>3</sup>

**10. Variance between pleadings and proof.**— *vide* Note 9 under O 6 R 2

**O. 14 R. 2**

**R. 2.** [S. 146, cl. 6.] Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

[1877, S. 146, cl. 6; 1859, S. 139. *Cf.* R. S. C., O. 25 R. 2.]

### Synopsis

1. Legislative changes
2. Scope and applicability of the Rule.
3. Revision

### Other Topics (miscellaneous)

Court, whether bound to decide questions of fact where it can dispose of on issues of law only. See Note 2

Disposal on issues of law. See Note 2

**1. Legislative changes.**— The words "or any part thereof" are new

**2. Scope and applicability of the Rule.**— Ordinarily, a Court is not under any obligation as to the order in which it is to try the issues raised before it, and has the right to dispose of the issues in any way which it considers most likely to be conducive to the ascertainment of truth<sup>1</sup> There are however two reservations. The first is that in appealable cases, the Court should as far as possible decide on all the issues joined, inasmuch as a piecemeal trial might lead to protracted litigation and

#### Note 8

- 1 (95) 44 Cal 324 (331) 22 Ind App 4 (PC)
- 2 (38) AIR 1933 Cal 270 (293) (Issue on question of locus standi of objector must be framed before trial and tried and determined as preliminary proceeding)

#### Note 9

- 1 (99) 21 All 53 (79) 25 Ind App 195 (PC)
- (70) 12 All 556 (558)
- 2 (71) 16 Suth W R 44 (45)

- (1864) 2 Mad H C R 423 (426)
- (79) 19 Suth W R 333 (334, 335) (Suit for possession)
- (92) 16 Bom 533 (535)
3. (96) 20 Bom 569 (570)

#### Order 14 Rule 2 — Note 2

- 1 (75) 23 Suth W R 54 (55)
- (39) AIR 1933 All 749 (751) (High Court will not interfere in revision to make a direction as to this)

repeated appeals in the same suit<sup>2</sup> The *second* is that contained in this rule which prescribes that where issues of law going to the root of the case and capable of being decided without evidence arise the Court is bound to try those issues first<sup>3</sup> and may in its discretion postpone the settlement of the issues of fact until after the issues of law have been determined<sup>4</sup> The rule casts on the Court the duty of determining whether circumstances exist in each particular case for the exercise of the power conferred therein<sup>5</sup> Where a party suggests that the suit can be disposed of on the hearing of a preliminary issue the proper procedure is to set down the case for settlement of issues and on that day decide which if any of the issues can be decided in the above manner<sup>6</sup>

The present rule no doubt contemplates the procedure to be followed at the issue stage But O 15 R 3 empowers the Judge to proceed to determine issues of law at any subsequent stage also<sup>7</sup> so that even if issues of fact have been settled a Judge commits no irregularity if he proceeds to determine issues of law postponing the trial of the issues of fact<sup>8</sup>

At the hearing of a case on a preliminary issue the party by whom it is raised has the right to begin<sup>9</sup>

The trial of issues of fact will not be stayed pending appeal on the decision on law except upon very strong grounds<sup>10</sup>

An issue *requiring evidence* is not a preliminary issue which can be dealt with under this rule<sup>11</sup> Where all the issues are issues of fact the Court has no power to try only some of them and postpone the trial of the others save on the ground of embarrassment<sup>12</sup>

The decision on a preliminary issue cannot be reopened in the trial Court<sup>13</sup>

**3 Revision** — Where the trial Court fails to consider whether a case or a part thereof may be disposed of on issues of law only but merely says that it is not desirable that the case be decided piecemeal the order is open to revision by the High Court<sup>1</sup>

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issue of law is clear )

3 ( 86 ) AIR 1936 Pat 250 (253)

4 ( 99 ) 3 Ind Crs 804 (806) (Cal) (Issue of law must be tried first)

50 " " " " " "

trial on facts )

( 39 ) AIR 1939 Lah 158 (158) (Preliminary issue as to existence of cause of action should be tried first)

61 " " " "

W O L A N O J J

8 ( 16 ) AIR 1916 Cal 161 (165)

( 29 ) AIR 1922 Mad 321 (329)

9 ( 88 ) 12 Bom 454 (459)

10 (1883) 92 Ch D 88 (89 90) Re Palmer & Appln on

11 ( 23 ) AIR 1923 Pat 314 (315)

( 15 ) AIR 1915 Cal 87 (90)

( 32 ) AIR 1932 Bom 128 (129) 66 Bom 224

(There is no power to frame a preliminary issue of fact)

(See ( 32 ) 1932 Mad W N 331 (339) (Such an issue not to be tried before framing all necessary issues))

Note 3

1 ( 36 ) AIR 1936 Pat 250 ( 253 )

O. 14 R. 3

Materials from which  
issues may be framed

**R. 3.** [S 147.] The Court may frame the issues from all or any of the following materials:—

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders or such parties;
  - (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;
  - (c) the contents of documents produced by either party
- [1877, S. 147, 1859, S. 139.]

### Synopsis

- 1 Legislative changes
- 2 Scope and applicability of the Rule
- 3 Issue not to be inconsistent with the pleadings
- 4 Appeal

**1. Legislative changes.** — The word "pleadings" in clause (b) has been substituted for the words 'in the plaint or in the written statement (if any) tendered in the suit' which occurred in the corresponding portion of the old Section

**2. Scope and applicability of the Rule.** — In *Eshenchunder v Shamcharan*<sup>1</sup> their Lordships of the Privy Council observed that 'the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made' In order to provide against failure of justice upon technical rules of pleadings and to enable the Court to frame issues on correct points of dispute this rule prescribes that the Courts are to base the issues not on the pleadings only but on the other materials referred to in the rule as well<sup>2</sup> Owing to the infelicitous mode of drawing up pleadings prevalent in this country, the real points in dispute are often missed or obscured and therefore even if the pleadings are bad it is the duty of the Judge to ascertain these points clearly and frame issues accordingly<sup>3</sup> The proper materials that may be taken into consideration under this rule are —

- (1) Allegations made on oath by the parties or any persons present on their behalf and statements made by pleaders appearing for the parties<sup>4</sup> [clause (a)]
- (2) Allegations made in pleadings or in answer to interrogatories [clause (b)] and
- (3) Documents filed by parties [clause (c)]

#### Order 14 Rule 3 — Note 2

- 1 (66) 11 Moo Ind App 7 (20 23) (P O)
- 2 (87) 10 Mad 375 (502)
- 3 (79) 8 Bom 210 (213)
- (74) 11 Mad H O R 114 (125 130)
- [See also (71) 15 Suth W R 286 (287)]
- 4 (81) 11 Bom 609 (614)
- (1863) 2 Ind Jour (N 6) 333
- (67) 8 Suth W R 162 (162)

- (71) 16 Suth W R 118 (219)
- (79) 11 Bom 210 (213)
- (84) 12 Ind App 52 (56)
- (85) 11 Cal 407 (410)
- 11 Cal 318 (P C)

Under Rule 4 the Judge can summon witnesses and documents and examine them before framing issues. In Rule 5 provision is made for amendment addition and striking out of issues in the course of the trial.

These materials mentioned in the rule are only intended to enable the Court to ascertain the contentions of the parties with precision <sup>5</sup> i.e. to elucidate points which are *ambiguous or obscure* <sup>6</sup>. They cannot *enlarge* the scope of the pleadings so as to enable the Court to raise an issue on a point not at all raised in the pleadings <sup>7</sup>. But the Court cannot refuse to enquire into a plea raised by plaintiff's *vakil* in reply to question put to him by the Court even though such a plea has not been advanced in the original plaint <sup>8</sup>. Also where a plaint has not set out the true facts a plea raised by a defendant in his examination cannot be refused on the ground that it is not found in the written statement <sup>9</sup>.

The result of the exhaustive provisions contained in this rule is that if a point or plea has not been raised or agitated in the trial Court it will not ordinarily be allowed to be raised for the first time in second appeal <sup>10</sup>.

The provisions of this rule do not apply where the defendant is *ex parte* <sup>11</sup>.

**3 Issue not to be inconsistent with the pleadings** — The issue raised by the Court should not be *inconsistent* with the allegations contained in the pleadings <sup>1</sup>. Thus on a plea of forgery of a document no issue can be raised as to whether it was executed under coercion or undue influence <sup>2</sup>. But an issue as to undue influence is not *inconsistent* with a plea of fraud <sup>3</sup>.

**4 Appeal** — An order refusing to frame an issue asked for by a party is not appealable either under the Code <sup>1</sup> or under Clause 15 of the Letters Patent as a judgment <sup>2</sup>.

#### R. 4. [S 148] Where the Court is of opinion that the

Court may examine witnesses or documents before framing issues

issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some

document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process

[1877, S 148, 1859, S 140]

{See (88) 10 All 697 (630)}  
(71) 15 South W R 145 (146)

Note 3

1 (88) 15 Cal 684 (692) 15 Ind App 81 (PC)

1 (91) 4 Cal 591 (535)  
2 (10) 8 Ind Cas 310 (313 319) 35 Mod 1 (FB)

O. 14 R. 4  
Notes 1-2

### Synopsis

#### 1 Legislative changes | 2 Scope and applicability of the Rule

##### 1. Legislative changes. —

1 The words "to be fixed by the Court" which occurred in the old Section have been omitted

■ The words "subject to the rules contained in the Indian Evidence Act" which occurred in the old Section have been substituted by the words "subject to any law for the time being in force"

3 The words "in whose hands it may be" which occurred in the old Section have been changed into "in whose possession or power it is"

2. **Scope and applicability of the Rule.** — Section 163 of the Evidence Act does not apply to a document produced under this rule by one party at the instance of the other party<sup>1</sup>

O. 14 R. 5

### R. 5. [S. 149.] (1) The Court may at any time before

Power to amend, and  
strike out, issues

passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[1877, S 149; 1859, S 141.]

### Synopsis

#### 1 Legislative changes

#### 2. Scope and object of the Rule

3 Where an amendment of issues and the framing of new issues is obligatory.

4. Where an amendment of issues and the framing of additional issues is discretionary

5 "At any time before passing a decree"

6. Power of the appellate Court to amend the issues or frame additional issues

7. Sub-rule (2).

1. **Legislative changes.** — The word "controversy" which occurred in the old Section has been changed into "matters in controversy"

2. **Scope and object of the Rule.** — This rule provides for amending issues, framing additional issues and striking out issues in the course of the trial of a suit. A Court trying a civil action has inherent jurisdiction to take cognizance of questions going to the root of the subject matter in controversy between the parties at any stage of the trial<sup>1</sup>. But before doing so, the Court should frame and record issues on such questions<sup>2</sup>

#### Order 14 Rule 4 — Note 2

1 (26) AIR 1926 Nag 60 (61)

#### Order 14 Rule 5 — Note 2

1 (12) 16 Ind Cas 250 (252) 35 Mad 607 39 Ind App 218 (PC)

(22) AIR 1922 Pat 514 (524) 2 Pat 52.

(16) AIR 1916 Mad 479 (479) (Invalidity of mortgage for want of proper attestation—Raised only at trial—Distinct issues to be raised and opportunity for evidence to be given)

■ (19) AIR 1919 Mad 471 (471)

This rule does not enable the re opening of issues already closed, in other words a permission to raise an additional issue will not empower the party to let in additional evidence on issues already closed<sup>2</sup>

A Judge who transfers a case to his own file can amend the issues already framed and frame additional issues<sup>4</sup>

**3 Where an amendment of issues and the framing of new issues is obligatory** — Where an amendment of an issue or an additional issue is necessary for determining the matter in controversy between the parties, it is obligatory on the Court under the second portion of sub rule (1) to make such amendments of issues or to frame such additional issues. The principle underlying this provision is that Courts are bound to take into consideration all the rights of parties whether legal or equitable<sup>1</sup>. Thus where the pleadings and proof necessarily lead to one or more particular issues, it is the duty of the Court if they do not come by surprise to the other side to raise such issues and give relief thereon<sup>3</sup>. Similarly where a matter is fairly within the scope of the pleadings and important for the decision of the substantial dispute between the parties it is equally the duty of the Court to frame issue on it and decide it<sup>3</sup>. For illustrations of this principle see the cases noted below<sup>6</sup>. If the issues already framed do not clearly bring out the points in controversy between the parties<sup>6</sup> or if by inadvertence or other causes the recorded issues do not enable the Court to try the whole case on the merits<sup>6</sup> the issues should be amended or new issues framed in order to be able to give a decision on the *real points* in dispute. Where a suit has been adjusted by a valid compromise and it is brought to the notice of the Court it is bound to raise an issue in respect of the compromise and proceed to determine it<sup>7</sup>.

(34) AIR 1931 All 278 (278) 56 All 428

3 (15) AIR 1915 Mad 1196 (1196) 89 Mad 456

4 (1865) 8 Suth W R 147 (150)

**Note 3**

2 (1802) 11 Hyde 208 (265)

3 (66) 1 Agra 46 (48) (FB)

4 (70) 14 Suth W R O C 11 (18 14) (Suit by several plaintiffs as partners — Some of them found to be not partners at the time of cause of action — Court should frame issue whether plaintiffs are or are not partners and give

to pro

he had been in possession of a part of the property but no issue had been framed as to the

been taken the principal defendant asked for

joint possession)

(Jl) 11 All W N 4 (46) (Do)

(or) 90 Bom 563 (570) (Do — I reserved a specific



O. 14 R. 4  
Notes 1-2

### Synopsis

1. Legislative changes. | 2. Scope and applicability of the Rule.

#### 1. Legislative changes. —

1. The words "to be fixed by the Court" which occurred in the old Section have been omitted
2. The words "subject to the rules contained in the Indian Evidence Act" which occurred in the old Section have been substituted by the words "subject to any law for the time being in force"
3. The words "in whose hands it may be" which occurred in the old Section have been changed into "in whose possession or power it is"

**2. Scope and applicability of the Rule.** — Section 163 of the Evidence Act does not apply to a document produced under this rule by one party at the instance of the other party<sup>1</sup>

O. 14 R. 5

**R. 5. [S. 149.]** (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[1877, S. 149; 1859, S. 141.]

### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and object of the Rule.</li> <li>3. Where an amendment of issues and the framing of new issues is obligatory.</li> <li>4. Where an amendment of issues and the framing of additional issues is discretionary.</li> </ol> | <ol style="list-style-type: none"> <li>5. "At any time before passing a decree"</li> <li>6. Power of the appellate Court to amend the issues or frame additional issues.</li> <li>7. Sub-rule (2).</li> </ol> |
|---|---|

**1. Legislative changes.** — The word "controversy" which occurred in the old Section has been changed into "matters in controversy"

**2. Scope and object of the Rule.** — This rule provides for amending issues, framing additional issues and striking out issues in the course of the trial of a suit. A Court trying a civil action has inherent jurisdiction to take cognizance of questions going to the root of the subject matter in controversy between the parties at any stage of the trial<sup>1</sup>. But before doing so, the Court should frame and record issues on such questions<sup>2</sup>

#### Order 14 Rule 4 — Note 2

1. (26) AIR 1926 Nag 60 (61)

#### Order 14 Rule 5 — Note 2

1. (12) 16 Ind Cas 250 (1932) 35 Mad 607 39 Ind App 218 (PC)

This rule does not enable the re opening of issues already closed in other words a permission to raise an additional issue will not empower the party to let in additional evidence on issues already closed<sup>3</sup>

A Judge who transfers a case to his own file can amend the issues already framed and frame additional issues<sup>4</sup>

**3 Where an amendment of issues and the framing of new issues is obligatory** — Where an amendment of an issue or an additional issue is *necessary* for determining the matter in controversy between the parties it is obligatory on the Court under the second portion of sub rule (1) to make such amendments of issues or to frame such additional issues. The principle underlying this provision is that Courts are bound to take into consideration all the rights of parties whether legal or equitable<sup>1</sup>. Thus where the pleadings and proof necessarily lead to one or more particular issues, it is the duty of the Court if they do not come by surprise to the other side to raise such issues and give relief thereon<sup>2</sup>. Similarly where a matter is fairly within the scope of the pleadings and important for the decision of the substantial dispute between the parties it is equally the duty of the Court to frame issue on it and decide it<sup>3</sup>. For illustrations of this principle see the cases noted below<sup>4</sup>. If the issues already framed do not clearly bring out the points in controversy between the parties<sup>5</sup> or if by inadvertence or other causes the recorded issues do not enable the Court to try the whole case on the merits<sup>6</sup> the issues should be amended or new issues framed in order to be able to give a decision on the *real points* in dispute. Where a suit has been adjusted by a valid compromise and it is brought to the notice of the Court it is bound to raise an issue in respect of the compromise and proceed to determine it<sup>7</sup>.

(84) AIR 1934 All 273 (78) 56 All 428

3 (15) AIR 1915 Mad 1196 (1198) 89 Mad 456

4 (1865) 3 Suth W R 147 (150)

#### Note 3

1 (1868) 1 Mad H O R 471 (477)

(80) 5 Cal 64 (70 71)

(78) 1 Cal L Rep 416 (417)

(14) AIR 1914 Oudh 255 (257)

[See also (84) 1884 Pun Re No 63]

2 (1860) 2 Hyde 563 (265)

3 (66) 1 Agra 46 (48) (FB)

4 (70) 14 Suth W R O C 12 (13 14) (Suit by several plaintiff as partners — Some of them found to be not partners at the time of cause of action — Court should frame issue whether plaintiff as are or are not partners and give

held it under a lease and mortgage deed. On the day of the final disposal of the suit the plaintiff petitioned that he was the son of that person the lessor of the defendant. Held upon the new allegations the Court should have allowed the defendant to make his defence framed issues and given the defendant an opportunity to produce his evidence.)

(On) 27 All 566 (O O 271)

(73) 70 Suth W R 908 (706) (In a case in which after the evidence of both parties had been taken the principal defendant asked for permission to file an amended written statement which would in effect raise a new question as part of the defence held though the application was informal it was the duty of the Munsif if it appeared that this was the real question between the parties to amend the issues.)

5 (35) 19 Bom 374 (376)

6 (1854 1857) G Moo Ind App 393 (410 411) (PC)

7 (37) AIR 1937 Mad 900 (907 204)

he had been in possession of a part of the property but no issue had been framed as to the

exclusive possession and proves a right to joint possession only he is entitled to a decree for joint possession.)

(11) 11 All W N 45 (46) (Do)

(17) 20 Bom 563 (570) (Do — I provided a specific



amendments or frame additional issues<sup>1</sup> But a point not suggested in the pleadings and not raised in the first Court should not be put in issue for the first time by the Appellate Court<sup>2</sup> Where new issues are raised by the Appellate Court the parties should have an opportunity of producing evidence on them<sup>3</sup> and the proper course in such cases is to frame the issues and refer them for trial by the Court of first instance<sup>4</sup>

As to the High Court's power in revision to frame an additional issue, see the undementioned case<sup>5</sup>

**7. Sub-rule (2).**—Sub rule (2) empowers the Court at any time before passing the decree, to strike out any issue that appears to have been wrongly framed or introduced But if the issues have been framed by consent of both the parties they should not be struck out without the consent of both<sup>1</sup> Where the lower Appellate Court framed a wrong issue, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court refused to remand the case for a new finding on the point<sup>2</sup>

## R. 6. [S 150.] Where the parties to a suit are agreed as to the question of fact or of law to be decided

Questions of fact or law may by agreement be stated in form of issues

between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

- (a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability

(

the other of them, or as that other may direct; or

- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute

[1877, S 150; 1859, S. 142. Cf O. 36 R. 1 ]

### Note 6

1 (72) 18 Suth W R 297 (997) (First Court framed wrong issue—Appellate Court framed right issue but was wrong in deciding without giving parties opportunity of adducing fresh evidence)

(82) 1882 All W N 93 (93)

2 (72) 17 Suth W R 407 (408)

(74) 22 Suth W R 299 (300)

(74) 23 Suth W R 169 (170)

(75) 2 Ind App 87 (107) (116)

(75) 23 Suth W R 392 (333)

(75) 23 Suth W R 404 (407) (Under special circumstances it can be allowed)

(76) 25 Suth W R 115 (115)

(88) 10 All 67 (23)

(1859 1861) 8 Moo Ind App 170 (187) (PC)

3 (69) 11 Suth W R 61 (61)

(72) 17 Suth W R 361 (362)

(72) 20 Suth W R 401 (402)

4 (90) 13 Ind 157 (159)

5 (30) AIR 1936 Pe h 157 (155) (Where in revision the petitioner urged that a new issue which was already covered by the issues under consideration should be framed. Held that he could not be granted a further opportunity to do that which with common care and attention he must have known he had to do from the start)

### Note 7

1 (75) AIR 1935 All 70 (70)

2 (30) 11 B m 325 (327)

O. 14 R. 5  
Notes 6-7

O. 14 R. 6

O. 14 R. 6  
Notes 1-2

## Synopsis

### 1. Scope and applicability of the Rule | 2. Appeal

**1. Scope and applicability of the Rule.** — This rule may be compared with Order 36 which deals with the statement of a special case for the opinion of the Court, without bringing a suit. This rule and Rule 7 deal with stating by consent, of *special issues in a suit*, and provide for what may be called an adjustment or compromise of a suit, not absolutely as under O. 23 R. 3 but contingently on the opinion of the Court on certain issues of fact or law submitted to it. Upon the finding on those issues being given, the adjustment or compromise becomes absolute.<sup>1</sup> As to the form of agreement for issues to be tried, see Appendix H, Form No. 1.

**2. Appeal.** — A decree passed under the terms of Rules 6 and 7 is appealable.<sup>1</sup> But where the parties agreed to refer issues of fact to a commissioner and to abide by his findings, it was held that no appeal would lie against a decree passed on the report of the commissioner.<sup>2</sup>

O. 14 R. 7

Court, if satisfied that agreement was executed in good faith, may pronounce judgment

**R. 7. [S. 151.]** Where the Court is satisfied, after making such inquiry as it deems proper, —

- (a) that the agreement was duly executed by the parties,
- (b) that they have a substantial interest in the decision of such question as aforesaid, and
- (c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

[1877, S. 151; 1859, S. 143]

## Synopsis

### 1. Legislative changes | 2. Scope of the Rule

**1. Legislative changes.** — The word "may" which occurred in the two paragraphs of clause (c) of the old Section has been substituted by the word "shall" in the present rule.

**2. Scope of the Rule.** — As has been seen in Note 1 to Rule 6 ante, that rule provides for the adjustment of a suit contingent upon the opinion of the Court on certain issues of fact or law, submitted to it by the parties. Upon the findings on issues so submitted being given, the adjustment becomes absolute and the Court is bound to

**Order 14 Rule 6 — Note 1**  
1 (12) 16 Bom 202 (216)

upon by parties)

**Note 2**

2 (17) 29 Cal 306 (309-310)

1 (46) 1446 All W N 233 (233) (Issue agreed

[See also (87) 8 Cal 455 (452)]

pronounce judgment according to the terms of the agreement <sup>1</sup>

As to appeals under this rule, *vide* Note 2 under Rule 6, *supra*

O. 14 R. 7  
Note 2

## ORDER XV.

### DISPOSAL OF THE SUIT AT THE FIRST HEARING

**R. 1. [S. 152.]** Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once

O. 15 R. 1

Parties not at issue.

pronounce judgment.

[1877, S. 152; 1859, S. 144.]

### *Synopsis*

1. First hearing, meaning of. See O 8 R 1. | 2. Disposal at first hearing.

**1. First hearing, meaning of. —** See Order 8 Rule 1.

**2. Disposal at first hearing. —** Where the parties are not at issue upon any point of fact or law, the Court may, under this rule, at once pronounce judgment. It has been seen in O 5 R 1 that no summons need be sent to a defendant who has appeared at the presentation of the plaint and admitted the plaintiff's claim. In such a case and in cases where the defendant appears after summons at the first hearing and *confesses judgment*, the Court may proceed to give judgment <sup>1</sup>. But the Court must be satisfied that the proper persons are before the Court and that the confession of judgment is *unconditional*. Where the confession is conditional the Court must dispose of the suit on the merits <sup>2</sup>.

A Court is not justified in disposing of a case two days before the date fixed for hearing and the decree so passed will be set aside <sup>3</sup>.

**R. 2. [S. 153.]** Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

O. 15 R. 2

One of several defendants not at issue.

[1877, S. 153.]

#### Order 14 Rule 7 — Note 2

1. ( 92 ) 16 Bom 202 (216)

#### Order 15 Rule 1 — Note 2

1. ( 69 ) 12 Suth W H 432 (434)

2. ( 67 ) 2 Agra 77 (77 78)

3. ( '24 ) AIR 1924 Lah 459 (460)

O. 15 R 2  
Note 1

MADRAS

### Local Amendment

*Re number* Rule 2 as sub rule (2) (1) and *insert* the following as sub rule (2)

(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced

**1 Confession of judgment by one of several defendants** — Where one of several defendants appears and confesses judgment, and judgment is pronounced against him it does not bar further prosecution of the suit as against the other defendants<sup>1</sup>

O. 15 R 3

**R. 3. [S 154] (1)** Where the parties are at issue on some

**Parties at issue** 'question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if

the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires

[1877, S 154, 1859, S 145]

### Synopsis

- 1 Application of the Rule
- 2 Summons for settlement of issues only—Effect of
- 3 And shall fix a day<sup>1</sup>—Sub rule (2)

**1 Application of the Rule** — This rule and O 14 R 2 give power to the Court to try issues of law first. The power under O 14 R 2 can be exercised at the issue stage<sup>1</sup>. As to whether this rule gives power to the Courts to proceed to determine issues of law at a stage subsequent to the issue stage there is a difference of opinion

Order 15 Rule 2 — Note 1

<sup>1</sup> (1) 95 Bom 378 (396)

Order 15 Rule 3 — Note 1

<sup>1</sup> (21) AIR 1921 P 467 (467)

The High Courts of Madras<sup>2</sup> and Patna<sup>3</sup> have held that it does, while the High Court of Calcutta<sup>4</sup> has held that it does not.

But though this rule empowers a Court to dispose of a suit on preliminary issues, it should not ordinarily do so but should pronounce its opinion on all important issues.<sup>5</sup> The reason is that piecemeal trial of a case leads to serious inconvenience and protracts litigation. In *Tara Kant Banerjee v. Puddu Mones Dossee*,<sup>6</sup> Lord Justice Turner, in delivering the judgment of the Privy Council, observed as follows:

"The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts should, as far as may be practicable, pronounce their opinion on all the important points."

Where the suit is sought to be disposed of on a preliminary point of law, it must be done only on the assumption that the facts pleaded can be and are proved.<sup>7</sup>

**2. Summons for settlement of issues only—Effect of.**—Where the summons has been issued for the settlement of issues only, the Court may proceed to hear and dispose of the case if the parties are ready and willing to proceed.<sup>1</sup> If, however, one of the parties objects to the adoption of such a procedure, the Court has no jurisdiction to proceed to dispose of the case.<sup>2</sup>

**3. "And shall fix a day"—Sub-rule (2).**—The object of the Code in requiring a day to be fixed for the hearing of the case and all the evidence to be adduced on that day is that parties may thus be confronted with each other and the whole evidence on either side be at one and the same time before the Court.<sup>1</sup>

**R. 4. [S. 155.]** Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

[1877, S. 155; 1859, S. 145.]

2. (1922) AIR 1922 Mad 321 (322)

3. (1921) AIR 1921 Pat 467 (467)

4. (1915) AIR 1915 Cal 87 (90)

(33) AIR 1913 Cal 559 (559, 560) (Court has however such power irrespective of the provisions of the Code.)

5. (1922) AIR 1922 Cal 105 (408) 50 Cal 211 50 Ind App 217 (14)

(30) AIR 1930 Cal 787 (790) 58 Cal 474

(1920) AIR 1920 Lah 125 (127, 128) 7 Lah 42

6. (66) 10 Moo Ind App 476 (489) (PC)

7. (66) 10 Moo Ind App 510 (553) (PC)

**Note 2**

1. 1 Ind Jour (OS) 14 1 Hyde 143

2. (15) AIR 1915 Mad 319 (319)

(92) 16 Mad 193 (200)

(74) 22 South W R 426 (427)

(61) 1 N W P H C R 147 (148)

**Note 3**

1. (71) 15 South W R 150 (151)



## Synopsis

1. "The Court may pronounce judgment."
2. "Sufficient cause."
3. Appeal

### Other Topics (miscellaneous)

**Court can determine preliminary issues first** See Note 1  
**Proviso to the Rule** See Note 2

1. "The Court may pronounce judgment." — Even in a case in which the summons may have been issued for final disposal, the Court has a discretion to adjourn the case for the production of such evidence as may be necessary. Thus, if, after the written statement is filed, the suit is found to involve issues of a less simple character than might have been anticipated at the outset, it is desirable, in the interests of justice, that the discretion given to the Court by this rule should be so exercised as to ensure a fair trial and not to deny, in effect, the trial to the parties.<sup>1</sup>

Where a party fails, without sufficient cause, to produce his evidence on the date fixed for final disposal, and an adjournment is refused, the Court can at once pronounce judgment. But it cannot *dismiss the suit for non-prosecution* <sup>2</sup>

2. "Sufficient cause." — Where the plaintiff and the defendants were endeavouring to settle their differences by arbitration, and the plaintiff was told by one of the defendants that he would inform the Court of what was going on, in consequence of which plaintiff did not appear with his evidence on the day fixed, it was held that there was sufficient cause for the plaintiff not to be ready with his evidence.<sup>1</sup>

**3. Appeal.**—A pronouncement of judgment under this rule is a decree and is appealable as such.<sup>1</sup>

## ORDER XVI.

## SUMMONING AND ATTENDANCE OF WITNESSES

**R. 1.** [S 159.] At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

**Summons to attend  
to give evidence or  
produce documents**

[1877, S. 159; 1859, S. 149.]

## ALLAHABAD

## Local Amendments

The following proviso shall be *added*

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not

Order 15 Rule 4 — Note 1

### Note 3

**1** / 1 \    775   0   1   76       18   0   2   75       = 2

1 (01) 31 C21 150 (154)

(83) 1893 All W N 171 (171) (Dismissal of suit for failure to produce evidence must be taken to be one under this rule)

1 ('87) 1857 All W N 105 (105)

previously issued or to call any witness not named in a list which must be filed in Court before the hearing of evidence on his behalf has commenced without an order of the Judge made in writing and stating the reasons therefor

**LAHORE**

*Add the following proviso*

Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued or to produce any witness not named in a list which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence without an order of the Court made in writing and stating the reasons therefor

*Note* — All the witnesses need not be named in the lists originally filed. A party can file his list up till the moment when he actually commences to lead evidence <sup>1</sup>

**N W F P**

*Substitute the following for Rule 1*

1 (1) On such date as the Court may appoint and not later than 30 days after the settlement of issues the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents

(2) They shall not be permitted to call witnesses other than those contained in the said list except with the permission of the Court and after showing good cause for the omission of the said witnesses from the list the Court granting such permission shall record reasons for so doing

(3) On application to the Court or such officer as it appoints in this behalf the parties may obtain summonses for persons whose attendance is required in Court

**OU DH**

*Substitute for Rule 1 the following*

1 (1) The Court may in any suit or class of suits require any party to file by a date to be fixed by the Court a list of witnesses whom he proposes to produce and may if necessary direct that such list be kept in a sealed envelope for such time as the Court considers desirable

Where such a list has been called for from any party the latter shall not except for special reasons be permitted to summon or produce as witness any person whose name has not been entered in the list

(2) Subject to the provisions of sub rule (1) the parties may after the suit is instituted obtain on application to the Court or to such officer as it appoints in this behalf summonses to persons whose attendance is required either to give evidence or to produce documents

### *Synopsis*

1 Legislative changes

2 Scope of the Rule

3 When witness summons may be applied for

4 Summoning of a party as a witness

5 Refusal of summons

6 Remedy when summons is refused

7 Form of witness summons See Form No 13 Schedule I Appendix B

8 Second appeal See Note 6

9 Revison

### *Other Topics (miscellaneous)*

Application Time of See Note 3 a 1  
May obtain See Note 2

**Order 16 Rule 1 (Lahore)**

1 (35) AIR 1 55 Lah 454 (3)

O. 16 R. 1  
Notes 1-4

## 1. Legislative changes. —

The words "at any time after the suit is instituted" have been substituted for the words "after the summons has been delivered or sent for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit before the day fixed for such settlement or disposal"

For the effect of the change, see Note 3

**2. Scope of the Rule.** — This Order contains the necessary rules in the matter of enforcing the attendance of persons either to give evidence or to produce documents provided for in Sections 30 and 32, *ante*. Though the Court is bound to help the parties in this behalf,<sup>1</sup> it is ordinarily for the parties to move the Court to take the necessary steps,<sup>2</sup> unless the Court chooses to act of its own motion under Rule 14, *infra*

The powers exercisable by Civil Courts under this Order have been conferred on the tribunals appointed under the undermentioned Acts<sup>3</sup>

**3. When witness summons may be applied for.** — Section 159 of the Code of 1882 was differently worded as is shown in Note 1, *supra*. It was, however, held under that Code that an application under that Section could be made at any time before the party closed his case and not necessarily before the date of the first hearing<sup>1</sup>. The present Code has clearly provided that an application under this rule can be made at any time after the institution of the suit

**4. Summoning of a party as a witness.** — The Code of 1859 had a special provision (Section 162) for summoning the opposite party as a witness in the case

## Note 2

1. (10) 5 Ind Cas 184 (185) (C11)  
(20) AIR 1926 Pat 545 (547) (Court may instead of summons send a Court poon with an order to Collector for production of documents)

2. (75) 23 Suth W R 83 (84)

(27) AIR 1927 Lah 845 (846)

(See (33) AIR 1933 Mad 821 (822) (Party desiring the presence of the opposite party for giving evidence should take steps under this order and apply under O 3 R 1))

3

of 1920), S 11 The Chota Nagpur Tenancy Act (VI of 1908), S- 203 and 265 (3), The Central Provinces Land Revenue Act (II of

Orissa Municipal Survey Act (I of 1920) S 7  
The Bombay Land Revenue Code (V of 1879) S 192  
The Bombay Local Boards Act (VI of 1923) S 123 (2)  
The Bundelkhand Revenue and Estates Act (I of 1903) S 34  
The Burma Boundaries Act (V of 1890) S 15  
The Burma Canal Act (II of 1905) S 74  
The Burma Forest Act (IV of 1902) S 9 (b)  
The Calcutta Improvement Act (V of 1911) S 70 (c)  
The Calcutta Survey Act (I of 1897) S 9  
The Charitable and Religious Trusts Act (XIV

Orissa Tenancy Act (II of 1913), S 67 (10)  
The Provident Insurance Societies Act (V of 1912) S 19 (3)  
The Punjab Sikh Gurdwara and Shrines Act (VI of 1922), S 24 (4)  
The United Provinces Canal Drainage Act (VIII of 1873), S 69  
The United Provinces Land

(1920),  
improve  
e Work  
S 23

## Note 3

1. (69) 9 Suth W R 530 (537)

(90) 1890 Bom P J 333 (333)

(93) 1893 Bom P J 419 (420)

(91) 15 Bom 86 (86)

[See also (81) 5 Bom 184 (185) (Defendant's side not closed)]

The Court had a discretion in the matter of such summons and had to be satisfied that such evidence was material<sup>1</sup> There is nothing in this rule to prevent a party from examining his opponent as his witness in the case<sup>2</sup> See also Rule 21, *infra*

**5. Refusal of summons** — The Court is bound to issue summons where application is made at any time after the institution of the suit and before its final disposal<sup>1</sup> provided the application made therefor is a proper one<sup>2</sup> It cannot be refused on the ground that such an application is too late, though it is within the discretion of the Court to refuse an adjournment of the hearing on the ground of want of diligence of the party<sup>3</sup> The reason is that it is possible that the hearing may for some reason be adjourned or the party may have his own facilities for the expeditious service of summons<sup>4</sup> Rule 9, *infra*, which provides that summons must be served on the witness in sufficient time, is only a rule in favour of the witness and intended to induce due diligence in the party but it does not empower the Court to refuse to issue a witness summons on the ground of late application<sup>5</sup> Nor can summons be refused on the ground that the evidence of a witness may not be beneficial to the party<sup>6</sup> or that the witness had not been summoned before<sup>7</sup> or that the party had undertaken to bring his witnesses<sup>8</sup> or that steps were not taken by the party within a time fixed by the Court for that purpose<sup>9</sup>

This rule does not, however take away the inherent power of the Court to refuse witness summons in order to prevent an abuse of the process of the Court<sup>10</sup>

**Note 4**

frivolous and vexatious the Court has no

- 1 (66) 6 Suth W R 65 (66)  
(1804) 1 Suth W R 207 (208)  
(1865) 2 Suth W R 4 (4)  
(72) 17 Suth W R 507 (508)  
(74) 21 Suth W R 44 (44)  
(67) 7 Suth W R 147 (147)  
2 (18) 20 Ind Cas 450 (451) 16 Ondh Cas 145  
(09) 12 Suth W R 817 (818)  
(75) 24 Suth W R 72 (78) (Ordinarily the Court  
must secure the evidence of the party if  
required before deciding the suit)  
[See also (83) AIR 1933 Mal 821 (822) (The  
procedure to examine a party is to take steps  
under this Order and not to apply under O 3  
Rule 1)]

- (79) 3 Cal L Rep 569 (571)  
(76) 25 Suth W R 71 (71)  
(81) 7 Cal 730 (781 739)

**Note 5**

- 1 (24) AIR 1924 Cal 971 (972)  
(53) AIR 1933 Lah 538 (539) (Court refusing to

not yet closed—Application a day before the  
hearing)  
(37) 167 Ind Cas 109 (169) (Lah) (The word  
may in O 16 R 1 means it shall be law  
ful)  
[See (79) 11 Suth W R 418 (419)]

2

- (See (04) Beng L R App 10 (10) ]  
7 (27) AIR 1937 Lah 281 (281)  
(10) 5 Ind Cas 184 (186) (Cal)  
(28) AIR 1923 Nag 58 (59)  
8 (82) 6 Bom 742 (743)  
9 (31) AIR 1931 Lah 135 (136)  
10 (70) 14 Suth W R 66 (67 66)  
(05) 28 Mad 28 (33 34 36)  
(24) AIR 1924 Lah 617 (619)  
[See also (26) AIR 1926 Cal 1 (36) ]

**O 16 R 1**  
**Notes 4-9**

**¶ Remedy when summons is refused** — An order refusing an application for witness summons is not open to appeal but its correctness can be questioned in an appeal from the decree in the suit and subject to the limitations prescribed in Sections 99 and 105 of the Code<sup>1</sup> The High Court may in a proper case interfere even in a second appeal<sup>2</sup> provided the appellant had insisted on his right in both the lower Courts<sup>3</sup>

**7 Form of witness summons** — See Form No 13 in Appendix B of the First Schedule

**8 Second appeal** — See Note ¶ above

**9 Revision** — An order wrongly refusing an application may be a material irregularity in the exercise of jurisdiction and in that case will be open to revision<sup>1</sup>

### Local Amendments

#### BOMBAY

The following shall be *added* as Rule 1A

**O 16 R 1A**  
**(Bombay)**

1A — (1) The Court may on the application of any party for a summons for the attendance of any person permit that service of such summons shall be effected by such party

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected the Court may if it is satisfied that reasonable diligence has been used by such party to effect such service permit service to be effected by an officer of the Court

#### SIND

*Add* the following as Rule 1A *after* Rule 1

**O 16 R 1A**  
**(Sind)**

1A — The Court may on the application of any party for a summons for the attendance of any person as a witness permit that service of such summons shall be effected by such party

**O 16 R 2**

**R. 2. [S 160]** (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

Expenses of witness to be paid into Court on applying for summons

**Experts**

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing

#### Note ¶

1. (94) 16 All 218 (220)  
(96) 1896 All W N 120 (120 121) (Refusal to summon some of the witnesses — Appeal from decree in suit—Order refusing to summon witness questioned)

2. (74) 22 Sath W N 296 (296)

3. (69) 11 Sath W R 418 (419)

#### Note 9

1. (80) 9 Bom 303 (310)

(21) 60 Ind Cas 656 (r56) (Lah)

[See also (37) 167 Ind C s 17 (170) (Lah)]

any work of an expert character necessary for the case.

O. 16 R. II

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

Scale of expenses.

[1877, S 160; 1859, S. 151.]

### Local Amendments

#### ALLAHABAD

To Rule 2, add

"(4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs 10 *per mensem* and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters "

#### BOMBAY

Insert as proviso to sub-rule (1)

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness "

#### CALCUTTA

Cancel clauses (1) and (2) and substitute the following

"(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the persons summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

#### LAHORE

Add the following exception to Rule 2 (1)

"Exception — When applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1) "

#### NAGPUR

Add the following as an exception to Rule 2 (1)

Exception — When applying for a summons for any of its own officers, Government will be exempt from the operation of sub rule (1) "

#### PATNA

Add the following proviso to Rule 2 (1)

" Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge or of matters with which he has had to deal in his public capacity

O 16 R 1  
Notes 4-9

**6 Remedy when summons is refused** — An order refusing an application for witness summons is not open to appeal but its correctness can be questioned in an appeal from the decree in the suit and subject to the limitations prescribed in Sections 99 and 105 of the Code<sup>1</sup> The High Court may in a proper case interfere even in a second appeal<sup>2</sup> provided the appellant had insisted on his right in both the lower Courts<sup>3</sup>

**7 Form of witness summons** — See Form No 13 in Appendix B of the First Schedule

**8 Second appeal** — See Note 6 above

**9 Revision** — An order wrongly refusing an application may be a material irregularity in the exercise of jurisdiction and in that case will be open to revision<sup>4</sup>

### Local Amendments

#### BOMBAY

The following shall be *added* as Rule 1A

O 16 R 1A  
(Bombay)

1A — (1) The Court may on the application of any party for a summons for the attendance of any person permit that service of such summons shall be effected by such party

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected the Court may if it is satisfied that reasonable diligence has been used by such party to effect such service permit service to be effected by an officer of the Court

#### SIND

*Add* the following as Rule 1A *after* Rule 1

O 16 R 1A  
(Sind)

1A — The Court may on the application of any party for a summons for the attendance of any person as a witness permit that service of such summons shall be effected by such party

O 16 R 2

**R. 2. [S 160 ] (1)** The party applying for a summons

Expenses of witness to  
be paid into Court on  
applying for summons

shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing

**Note 6**  
1 (94) 10 All 218 (220)  
(96) 1896 All W N 120 (120 121) (Refusal to  
summon some of the witnesses — Appeal from  
decree in suit—Order refusing to summon wit-  
ness questioned)

2 (74) 22 Suth W R 206 (296)  
3 (69) 11 Suth W R 418 (419)

#### Note 7

1 (85) 9 Bom 803 (310)  
(21) 60 Ind Cas 656 (15) (Lab)  
{ See also (37) 167 Ind Cas 16 (170) (Lab) }

(5) *Witnesses following any profession such as medicine or law* — A special allowance according to circumstances which is not to exceed Rs 3 unless the witness is called to give expert evidence. In determining the amount payable under this rule the Court may in the case of any person summoned to give evidence as an expert allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(6) *Lodging allowance* — In addition to the above a lodging allowance not exceeding except in special cases annas thirteen for persons in class (3) and Re 1 10 0 for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness had to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case it shall not exceed the actual amount spent and the Court must be satisfied that such expenditure was necessary.

Provided that —

(i) a servant of Government or of a local authority whose salary exceeds Rs 10 per mensem giving evidence in his official capacity in a suit to which Government or the local authority respectively is a party —

(a) when giving evidence at a place more than five miles from his headquarters shall not receive anything under these rules but shall be given a certificate of attendance

(b) when giving evidence at a place not more than five miles from his headquarters shall in cases where the Court considers it necessary receive under these rules actual travelling expenses but shall not receive subsistence special or expert allowances

(ii) a servant of Government or of a local authority whose salary does not exceed Rs 10 per mensem giving evidence in his official capacity shall receive his expenses from the Court

[*Note* — When the journey has to be performed partly by rail or steam boat partly by road or boat the fare shall be paid in respect of the former and the go or boat allowance in respect of the latter part of the journey.]

Railway servants summoned by a Civil Court as witnesses and travelling by to attend the Court shall be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares

Insert the following as proviso to sub rule (1)

Provided that where Government or a public officer being a party to a suit or acting as such public officer supported by Government in the litigation applies for orders to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge or of matters with which he has to deal as a public officer, or to produce any document from public records the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness

### Synopsis

Relative changes  
in applicability of the Rule to Chartered  
Courts  
Expenses of witnesses  
Remedy where the expenses are not  
paid

5 Effect of non service of summons owing  
to the default of process server  
6 Government servants summoned as wit-  
nesses are entitled to salary during absence  
on summons



## O. 16 R. 2 RANGOON

(1) *Add the following to Rule 2 (1)*

' Provided that in cases to which Government or a local authority is a party

(a) No payment into Court will be required for the travelling and other expenses of a servant of Government or of local authority who may be required to be summoned at the instance of Government or the local authority prospectively to give evidence in the official capacity,

(b) The amount to be paid into Court for the travelling and other expenses of a servant of a Government or of a local authority whose salary exceeds Rs 10 and who may be required to be summoned at the instance of a party other than the Government or the local authority respectively to give evidence in his official capacity in a Court situated at a distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the rules applicable to him in his official capacity "

(2) For sub rule (3) substitute the following

' (3) Subject to provisions of sub rule (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale

(1) *Ordinary labouring classes* — The actual fare to and from the Court by the lowest class for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 11 (12), or where the journey could not have been performed by public conveyance, actual travelling expenses reasonably incurred not exceeding Re 1 4 0 a day by boat and annas *two* a mile by road, and an allowance for each day's absence from home of annas *six* to those who are residents of places other than the place where the Court is held, and of annas *four* to those who are residents of the place where the Court is held

(2) *Petty village officers* — The same rates as above for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or actual travelling expenses reasonably incurred not exceeding Re 1 4 0 a day by boat and annas *two* a mile by road, and an allowance of annas *eight* for each day's absence from home

(3) *Persons of higher ranks of life, such as Clerks, Tradespeople, Village Headmen, Headmen of Circles and Members of Circle Boards* — Third class fare to and from the Court for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or where the journey could not have been performed by public conveyance, actual travelling expenses reasonably incurred not exceeding Rs 2 8 0 a day by boat and annas *two* a mile by road and an allowance not to exceed, except in special cases, Re 1 for each day's absence from home

Provided that the second class fare by public conveyance may be paid in any case in which the Court is satisfied that the witness is a person who ordinarily travels by second class and did actually travel by that class The Court should certify that it is so satisfied in all cases in which second class fare is paid

(4) *Members of District Councils, persons paying income tax on Rs 3000 per annum or more, and other persons of equal or superior status* — The actual travelling expenses reasonably incurred to and from the Court with an allowance according to circumstances, not to exceed, except in very special cases, Rs 11 for each day's absence from home

(5) *Witnesses following any profession such as medicine or law* — A special allowance according to circumstances, which is not to exceed Rs 3, unless the witness is called to give expert evidence. In determining the amount payable under this rule the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(6) *Lodging allowance* — In addition to the above, a lodging allowance not exceeding, except in special cases, annas *thirteen* for persons in class (3) and Re 1 10 0 for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness had to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent and the Court must be satisfied that such expenditure was necessary.

Provided that —

(1) a servant of Government or of a local authority whose salary exceeds Rs 10 per mensem giving evidence in his official capacity in a suit to which Government or the local authority respectively is a party —

(a) when giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance,

(b) when giving evidence at a place not more than five miles from his headquarters, shall, in cases where the Court considers it necessary, receive under these rules actual travelling expenses but shall not receive subsistence, special or expert allowances.

(2) a servant of Government or of a local authority whose salary does not exceed Rs 10 per mensem, giving evidence in his official capacity shall receive his expenses from the Court.

[Note — When the journey has to be performed partly by rail or steam boat and partly by road or boat the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the latter part of the journey.]

Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, shall be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares.

SIND

Insert the following as proviso to sub rule (1)

"Provided that where Government or a public officer being a party to a suit or proceeding is such public officer supported by Government in the litigation applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge or of matters with which he has had to deal as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness.

### Synopsis

- 1 Legislative changes
- 2 Applicability of the Rule to Chartered High Courts
- 3 Expenses of witnesses
- 4 Remedy where the expenses are not paid

- 5 Effect of non-service of summons owing to the default of process server
- 6 Government servants summoned as witnesses, if entitled to salary during absence on summons

O. 16 R. 2  
Notes 1-6

*Other Topics (miscellaneous)*

Considerations in fixing the scale of expenses · Party making due payment not responsible for service See Note 5  
See Note 3

**1. Legislative changes.** — Sub rule (2) is new

**2. Applicability of the Rule to Chartered High Courts.** — This rule does not apply to Chartered High Courts See Order 49 Rule 3

**3. Expenses of witnesses.** — A witness is entitled to be paid his travelling and other expenses for his attendance in Court. But except as provided for in sub rule (2), no witness is entitled to any compensation for *loss of time*<sup>1</sup> or to any special amount on the ground of *status*,<sup>2</sup> though the expenses may be claimed suitable to the rank or status of the witness.<sup>3</sup> The right to claim expenses is not lost by the fact of the witness having attended and given evidence before making the claim,<sup>4</sup> or of his having been called by one party and examined by the opposite party.<sup>5</sup> The Court must give the party a reasonable time for payment of the amount of expenses into Court.<sup>6</sup>

**4. Remedy where the expenses are not paid.** — The remedy of the witness whose expenses are not paid is by an *application* to the Court and not by a separate suit.<sup>1</sup> See also Rule 4

**5. Effect of non-service of summons owing to the default of the process-server.** — If the party duly pays the necessary fees into Court, he is not answerable for the non service of the summons owing to the default of the process server.<sup>1</sup> A dismissal of the plaintiff's suit by reason of the plaintiff's witnesses not appearing owing to the default of the process server in serving the summons on them, is illegal.<sup>2</sup> It is otherwise if the fees are not duly paid.<sup>3</sup>

**6. Government servants summoned as witnesses, if entitled to salary during absence on summons.** — Government servants summoned as witnesses are not entitled to the payment of any salary as part of the expenses inasmuch as the Government does not deduct any salary for such absence.<sup>1</sup>

O. 16 R. 3

**R. 3. [S 161.]** The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally

Tender of expenses to witness

[1877, S. 161; 1859, S 151.]

**Order 16 Rule 2—Note 3**

1. (1865) 2 Hyde 236 (236)
- (11) 12 Ind Cas 190 (190) (Chief officer of municipality—Summons to produce documents—Not entitled to search fee)
2. (22) AIR 1922 Bom 116 (117) 45 Bom 89 (Pleader as witness of facts—No expert—No claim on account of status)
3. (73) 19 Suth W R 78 (78)
4. (80) 4 Bom 619 (621)
- (04) 28 Bom 647 (649)
5. (04) 28 Bom 647 (649, 650)
6. (24) AIR 1924 Nag 271 (275) 20 Nag LR 131

[See (68) 9 Suth W R 127 (128)]

**Note 4**

1. (66) 5 Suth W R 8 C C Ref 6 (7)
- [See however (07) 17 Mad LJour 143(143, 144) (But a suit lies to recover money paid to a witness for expenses if he does not attend)]

**Note 5**

1. (71) 15 Suth W R 89 (89)
2. (25) AIR 1925 Lah 296 (296)
3. (25) AIR 1925 Lah 457 (458)
- (72) 18 Suth W R 16 (18 19)

**Note 6**

1. (23) 39 Cal LJour 149 (149, 150)

## Local Amendments

O. 16 R. 3

## BOMBAY

*Insert the proviso*

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him "

## CALCUTTA

*Substitute the following for Rule 3*

"3 The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally "

## LAHORE

*For Rule 3, substitute*

"3 (1) The sum paid into a Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons if it can be served personally

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government

*Exception* — (1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them

*Exception* — (2) A Government servant, whose salary does not exceed Rs 10 *per mensem* may receive his expenses from the Court "

## NAGPUR

*For Rule 3, substitute the following*

"3 (1) The sum so paid into Court shall, except in case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government

*Exception* — (1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, the actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them

*Exception* — (2) A Government servant whose salary does not exceed Rs 10 *per mensem* may receive his expenses from the Court "

## PATNA

*Add the following as proviso*

"Provided that when the person summoned is an officer of Government, who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge or of matters which he has had to deal, in his public capacity, then—

(1) if the officer's salary does not exceed Rs 10 a month the Court shall at the time of the service of the summons make payment to him of his expenses as determined by Rule 2 and recover the amount from the Treasury

(2) if the officer's salary exceeds Rs 10 a month, and the Court is situated not

**O. 16 R. 4A**  
(Madras)

**MADRAS**

### Local Amendment

*Insert the following as Rule 4A*

"4A — (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council, no payment in accordance with Rule 2 or Rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required under Rule 4 according to the same scale, and the money so deposited or paid shall be credited to Government

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance "

**O. 16 R. 5**

**R. 5. [S. 163.]** Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also

*Time, place and purpose of attendance to be specified in summons*

whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

[1877, S. 163; 1859, S. 152.]

### Synopsis

- |  |                                   |
|--|-----------------------------------|
| 1. Contents of summons                         | 3. Where the hearing is postponed |
| 2. Failure to specify the place of appearance. | Note 3 to Rule 4 and Rule 16      |

**1. Contents of summons.** — A summons should contain the necessary particulars of time and place of attendance<sup>1</sup> and of the documents to be produced<sup>2</sup>. In fixing the time for the attendance of public officers and witnesses, sufficient consideration must be given to the exigencies of public duties<sup>3</sup>.

**2. Failure to specify the place of appearance.** — A witness cannot be held liable for non compliance with the summons where it is defective in particulars of time or place<sup>1</sup>. See Rule 15, *infra*

#### Order 16 Rule 5 — Note 1

1. ('83) 5 All 7 (3)  
2. (1864) 1864 Suth W R Gap No 164 (165)  
[See also (13) 12 Ind Cas 190 (190) — Sind L R 44]

(Documents specified only need be produced)]

3. ('70 71) 6 Mad H O R App Side Ruling VI

#### Note 2

- 1 ('83) 5 All 7 (3)

3. Where the hearing is postponed. — See Note 3 to Rule 4, *supra* and Rule 16, *infra*

O. 16 R. 5  
Note 3

**R. 6. [S. 164.]** Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

O. 16 R. 6

[1877, S. 164; 1859, S. 153; R. S. C., O. 37 R. 7.]

1. Scope. — It is open to a witness to produce documents at the hearing though he has not been summoned to produce them<sup>1</sup>

Where anything has to be done before a document can be produced under this rule, it must be done by the party and not the Court<sup>2</sup>

**R. 7. [S. 165.]** Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

O. 16 R. 7

Power to require persons present in Court to give evidence or produce document

[1877, S. 165.]

1. Scope. — This rule is subject to Sections 130 and 131 of the Evidence Act under which persons who are not parties to the suit cannot be compelled to produce particular documents<sup>1</sup> It is left to the discretion of the Court to act under this rule<sup>2</sup>

### Local Amendment

#### CALCUTTA

Insert the following as Rule 7A:

"7A (1) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court

O. 16 R. 7A  
(Calcutta)

(11) Rules 16 and 18 of Order 5 shall apply to summons personally served under this rule, as though the person effecting service were a serving officer

(111) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant "

Order 16 Rule 6 — Note 1

of a message that passed through his office }

Order III Rule 7 — Note 1

1 (11) II Ind Cas 791 (795) (Cal)

2 (04) 4 Nag L R 129 (133)

O. 16 R. 4A  
(Madras)

## MADRAS

## Local Amendment

Insert the following as Rule 4A

"4A — (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council, no payment in accordance with Rule 2 or Rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required under Rule 4 according to the same scale, and the money so deposited or paid shall be credited to Government

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance "

O. 16 R. 5

## R. 5. [S 163.] Every summons for the attendance of a

Time, place and purpose of attendance to be specified in summons

person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

[1877, S. 163; 1859, S. 152.]

## Synopsis

1. Contents of summons

2. Failure to specify the place of appearance.

3 Where the hearing is postponed See Note 3 to Rule 4 and Rule 16

1. Contents of summons. — A summons should contain the necessary particulars of time and place of attendance<sup>1</sup> and of the documents to be produced<sup>2</sup>. In fixing the time for the attendance of public officers as witnesses, sufficient consideration must be given to the exigencies of public duties<sup>3</sup>

2. Failure to specify the place of appearance. — A witness cannot be held liable for non compliance with the summons where it is defective in particulars of time or place<sup>1</sup> See Rule 15, *infra*

Order 16 Rule 5 — Note 1

(Documents specified only need be produced )]

1. (83) 5 All 7 (8)

2. (1864) 1864 South W R Gap No. 164 (163)

(See also (18) 12 Ind Cas 190 (190) 5 Sind L R 44

3. ('70 71) 6 Mad II G R App Side Ruling VI

Note 2

1. (83) 5 All 7 (9)

service on a witness or witnesses, whose attendance is required by such party, may be delivered to such party or his pleader for service by a person employed by such party or his pleader, and the rules in Order II as to service and proof of service shall apply in such case as if the person employed by such party or his pleader to effect service were the officer of the Court whose duty it is to effect service of summons "

O. 16 R. 8

**R. 9.** [S. 167.] Service shall in all cases be made a sufficient time before the time specified in the summons

O. 16 R. 9

Time for serving  
summons.

for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

#### Local Amendment

#### RANGOON

Add the following :

"Where the person summoned is a public officer or servant of a Railway Company, sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post "

**R. 10.** [S. 168 ] (1) Where a person to whom a summons

O. 16 R. 10

Procedure where wit-  
ness fails to comply with  
summons

has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a



O. 16 R. 10  
Note 1

warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12 :

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

[1877, S. 168; 1859, S. 159; R. S. C., O. 37 R. 8.]

### Local Amendment

#### ALLAHABAD

In sub rule (1) *substitute* a colon for the full stop after the word "summons" and *add* the proviso

"Provided that the Court need not examine the serving officer if the person has been summoned only to produce a document and has attended and admitted receipt of the summons but has failed to produce the document "

In sub rule (2)

(a) between the word "proclamation" and the word "requiring," *insert* the words, "or, if he is present, an order in writing to be signed by him",

(b) for the words "and a copy of such proclamation" *substitute* the words, "and a copy of the proclamation if issued "

In sub-rule (3) between the word "proclamation" and the words "or at any time afterwards" *insert* the words, "or an order in writing "

### Synopsis

- |   |  |
|---|--|
| 1. Scope and applicability of the Rule. | 4. Issue of warrant of arrest—Sub-rule (3).        |
| 2. "Without lawful excuse."             | 4a. Order for attachment of property—Sub-rule (3). |
| 3. Issue of proclamation—Sub rule (2).  | 5. Appeal.   |

### Other Topics (miscellaneous)

Clause (1) See Note 1

Duty of Settlement Courts See Note 1

May issue See Note 1

**1. Scope and applicability of the Rule.**— This rule is intended to enable the Court to help the parties by *compelling* the obedience of recalcitrant witnesses<sup>1</sup> The rule becomes applicable only where the Court *finds* that the summonses have been *duly served*<sup>2</sup> as indicated in sub-rule (1) It has no application where there has been no summons<sup>3</sup> or where the summons has not been returned<sup>4</sup> or where the witness attends or produces the document on the required date though he had refused the summons<sup>5</sup> The rule being of a highly penal nature, the procedure laid down in sub-rule (1) must be strictly followed before a Court finds whether the summons was served or not<sup>6</sup> The Nazir's report is not legal evidence on this point<sup>7</sup>

#### Order 15 Rule 10 — Note 1

1. ('66) 6 Suth W R 14 (15)

[See ('66) 5 Suth W R Act X, 49 (50)]

[See also ('67) 7 Suth W R 519 (520) (FB)]

(Court can even send them for trial before Magistrate)]

('37) AIR 1937 Mad 811 (813) (Purpose = to vindicate authority of Court)]

2. ('67) 7 Suth W R Cri Rul 60 (60)

3. ('16) AIR 1916 Cal 421 (422) { Duty of Settle

ment Courts )

4. ('69) 11 Suth W R 99 (99)

5. ('28) AIR 1928 Lah 469 (469)

6. ('93) 3 Cal W N 207 (210)

(17) AIR 1917 Lah 281 (281) (Issue of a warrant without an affidavit or examination on oath of the serving officer illegal)

[See however ('05) 27 All 491 (493) (A case of criminal revision)]

7. ('86) C Suth W R Act X, 92 (93)

As a general rule, it is for the party to move the Court to issue one or more of the coercive processes under this rule<sup>8</sup> though the Court is not precluded from taking action *suo motu*<sup>9</sup> In either case both the conditions precedent laid down in sub rule (2) must be satisfied before any coercive action is taken<sup>10</sup> If the conditions are not satisfied, the party is entitled only to a fresh summons<sup>11</sup> Even where both the conditions are satisfied it is left to the discretion of the Court to take coercive measures or not<sup>12</sup> but the discretion must not be *arbitrarily* exercised<sup>13</sup>

**2 "Without lawful excuse"** — The question of lawful excuse depends on the circumstances of each case<sup>1</sup> It is not necessary for the Court to institute a formal investigation and come to a decision on the evidence adduced in order to believe in the want of lawful excuse If the Court believes that the witness has knowledge of the summons and thinks that his evidence is material and if there is no one in Court to account for the witness's absence there is sufficient reason to act under this rule<sup>2</sup> Non payment or non tender of expenses to the witness is a lawful excuse for non attendance<sup>3</sup> Where the summons is returned unserved the party must be given reasonable time to make out the grounds for the coercive process<sup>4</sup>

**3 Issue of proclamation—Sub-rule (2)** — Delay caused by the office owing to the late payment of process fees for proclamation cannot be set up by the party as a ground for non production of witnesses<sup>1</sup>

**4 Issue of warrant of arrest—Sub rule (3)** — In requiring parties to take out warrants of arrest against recalcitrant witnesses the Court must have due regard to the practical difficulties felt by litigants in procuring the evidence of an important

- { 68 } 10 Suth W R 8 (4)  
{ 72 } 18 Suth W R 197 (107)  
{ 1864 } 1864 Suth W R Gap No Misc 9 (9)  
{ 81 } 7 Cal 84 (88)  
{ 1865 } 3 Suth W R Misc App 11 (12 15)  
{ See (1865) 4 Suth W R Misc 4 (5) }  
{ 8 } (60) 11 Suth W R 99 (99)  
{ 70 } 18 Suth W R 824 (324)

ing to appear — Warrant must issue though applied for late)

{ 1865 } 3 Suth W R 97 (97) (Warrant returned not found a day before hearing — Application for attachment on date of hearing — Not to be refused)

{ 1865 } 3 Suth W R 21 (23) (Case clearly falling within the rule—Refusal of coercive process illegal)

{ 20 } AIR 1920 Mad 1014 (1017) 61 Ind Cas 907 (909) (Witness appearing and stating documents not to be in his possession — Issue of warrant arbitrary)

#### Note 2

1 { 72 } 18 Suth W R 63 (64)

{ See (35) AIR 1935 Mad 659 (660) (Absence of witness due to alleged illness—Certificate given by medical practitioner by itself is not evidence — Examination of doctor on oath or at least affidavit by him should be insisted on ) }

{ See also ( 72 ) 18 Suth W R 45 (47)

{ 89 } AIR 1939 Pat 295 (297) (Witness—Non appearance on day of hearing—Order-sheet not clear as to direction to witness to appear—Witness held not guilty of wilful absence in defiance of order ) }

2 { 69 } 5 Mad H O H 101 (105)

3 { 95 } 17 All 777 (779)

{ 72 } 18 Suth W R 11 (19 19)

4 { 66 } 6 Suth W R 196 (196)

#### Note 3

1 { 31 } Cal 730 (731 732)

10 { 20 } AIR 1920 All 850 (853 854)

{ 70 } 18 Suth W R 416 (416)

{ 66 } 6 Suth W R 295 (295)

{ 10 } 5 Ind Cas 184 (186) (Cal)

**O. 16 R. 10** witness by means of his arrest <sup>1</sup> The issue of a proclamation *subsequent* to the issue of  
**Notes 4-5** ■ warrant of arrest is ■ contravention of the terms of sub-rule (3) <sup>2</sup>

A *panchayatdar* is not exempt from the coercive provisions of this rule <sup>3</sup>

**4a. Order for attachment of property—Sub-rule (3).** — A Court can order the attachment of the property of a witness under sub-rule (3) of this rule. In applying for attachment under this sub rule, a party is not in the same position as ■ decree holder seeking to attach the property of his judgment-debtor. The reason is that proceedings to enforce the attendance of a witness are the acts of the *Court* and the object of such proceedings is to vindicate the authority of the Court. Hence, where the properties of a person other than the witness are attached by mistake, the party applying for attachment is not liable for damages <sup>4</sup>

**5. Appeal.** — An order for attachment under this rule is appealable under O 43, Rule 1, clause (g) of the Code

**O. 16 R. 11** If witness appears, attachment may be withdrawn

**R. 11.** [S. 169.] Where, at any time after the attachment of his property, such person appears and satisfies the Court, —

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

[1877, S. 169; 1859, S 160.]

**1. Scope.** — This rule provides for a case where the person in default satisfies the Court that he had not intentionally failed to carry out the order of the Court <sup>1</sup>

**O. 16 R. 12**

**R. 12.** [S. 170.] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition

**Note 4**  
 1. ('26) AIR 1926 All 103 (107)  
 [See also ('27) AIR 1927 Lah 424 (424)]  
 2. ('20) AIR 1920 Mad 1014 (1017) 61 Ind Cas 967 (969)

3. ('28) AIR 1928 Mad 293 (305) 51 Mad 1  
**Note 4a**  
 1. ('37) AIR 1937 Mad 811 (813)  
**Order 16 Rule 11 — Note 1**  
 1. ('20) AIR 1920 Cal 46 (47)

in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:

O. R. 12  
Notes 1-2

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

[1877, Ss. 170, 174; 1859, S. 160.]

### Synopsis

1. Scope of the Rule
2. When fine can be imposed.
3. Appeal

**1. Scope of the Rule.** — Rule 11 deals with the case when the person served appears and shows proper cause for his failure to appear, the present rule applies to a witness who does not appear or on appearance, fails to show proper cause<sup>1</sup>

This rule does not affect the special jurisdiction of a Chartered High Court to proceed for contempt against a defaulting witness<sup>2</sup>

**2. When fine can be imposed.** — There is a conflict of opinion on the point as to when fine can be imposed and three different views have been expressed —

- (1) The first view is that no fine can be imposed under this rule until the procedure laid down in Rule 10, sub rule (2) or sub rule (3) has been followed, i.e., either a proclamation or a warrant of arrest or an attachment has been issued<sup>1</sup>. A person to whom a summons has been issued and who fails to obey it cannot straightway be fined under this rule
- (2) The second view is that the words "such person" in this rule refer to the "person to whom a summons has been issued" in sub rule (1) of Rule 10 and that the issue of a proclamation or an order for arrest or attachment are not *conditions precedent* to the imposition of fine, and that this rule deals with *all* cases of disobedience not covered by Rule 11<sup>2</sup>
- (3) Where a party is *present in Court* and is directed to produce a document, the Court can, on his failure to comply with the order, impose a fine upon him without going through the procedure in sub rules (2) and (3)<sup>3</sup>

#### Order 16 Rule 12 — Note 1

1. (20) AIR 1920 Cal 46 (47)  
[See also (19) AIR 1919 Cal 474 (475) (Legal Practitioners Act — Non production of documents by pleader—District Judge can apply this rule—See S. 141, O P O)]  
2. (20) AIR 1926 Rang 188 (189 190) 4 Rang 237

#### Note 2

1. (10) AIR 1916 Cal 421 (422)  
(20) AIR 1920 Cal 46 (47)

- { 20) AIR 1920 Cal 655 (655)  
{ 29) AIR 1929 All 650 (653)  
{ 29) AIR 1928 Lah 473 (474)  
[See also (39) 3 Cal W N 307 (310) (Can only be fined after he has been arrested and brought before the Court)]  
2. (25) AIR 1925 Mad 1247 (1247, 1219) 15 Mad 94  
{ 24) AIR 1929 Lah 469 (469)  
{ 24) AIR 1929 Lah 973 (970) (Oyster)  
3. (29) AIR 1929 All 99 (100)

O. 16 R. 12  
Notes 2-3

It is submitted that the second of the above views is correct. This rule, Rule 1 and sub-rules (2) and (3) of Rule 10 all refer to "such person" and must, therefore necessarily refer to some person referred to before, *i. e.*, "a person to whom a summons has been issued" in sub rule (1) of Rule 10

What is lawful excuse depends upon the circumstances of each case \*

**3. Appeal.** — An appeal lies from an order imposing a fine under this rule *vide* Section 104 (1) (b) of this Code. But there is no second appeal *see* S 104 (2)

As regards orders of attachment and sale under this rule, no appeal lies under the Code of 1882<sup>1</sup> Rule 13 of the present Code makes applicable to such attachment and sale, all the provisions in the Code regarding attachment and sale in execution of a decree

O. 16 R. 13

**R. 13.** [New.] The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

*Mode of attachment*

O. 16 R. 14

**R. 14.** [S. 171.] Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

*Court may of its own accord summon as witnesses strangers to suit*

[1877, S. 171]

### Synopsis

1. Scope of the Rule.
2. Cross-examination of a witness summoned by Court of its own accord

**1. Scope of the Rule.** — Ordinarily, it is for the party to summon the witnesses necessary for his case. This rule is only intended to enable the Court to secure *suo motu* the attendance of a witness whose evidence appears to the Court to be

4. (128) AIR 1928 Lah 979 (950) (Missing the train and intimating to Court by telegram—  
Lawful excuse)  
(10) II Ind Cas 184 (186) (Cal) (Latitude to be given to busy professional men)  
(68) 12 Bom 63 (64) (Summons to produce docu

ments—Witness attends but pleads non possession of documents — Not liable to fine — Jurisdiction can be exercised only after arrest)

### Note 3

1. (10) 7 Ind Cas 100 (100) 33 All 68

necessary<sup>1</sup> But the Court cannot compel a party to summon such a witness or penalise him for his refusal to summon him<sup>2</sup>

O. 10 R. 14  
Notes 1-2

The general powers under this rule are, in the case of Appellate Courts, circumscribed by the specific provisions of O 41 R 27<sup>3</sup>

**2. Cross-examination of a witness summoned by Court of its own accord.** — The parties cannot be refused the right to cross examine a witness examined by the Court under this rule<sup>1</sup>

**R. 15. [S 172.]** Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

O. 10 R. 15

Duty of persons summoned to give evidence or produce document

is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

[1877, S. 172; 1852, S. 167.]

**R. 16. [S. 173.] (1)** A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

O. 16 R. 16

When they may depart

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

### Local Amendment

#### LAHORE

Add the following sub rule (3)

"(3) In the absence of the presiding officer the powers conferred by sub rule (2) may be exercised by the Senior Subordinate Judge of the first class exercising jurisdiction at the headquarters of the district, or by any Judge or court official nominated by him for the purpose "

**1. Direction to witness to appear on the adjourned date.** — See Rule 4, Note 3

#### Order 10 Rule 14 — Note 1

1. ('93 1900) 1893 1900 Low Bur Rul 659  
(09) 2 Ind Cas 317 (348) 5 Low Bur Rul 1  
(Boundary dispute — Identity of land doubtful — It is rule freely used)

[See also (33) AIR 1933 Pat 306 (324 325) 12 Pat 359 (Lawyer present all through — He should not be examined as court witness)]

2. ('11) 10 Ind Cas 35 (36) (Lah).

3 ('95) 18 Mad 91 (99) (Per Shephard J)  
[See (33) AIR 1933 Pat 306 (325) 12 Pat 359  
(Party having plenty of opportunities — Court would refuse to examine witness at appellate stage)]

#### Note 2

1 (69) 11 Suth W R 110 (111) (Cross-examination refused — The evidence is not legal evidence.)  
(69) 11 Suth W R 408 (472) (Refusal — A serious mistake)

O 16 R 17

**R. 17.** [Ss 174, 175 ] The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16

Application of  
rules 10 to 13

[1877, Ss 174, 175, 1859, Ss 168, 169 ]

1 Jurisdiction of Court to punish — See Rule 11, Note 2

2. "Without lawful excuse" — See Rule 10 Note 2

O 16 R 18

**R. 18.** [S 174 ] Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison

Procedure where witness apprehended cannot give evidence or produce document

[1877, S 174, 1859, S 169 ]

1 Non-attendance, when an offence — Section 174 of the Indian Penal Code deals with the offence of non attendance in obedience to an order passed by a public servant No such offence is committed unless —

(a) there is summons to attend <sup>1</sup>

(b) such summons is specific as to the time and place of attendance <sup>2</sup> and

(c) the non attendance is legally found<sup>3</sup> to be intentional <sup>4</sup>

O 16 R 19

No witness to be ordered to attend in person unless resident within certain limits

**R. 19.** [S 176 ] No one shall be ordered to attend in person to give evidence unless he resides —

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of

Order 16 Rule III — Note 1

1 ( GS ) 10 Suth W R Cri Ral 33 (31)

2 ( 83 ) 5 All 7 (8)

( 72 ) 17 Suth W R Cri Ral 33 (35)

3 ( 70 ) 14 Suth W R Cri Ral 20 (20)

4 ( GS ) 10 Suth W R Cri Ral 33 (31) (Superior officer refusing permission to attend — No intention to disobey )

the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house. **O. 16 R. 19 Notes 1-2**

### Synopsis

#### 1. Scope of the Rule. | 2. Revision.

**1. Scope of the Rule.** — When a party desires to examine himself on commission, in his own favour, the provisions of O. 26 R. 4 apply<sup>1</sup> This rule provides an exemption from personal attendance of a witness who resides outside the limits prescribed in the rule<sup>2</sup>

**2. Revision.** — The High Court of Lahore has held that an order in contravention of this rule is not open to revision<sup>1</sup>

### R. 20. [S. 177] Where any party to a suit present in Court refuses, without lawful excuse, when **O. 16 R. 20**

Consequence of refusal of party to give evidence when called on by Court.

required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

[1877, S. 177; 1859, S. 170.]

### Synopsis

1. Scope and applicability.
2. "May pronounce"
3. Appeal

**1. Scope and applicability.** — This rule applies to miscellaneous proceedings also<sup>1</sup> The provisions of this rule being highly penal in character, the rule must be strictly construed<sup>2</sup> Thus, a party is bound only to produce the document required and is not bound to exhibit it as evidence in the case<sup>3</sup> Again, the rule applies only when the party is present in Court and refuses to comply with the order<sup>4</sup> The failure in one suit to obey a requisition to produce or give evidence will not entitle the Court to give a judgment against the defaulter under this rule, in any other suit<sup>5</sup> Nor can the rule be applied when the default has been once condoned<sup>6</sup> nor against all parties when only one of them was affected by an obligation under this rule<sup>7</sup>

#### Order 16 Rule 19 — Note 1

summoned as defendant's witness)

#### Note 2

1. ('23) AIR 1923 Lah 801 (301)

#### Order 16 Rule 20 — Note 1

1. ('73) 19 Suth W R 183 (184) (Interlocutory application)

('67) 8 Suth W R 64 (64) (Execution proceedings)

(Suits)

2

3. ('18) AIR 1918 Cal 145 (145)

4. ('11) 19 Ind Cas 719 (719) (Mad) (H. is there fore, not bound to be pre-ent on the adjourned date)

5. ('77) 5 Mad H C R 279 (272)

6. ('68) 4 Mad H C R 231 (233) (Default over looked — Case adjourned — Rule cannot be enforced on adjourned date)

7. (1564) 1 Suth W R 168 (162, 170)

(1864) 1 Suth W R 2 (25)



O. 16 R. 20  
Notes 1-3

A party who is not guilty of *wilful* default is not liable to be visited with the consequences of this rule.<sup>8</sup>

2 "May pronounce" — The rule is permissive and not mandatory and it is, therefore within the *discretion* of the Court to pronounce judgment against the defaulter<sup>1</sup> though such discretion must be exercised with caution and forbearance.<sup>2</sup> It would be a wrong exercise of discretion if the Court penalises the party and prevents him from proving his case<sup>3</sup> merely by reason of the default. Where for example there is sufficient evidence on his side<sup>4</sup> or where the opposite party has failed to give any evidence in support of his own case<sup>5</sup> or the claim of the opposite party is *prima facie* unsustainable<sup>6</sup> the Court need not act under this rule. But the Court will be justified in acting under this rule against the defaulting party<sup>7</sup> where for example his evidence or his production of any document is material<sup>8</sup> or where there is evidence for the opposite party<sup>9</sup> or where the opposite party is unable to make out his case without compliance of the order by the defaulting party.<sup>10</sup>

3 Appeal — A decision pronouncing judgment against a party under this rule is an appealable order and an appeal lies therefrom.<sup>1</sup> See Order 43 Rule 1 (h)

O. 16 R. 21

R. 21. [S 178] Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable

Rules as to witnesses to  
apply to parties summoned

[1877, S 177, of 1859, S 126]

#### Local Amendments

#### CALCUTTA

Cancel Rule 21 and substitute therefor the following

21 (1) When any party to a suit is required by any other party thereto to

8 (66) 6 Suth W R 247 (248)

{ 69 } 11 Suth W R 110 (112)

{ 71 } 15 Suth W R 253 (254)

{ 71 } 15 Suth W R 269 (269)

{ 73 } 20 Suth W R 165 (166)

[See (60) 19 Suth W R 359 (360)]

[See also (66) 2 Bom H C R 340 (341) (Refusal to answer — Not of any material question — Judgment not to be against party)]

#### Note 2

1 (66) 5 Suth W R 89 (89)

{ 66 } 6 Suth W R Act 86 (86)

{ 69 } 10 Suth W R 174 (174)

{ 69 } 11 Suth W R 5 (5)

{ 1864 } 1864 Suth W R 133 (134)

{ 68 } 1 Beng L R (S N) 10 (10 11)

[See (66) 3 Mad H C R 299 (300 301)]

2 (68) 4 Mad H C R 231 (233)

{ 66 } 6 Suth W R 247 (249)

{ 72 } 17 Suth W R 563 (564)

3 (60) 19 Suth W R 359 (360)

{ 75 } 24 Suth W R 314 (314 315)

4 (72) 18 Suth W R 16 (18)

Marsh 407

5 (60) 12 Suth W R 242 (249)

{ 71 } 15 Suth W R 253 (254).

{ 72 } 17 Suth W R 563 (563)

{ 84 } 9 Bom 241 (244) (Rule will not justify the judge in dispensing with proof of the execut on of a will in probate cases)

6 (67) 7 Suth W R 46 (47) (A claim barred by limitation on the very face of it)

7 (76) 2 Cal 222 (225)

{ 71 } 16 Suth W R 196 (197)

8 (68) 4 Mad H C R 142 (144) (Non production of a material document)

[See (1865) 11 Suth W R Act 43 (43)]

[See also (71) 16 Suth W R 196 (197)]

9 (69) 12 Suth W R 369 (369)

10 (68) 10 Suth W R 158 (159)

{ 72 } 17 Suth W R 550 (551) (The correspond of provision of the Code of 1859 i.e. S 10 does not contain the words present in Court, and

#### Note 3

1 (66) 5 Suth W R 270 (270)

Marsh 568

[See also (72) 18 Suth W R 16 (18)]

give evidence or to produce a document the provisions as to witnesses shall apply to him so far as applicable

© 16 R 21  
Note 1

(2) When any party to a suit gives evidence on his own behalf the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing

MADRAS

*Substitute the following for Rule 21*

21 (1) When a party to a suit is required by any other party thereto to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as applicable

(2) When a party to a suit gives evidence on his own behalf the Court may, in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing

1 **Opposite party as a witness** — This rule applies only to the case where a party to a suit has been called to give evidence by the other party. The Court has therefore no power under this Code to order the travelling expenses of a party who has given evidence in support of his own case<sup>1</sup> See the amendment to this rule made by the Calcutta High Court

The practice of a party not examining himself as his witness and forcing the opposite party to summon him thereby hoping to obtain an opportunity of being cross examined by his own counsel<sup>2</sup> has been severely condemned by their Lordships of the Privy Council. The High Courts of Bombay and Lahore have also held that the practice of summoning the opposite party as a witness is equally objectionable<sup>3</sup>

As regards the weight of the evidence of the opposite party summoned as a witness see the undermentioned case<sup>4</sup>

It is the duty of a party who has certain facts within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to these facts and submit himself to cross examination by the other side<sup>5</sup>

### Local Amendment

#### ALLAHABAD

To Order 16 *add* the following rules

22 (1) Save as provided in this rule and in Rule 2 the Court shall allow travelling and other expenses on the following scale —

© 16 R. 22  
(Allahabad)

(a) in the case of witnesses of the class of cultivators labourers and menials six annas a day

(b) in the case of witnesses of a better class such as zamindars traders pleaders and persons of corresponding rank from eight annas to two rupees a day as the Court may direct and

(c) in the case of witnesses of superior rank including officers of Government in receipt of a salary of not less than Rs 200 a month from three to five rupees a day

#### Order 16 Rule 21 — Note 1

9 (P C)

1 (35) AIR 1933 W D 11 (11) 3 (O) 3 Ind Cas 45 (15) Bo )

2 (10) 51 ILR 513 (550) 3 Al 101 37 Ind 1 (9) AIR 1931 B 4 (1)

App 1 (1) 4 (2) C. W. N. (S. 199) 99)

(O) 1 Ind C 1 (1) 31 All 116 36 Ind App 5 (33) AIR 1933 Lah 213 (214)

O. 16 R. 22  
(Allahabad)

(2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfy the Court that he has actually and necessarily incurred the additional expense

*Illustration*

A post office or railway employee summoned to give evidence is entitled to demand from the party on whose behalf or at whose instance he is summoned the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip which the witness will present to the Court from which the summons issued

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule as may seem to the Court to be reasonable and proper

Provided that the Court may, for reasons stated in writing allow expenses on a higher scale than that hereinbefore prescribed

O. 16 R. 23  
(Allahabad)

23 In cases to which Government is a party, Government servants whose salary exceeds Rs 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their head quarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses

## ORDER XVII.

### ADJOURNMENTS

O. 17 R. 1

**R. 1. [S. 156.]** (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment :

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded

[1877, S. 156; 1859, S. 146.]

#### Local Amendments

#### ALLAHABAD

Add the following further proviso

" Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order 16 Rule 1."

## LAHORE

O. 17 R. 1  
Notes 1-2

Add the following as sub rule (3) .

"(3) Where sufficient cause is not shown for the grant of an adjournment under sub rule (1), the Court shall proceed with the suit forthwith "

*Synopsis*

- |   |                         |
|---|-------------------------|
| 1. Scope of the Rule.                       | 6 Costs in pauper suits |
| 2. "May adjourn"—Discretion of Court.       | 7. Proviso.             |
| 3. Sufficient cause must be shown           | 8. Appeal.              |
| 4. "The Court shall fix a day"—Sub-rule (2) | 9. Review.              |
| 5. Costs of adjournment—Sub-rule (2).       | 10 Revision             |

*Other Topics (miscellaneous)*

Adjournments not at the instance of parties—  
Applicability of rule See Note 1

Hearing of the suit and hearing of the evidence—  
Distinction See Note 1

Costs of adjournment as condition precedent See  
Note 5

Proviso—Trial Court itself to exercise discretion  
and not to ask for orders of superior Court  
See Note 7

**1. Scope of the Rule.** — The rule vests in Courts a discretion to grant time to a party at any stage of the suit<sup>1</sup> But the application of the rule is limited to adjournments granted at the instance of *parties* and does not extend to those necessitated by rules of the Court<sup>2</sup> Thus, an order made on the settlement of issues fixing a day for the final hearing is not an order under this rule<sup>3</sup> Similarly, orders for adjournment necessitated by delay on the part of Court's officers in the performance of Court's duty are not governed by this rule<sup>4</sup> But the High Court of Allahabad has held in the undermentioned case<sup>5</sup> that this rule applies both to adjournments made at the instance of a party and to adjournments by the Court of its own motion

The rule speaks of the "hearing of the suit" There is a distinction between the hearing of the *suit* and the hearing of *evidence* Thus, the Court may adjourn the hearing of the suit and yet may, under O 13 R 2, refuse to accept documentary evidence which ought to have been but was not produced at the first hearing of the suit, though such hearing resulted only in an adjournment<sup>6</sup>

Neither this rule nor any other rule of this Order applies to execution proceedings<sup>7</sup> *Vide also* Notes under Rules 2 and 3

**2. "May adjourn"—Discretion of Court.** — The granting of an adjournment to a party to a suit is, under this rule, left to the discretion of the Court<sup>1</sup> The discretion is not subject to any definite rules, but should be exercised in a judicial and

**Order 17 Rule 1 — Note 1**

1. (16) AIR 1916 Lah 175 (176) (Such time may be granted even at the stage of arguments)

(35) AIR 1935 All 476 (477)

2. (98) 2 Cal W N 490 (491)

3. (91) 14 M L R 93 (93)

4. (29) AIR 1929 Lah 620 (621) (It is the duty of Court to see that service of summons to witness is effected — Adjournment caused by non service of such summons on the part of the process server is not an adjournment under this rule)

5. (35) AIR 1935 All 210 (211)

6. (19) AIR 1919 Cal 500 (501)

7. (93) 13 All 84 (91) (177)

(83) AIR 1933 Mad 418 (422) 56 Mad 490 (F B)  
Note 2

1. (14) AIR 1914 Sind 105 (106) 8 Sind L N 275

(16) AIR 1916 Lah 175 (176)

(22) AIR 1922 Nag 81 (81) (This is a matter in the discretion of the first Court not in that of appellate Courts)

(21) AIR 1921 Pat 76 (78) 5 Pat L Jour 320 (Apart from an express provision of law the Court is not bound to grant an adjournment)

(11) 10 Ind L Cas 749 (749) (10m) (Parties to a suit cannot by consent obtain an adjournment of the case as a matter of course)

(See (87) AIR 1931 Pat 472 (472 473) 15 Pat 561 (561) (Non appearance of defendant living at great distance in another province—Adjournment for a month is proper))

17 R. 1  
Notes 2-3

reasonable manner," and upon proper materials.<sup>3</sup> It should be exercised after considering the party's conduct in the case<sup>4</sup> and the opportunity he has had of getting ready and the truth and sufficiency of the reason alleged by him for not being ready.<sup>5</sup> Where the adjournment is refused, reasons should be given for such refusal.<sup>6</sup>

The main object of vesting the discretion in the Court is to enable it to prevent a party from improperly *delaying* proceedings and abusing the process of the Court.<sup>7</sup> The Court should not therefore be too technical in such matters<sup>8</sup> and unless there is a pressing necessity for proceeding with the case or the application for adjournment is obviously frivolous the adjournment asked for should not be refused.<sup>9</sup> But adjournment is improper when it is granted on the intervention of a third party without hearing the plaintiff or his pleader.<sup>10</sup>

**3. Sufficient cause must be shown** — On the one hand an adjournment should not be refused where sufficient cause for the adjournment is shown<sup>1</sup> and on the other it should not be granted even on condition of payment of costs where no sufficient cause exists.”

What is sufficient cause will depend upon the circumstances of each case.<sup>3</sup> Speaking generally, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible<sup>4</sup> or where there has been little or no negligence on his part<sup>5</sup> an adjournment should not be refused. But where the party has been wanting in due diligence<sup>6</sup> or is guilty of negligence,<sup>7</sup> an adjournment can be refused.

The following are some of the circumstances which have been held to constitute sufficient cause for adjournment —

2 (14) AIR 1914 Smd 105 (106) 8 Smd LR 275 (26) AIR 1926 Mad 944 (944)  
3 (16) AIR 1916 All 188 (189) (29) AIR 1929 Rang 215 (216)  
(36) AIR 1936 Pat 472 (474) 15 Pat 561 (S B) (35) AIR 1935 All 476 (477)  
4 (16) AIR 1916 Pat 33 (33) 1 Pat LJour 1<sup>st</sup> 4 (16) AIR 1916 All 188 (189)  
5 (27) AIR 1927 Loh 879 (879)  
(28) AIR 1928 Cal 102 (102)  
6 (16) AIR 1916 All 188 (189)

DATA IS A PUBLIC RESOURCE

(20) AIR 1923 Rang 215 (216) (On the day fixed for hearing case not called until 2 p m.—8 witnesses for plaintiff examined and forty witnesses for defendant present.—Defendant's advocate appearing in other Court and defendant applying for adjournment but Court refusing.—Though defendant has not shown sufficient cause for not being ready with his case Court could use its discretion in allowing adjournment.)

1. The first step is to identify the problem or question that needs to be answered.

for adjournment.)

(72) 18 South W 375 (325-326) (Court not sitting on date of hearing—No date fixed—Court taking it on a future date—Party not knowing the usual practice in such cases—Adjournment ought to be given)

(33) AIR 193; Nag 336 (337) (Witnesses served but absent as wrong date given in processes—It is good ground for adjournment)

5 (26) AIR 1926 Mad 859 (8EO)

5 (20) AIR 1920 MAG 055 (050)  
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sound 1

### Note 3

served owing to process fee being paid late) 172

(16) AIR 1916 Pat 83 (33) 11 at L Jour 173 (Do)

( 13 ) 15 Ind Cir 584 (585) (Mad) (Do)

7 (11) 10 Ind Ca+ 554 (555) 5 Sund L R 49

(32) AIR 1932 Lab 591 (59<sup>o</sup>) 13 Lab 453 (De



**O. 17 R. 1**  
**Notes 4-6**

should be communicated to the parties or their pleaders or to such of them as are present or represented in Court when the adjournment takes place<sup>2</sup> It is not, however, necessary to communicate it to an absent party,<sup>3</sup> for, it is the duty of the pleaders to get acquainted with the date of adjournment<sup>4</sup> See also the undermentioned decision<sup>5</sup>

**5. Costs of adjournment — Sub rule (2).** — In granting an adjournment under this rule, the Court may, if it thinks fit, direct the party asking for adjournment to pay costs to the other party<sup>1</sup> The sum so awarded should not, however, be in the nature of a penalty or punishment but should be commensurate with the costs which in the opinion of the Court, the party who is ready will have to incur,<sup>3</sup> and sufficient opportunity should be given to the party to obey the order<sup>3</sup> The rule gives the Court power to make an order as to costs only in respect of the costs occasioned by the adjournment and not the costs of the suit generally<sup>4</sup>

An order directing payment of costs can be executed under Section 36

The payment of costs may be made a condition precedent to the adjournment<sup>5</sup> Such a condition need not, however, be express if it is sufficiently obvious from the context<sup>6</sup> If the costs are not so paid a further adjournment may be refused<sup>7</sup> If a suit or appeal is adjourned on condition that it will *stand dismissed* if the costs of the adjournment are not paid within a certain date then on failure of payment of costs within such a date the suit or appeal will stand dismissed<sup>8</sup> Similarly, if the suit is adjourned on condition that if the defendant does not pay the costs ordered before the adjourned date, the defence will be struck off and the suit proceeded with *ex parte* the Court can in case of default strike off the defence<sup>9</sup> But the Court has no jurisdiction to pass such a conditional order of adjournment as to enable it, on default, to pass a decree without evidence, *when such evidence is necessary*<sup>10</sup>

No costs can be awarded against a party not at fault, in the matter of the adjournment<sup>11</sup>

**6. Costs in pauper suits.** — The High Court of Rangoon has held that even a plaintiff suing in *forma pauperis* may be ordered to pay costs as a condition precedent to his being granted an adjournment<sup>1</sup>

2 (23) AIR 1923 All 79 (80)  
(25) AIR 1925 Pat 807 (809) 4 Pat 440 (Signa-  
ture of the pleaders of both the parties should be

by the opposite party)

5 (28) AIR 1928 Rang 806 (807) 6 Rang 501

6 (28) AIR 1928 Mad 786 (788)

(16) AIR 1916 Lah 162 (163)

(19) AIR 1919 Cal 111 (112)

2  
4  
2

1 (81) 7 Cal 177 (177)

(28) AIR 1928 Rang 306 (307) 6 Rang 561 (Costs

10. (08) 18 Mad L Jour 541 (542)

11

**7. Proviso.** — Where the trial of the suit has once begun, it should ordinarily go on from day to day. The Court has, however, a discretion to adjourn the trial of a part heard case to a day beyond the following day, but in such a case the Court should record its reason therefor.<sup>1</sup> In exercising such a discretion the Court should act of itself and not ask for orders of the superior Court in the matter.<sup>2</sup>

**O. 17 R. 1**  
**Notes 7-10**

**8. Appeal** — No appeal lies from an order refusing adjournment under this rule,<sup>1</sup> but such a refusal is liable to correction by an Appellate Court in an appeal from the decree in the suit.<sup>2</sup> The refusal may be made a ground of attack in appeal, at whatever stage of the hearing of the suit the order of refusal may have been made.<sup>3</sup> The exercise of discretion under this rule is not liable to be interfered with in second appeal.<sup>4</sup> (*Vide* also Notes under Sections 100 & 101)

**9. Review.** — An order of adjournment once made cannot be rescinded in review unless for good and sufficient reasons and in the presence of the other side.<sup>1</sup>

**10. Revision.** — An order of adjournment is not liable to revision.<sup>1</sup> But where an adjournment is refused and the suit is either dismissed for default or decreed *ex parte*, a revision will lie from an order passed in appeal against an order refusing to set aside the dismissal for default or the *ex parte* decree as the case may be.<sup>2</sup> Even in such a case the matter will not be interfered with except for strong reasons.<sup>3</sup>

**R. 2. [S 157.]** Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

**O. 17 R. 2**

Procedure if parties fail to appear on day fixed

[1877, S. 157; 1859, S. 147.]

### Local Amendments

#### ALLAHABAD

Add the following

"Where on any such day the evidence, or a substantial portion of the evidence, of any party has been recorded and such party fails to appear, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits

**Explanation** — No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application"

#### Note 7

1. (10) 8 Ind Cas 990 (921) (Low Bur)
2. (15) AIR 1915 Mad 78 (78)

#### Note 8

1. (17) AIR 1917 Nag 48 (49)

#### ("35) AIR 1935 All 476 (477)

#### Note 9

1. (73) 20 Suth W R 2 (3)

#### Note 10

"

"

"

"



**O. 17 R. 2**  
**Notes 5-7**

failed to appear if he is represented by an agent or a pleader though engaged only for making an application (See also O 3 R 1 and Notes thereto) But, the mere fact that before the case is called on for hearing a pleader files a list of witnesses does not amount to the party being 'represented' at the hearing<sup>3</sup> But, where, however, on the day of the adjourned hearing the pleader reports that he has no instructions and the party is absent and a decree is passed in the suit, the Explanation (added by the Allahabad High Court) does not apply and the decree is an *ex parte* decree<sup>4</sup>

**6. "Hearing."** — The word "hearing" means the taking of evidence or the hearing of arguments or the consideration of questions relating to the suit which would enable the Judge to finally come to an adjudication upon it, and not the consideration of merely interlocutory matters<sup>1</sup> It refers, so far as this rule is concerned, to the commencement of the hearing on *each day* of the hearing, and cannot be considered to mean that the suit is in a continuous state of being called on for hearing so long as it is being heard<sup>2</sup>

The reader of a Court, when the presiding Judge is on leave, is not competent to pass an order e.g., giving a further date which can bind the parties The non appearance of the plaintiff on a date so fixed should not entail the dismissal of the suit for default<sup>3</sup>

See also Notes to Order 9 Rule 9

**7. One of the modes directed by Order 9.** — As has been seen in Note 1, Order 9 refers to cases of default of appearance of parties at the *first hearing* of a case This rule makes the provisions of Order 9 applicable to cases of such default at *adjourned* hearings

In an old Calcutta case<sup>1</sup> it was held that there was a distinction between Order 9 and this rule and that the provisions of Order 9 relating to the restoration of suits and the setting aside of *ex parte* decrees did not apply to orders passed under this rule This view has however, been overruled and it has been repeatedly held that the said provisions of Order 9 will apply to orders passed under this rule on default of appearance of parties at adjourned hearings Thus —

(1) if the *plaintiff* fails to appear at an adjourned hearing, the Court may make an order dismissing the suit for default under this rule and Rule 6 of Order 9, and the plaintiff may thereupon apply for restoration of the suit under Order 9 Rule 9,<sup>2</sup>

3 (36) AIR 1936 All 619 (620, 621) (Appearance is appearance at hearing and not before)  
[See also (35) AIR 1935 Mad 210 (211) 58 Mad 617 (1935) 233 A.L.J. 1000 (1935) 1000 (1935) 1000]

[See also (36) AIR 1936 Lah 1000 (1001) (If suit is dismissed it must be restored — 33 Pun L R 804, Foll.)]

**Note 7**

1. (94) 21 Cal 269 (273, 274) (Overruled by Full Bench decision in 23 Cal 738)

2. (07) 34 Cal 403 (417) (FB)

4 (33) AIR 1933 All 652 (654)

**Note 6**

1 (20) AIR 1920 Pat 593 (597)

(22) AIR 1922 Pat 485 (487, 489) 1 Pat 168

(36) AIR 1936 Lah 280 (281) (Date fixed for return of Commissioner's report is not date of hearing)

2. (27) AIR 1927 Mad 799 (800)

3. (32) 33 Pun L R 804 (805).

(81) 7 Mad 41 (42)

(07) 34 Cal 235 (240)

(09) 1 Ind Cas 741 (741, 742) 30 Cal 189

(22) AIR 1922 All 69 (69)

(58) AIR 1938 Cal 789 (790).

(ii) if the *defendant* fails to appear at an adjourned hearing the Court may pass an *ex parte* decree under this rule and Rule U of Order 9, and the defendant may thereupon apply under O 9 R 13 to set aside the *ex parte* decree<sup>3</sup>

(iii) if neither party appears at such hearing the Court may dismiss the suit under this rule and Rule 3 of Order U, and the plaintiff may thereupon either file a fresh suit or apply to have the dismissal set aside<sup>4</sup>

But the provisions of this rule will not apply to proceedings after decree<sup>5</sup>

8 "Or make such other order as it thinks fit." — In the interpretation of these words three questions arise for consideration, viz —

(i) What is the meaning of the expression "such other order as it thinks fit?"

(ii) Does the expression include the power to decide the case on the merits? And if so

(iii) When is the Court to proceed under Order 9 and when to proceed to decide the case on the merits?

On the first two questions the High Court of Allahabad<sup>1</sup> had held that the expression "such other order as it thinks fit" only empowers the Court to grant an *adjournment* and not to decide the case on the *merits*. The High Court of Lahore<sup>2</sup> has also taken the same view. An earlier decision of the High Court of Madras<sup>3</sup> was also to the same effect. But in a later decision of the same High Court, the power of the Court to give a decision on the *merits* in certain circumstances has been recognized<sup>4</sup>. The High Court of Calcutta<sup>5</sup> also recognizes the power of the Court to give a decision on the merits. The Allahabad High Court and the Chief Court of Oudh have recognized this power by adding a new clause to this rule.

On the third question where the evidence has *not yet begun* it has been held that the Court should either proceed under Order 9 or adjourn the case<sup>6</sup>. Where however, the case is *part heard* it would seem that the rule vests in the Court a discretion either to proceed under Order 9 or to give a decision on the merits<sup>7</sup>. In cases

(33) AIR 1933 Nag 234 (235-236) 29 Nag L R 148

5 (24) AIR 1924 P C 108 (200) 4 Pat 61 51 Ind App 821 (PC)

(32) AIR 1932 Mad 519 (522) (Preliminary decree passed in partition suit—Court cannot subsequently dismiss suit—Decree can be varied only in appeal)

Note 8

(33) AIR 1933 All 907 (908)

(34) AIR 1934 Cal 116 (117) 60 Cal 1331 (An application for review is not the proper remedy)

(34) 20 Bom 380 (382)

(33) AIR 1933 Nag 370 (373) 30 Nag L R 91

(27) 19 All 300 (357)

(28) 2 Cal W N 693 (694-695)

(14) AIR 1914 Cal 360 (361) 41 Cal 956

(37) AIR 1937 Mad 674 (673) (Defendant being

O. 17 R. 2  
Notes 8-9

where the plaintiff has adduced *all his evidence* or has made out a *prima facie* case, but is absent at the adjourned hearing, the Court should proceed to give a decision on the merits and *not* dismiss the suit for default.<sup>2</sup> Where the case *has been closed* but has been adjourned for the Court to refer to a document<sup>3</sup> or to pronounce judgment, and either of the parties fails to appear at the adjourned hearing, the Court should *not* proceed under Order 9 but give a decision on the merits.

**9. Appeal and revision.** — No appeal lies from an order dismissing a suit<sup>1</sup> or appeal<sup>2</sup> for default under this rule. It may, however, be open to revision.<sup>3</sup>

No appeal lies from an order restoring a suit dismissed for default under this rule.<sup>4</sup> Where a Court wrongly held that no application under O 9 R 13 lay against an order under this rule, it was held that it amounted to a refusal to exercise jurisdiction vested in it and hence liable to revision.<sup>5</sup>

## O. 17 R. 3

Court may proceed notwithstanding either party fails to produce evidence, etc.

**R. 3. [S. 158.]** Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been

allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

[1877, S. 158; 1859, S. 148.]

## Local Amendments

## ALLAHABAD

## Amend Rule 3 :

"3. Where any party to a suit, to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits."

## OUDH

## Substitute the following

"3 Where any party to a suit to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the

8 (1877) 23 Cal 827 (829)

(16) AIR 1916 Cal 233 (233)

(25) AIR 1925 Pat 433 (434)

(89) AIR 1939 Nag 213 (213) ILR (1939) Nag 574.

2. (96) 23 Cal 827 (829)

3. (25) AIR 1925 Pat 433 (434)

(33) AIR 1933 Nag 231 (236) 29 Nag L R 326.  
(Conditions of 111 not satisfied)

4. (87) 10 Mad 270 (271)

(97) 19 All 355 (357) (No appeal was held to lie

9. (71) Select Cases Part X, No 10

(11) 11 Ind Cas 842 (842) (Lah) (Pronounce judgment)

## Note 9

1. (14) 12 Mad L Jour 473 (474).

(31) AIR 1934 Mad 199 (199)

(02) 5 Oudh Cas 294 (296).

further progress of the suit for which time has been allowed the Court may notwithstanding such default and whether such party is present or not proceed to decide the suit on the merits

### Synopsis

- 1 Scope and applicability of the Rule
- 2 Execution proceedings
- 3 Distinction between Rules 2 and 3
- 4 'To whom time has been granted'

- 5 When is party deemed to fail to do the act for which time has been granted
- 6 'Any other act necessary to the further progress of the suit'
- 7 Remedy of a person aggrieved by an order under this rule

### Other Topics (miscellaneous)

- Applicability only to cases of default by party given time for acts specified See Notes 1 and 4
- Applicability where time granted owing to non service of summons See Note 5
- Decision under this rule is res judicata See Note 7
- Default by non production of birth certificate See Notes 5 and 7
- Default contemplated by this rule See Note 1 and Notes 5 to 6

- Default in payment of costs ordered as condition precedent See Note 7
- Disposal to be not for default but on merits See Note 1
- Inapplicability to default in filing amended plaint ordered See Note 1
- Inapplicability to default in payment of court fee ordered See Notes 1 and 7
- Inapplicability to default in supplying several stamps for partition decree as per award See Note 1
- No revision See Note 7

**1 Scope and applicability of the Rule** — This rule does not apply unless time had been granted to a party at his instance<sup>1</sup> to do one or other of the three things mentioned in the rule viz to produce evidence or to cause the attendance of witnesses or to perform any other act necessary for the progress of the suit<sup>2</sup> and unless default had been committed by such party in doing the act for which the time was granted<sup>3</sup>

#### Order 17 Rule 3 — Note 1

1 (84) 1884 Pun Re No 189 ¶ 867

by Court of spot)  
(76) 1876 Bom P J 250 (51) (Where it did not

(18) 19 Ind Cas 472 (478) (Lah) (A plaint was

ance of his witnesses the order was not one which could properly be made)

in ordinary course for defendants to file list of witnesses—Failure of defendants to appear and file list on day fixed — Court cannot pass *ex parte* decree under this rule)

2 (91) 1891 All W N 112 (113 114)

(33) AIR 1933 All 907 (908)

(75) 1875 Pun Re No 32 p 96 (When the adjournment was not granted for a party to do anything—If an adjournment was for inspection on

(15) AIR 1915 Lah 439 (440) 1915 Pun Re No 51

(17) AIR 1917 Mad 196 (197)

(21) AIR 1921 Bom 458 (458) 45 Bom 1181

(26) 27 Pun L R 714 (715)

(26) 27 Pun L R 590 (593)

(27) AIR 1927 Lah 494 (495)

(27) AIR 19 7 Rang 143 (148 149) 5 Rang 833

3 (68) 4 Mad H O R 56 (59)

(08) 35 Cal 1073 (1077)

(15) AIR 1915 Mad 864 (865)

(15) AIR 1915 Lah 439 (439) 1915 Pun Re No 51

(21) AIR 1921 Bom 458 (458) 45 Bom 1181

(2) AIR 19 Pat 485 (488) 1 Pat 183

(28) AIR 19 8 Rang 191 (190) ¶ Rang 303

O. 17 R. 3  
Notes 1-2

The rule is *permissive* and not mandatory as is shown by the words 'the Court may' proceed to decide the suit forthwith<sup>4</sup>. The stringent provisions thereof should not be applied unless the facts do not admit of the application of any other provision of the Code<sup>5</sup>. Where for instance there are no sufficient materials on record to give a proper decision the Court should grant a further adjournment of the case<sup>6</sup>. Similarly if the facts of the case make the provisions of Rule 2 applicable the Court should act under that rule even though such facts come within the operation of this rule as well<sup>7</sup>.

A decision forthwith should nevertheless be a decision on the merits<sup>8</sup> and on a consideration of such materials as may be necessary and available<sup>9</sup> and does not mean a *summary* decision<sup>9</sup>. If in the case of the plaintiff such materials fail to substantiate the claim the suit will be dismissed on *that ground* and *not for the default* committed by him<sup>10</sup>. Similarly, a decree passed against the defendant under this rule will not be an *ex parte* decree which can be set aside under O 9 R 13<sup>11</sup>.

In a case where the defendant's prayer for adjournment was refused but some time was nevertheless given to him for his evidence and after plaintiff's evidence was over the Court passed a decree without waiting for the time fixed for the defendant's evidence the decree was held to be illegal<sup>12</sup>.

The rule applies only *after the suit* has been instituted<sup>13</sup> but not to proceedings *after the decree*<sup>14</sup>.

**2. Execution proceedings** — The provisions of this rule do not apply to execution proceedings<sup>1</sup>.

- 4 (93) 1893 All W N 81 (81)  
(34) AIR 1934 Lah 560 (560)  
(35) AIR 1935 All 210 (212)  
(19) AIR 1919 Lah 344 (345) 1919 Pun Re No 150  
(39) AIR 1939 All 524 (526) (Rule 2 confers discretion on Court — Discretion if not properly exercised High Court can interfere)  
(39) AIR 1939 All 642 (643) 1939 All L Jour 627 (628)  
5 (04) 1904 Pun L R No 74  
(10) 1904 Pun L R No 74

- (20) AIR 1920 Pat 600 (601) 4 Pat L Jour 277  
(19) AIR 1919 Lah 844 (845) 1919 Pun Re No 150  
(24) AIR 1924 Lah 404 (404)  
(27) AIR 1927 Lah 899 (899)  
(19) AIR 1919 All 252 (253) 41 All 663  
(07) 17 Mad L Jour 81 (82) (A Court has no power to restore an *ex parte* decree once set aside — Where the Court is acting under S 159 the proper course for it is to decide the suit as it stood then before it if the Judge could do so and not to restore the *ex parte* decree once set aside by it)  
10 (27) AIR 1927 Mad 109 (110)  
11 (39) AIR 1939 All 642 (643) 1939 All L Jour 627 (628)

R 11) contains clear directions as to the procedure in such cases)

- 6 (70) 1870 Pun Re No 20 p 85  
(33) AIR 1933 Ag 231 (235) 29 Ag L R 3 C  
7 (93) 1893 All W N 81 (84)  
(35) 1895 Pun Re No 87 p 391  
(75) 1875 Pun Re No 30 p 96  
(19) AIR 1919 Low Bur 139 (140) 9 Low Bur Rul 266

- 12 (30) AIR 1930 Cal 201 (251)  
13 (25) AIR 1925 Mad 1045 (1046) (Where a plaint is rejected on the ground that the plaintiff has not filed an amended plaint as he was asked to do O 17 R 3 does not apply)  
14 (19) AIR 1919 All 269 (270) (Where an order has been made for preparation of a partition decree in terms of an award and the plaintiff fails to comply with an order of the Court to pay the stamp duty as distinct from court fees his omission to pay is no ground for dismissal of the suit)

#### Note 2

- (39) AIR 1939 E and 142 (141) (Dismissal of suit without reference to materials on record is against the provisions of the rule)  
9 (01) 23 All 462 (464)  
(10) 8 Ind Cas 850 (850) (Mad)

- 1 (94) 18 Bom 479 (432)  
(33) AIR 1933 Mad 418 (422) 53 Mad L Jour (FR)  
(Still Court has inherent power to dismiss execution applications)

**3 Distinction between Rules 2 and 3** — Rules 2 and 3 provide for distinct and different sets of circumstances —

**O 17 R 3  
Note 3**

- (1) Rule 2 applies where an adjournment has been generally granted and not for any special purpose. This rule applies where the adjournment has been given for one of the purposes mentioned in the rule.<sup>1</sup>
- (2) Rule 2 does not apply unless the party has failed to appear at the hearing. Rule 3 will apply where the party is present and has committed the default referred to in the rule.<sup>2</sup> A party appearing by pleader and asking for adjournment must in the absence of an effective withdrawal of appearance by the pleader be deemed to have appeared.<sup>3</sup> And even if the pleader reports no instructions after refusal of the adjournment it may not under certain circumstances constitute a failure to appear.<sup>4</sup>

There might be cases where a default under this rule is coupled with a default under Rule 2 as well. Thus a party to whom time has been granted at his instance for doing one or other of the acts mentioned in this rule may not only commit default in the doing of the act but may not appear in person or by pleader. In such a case what has the Court to do? On this question the authorities are not uniform. It was held by the High Court of Allahabad in the undermentioned cases<sup>5</sup> that in such cases the procedure to be followed is under Rule 2. The decisions of the Oudh Court were

(99) 1898 All W N 12 (18) (Difficulty of applying the provisions to execution proceedings pointed out. In this case it was assumed that the order was made for the first time. Relief was granted on the second application.)

is under O 17 R 2 and liable to be set aside under Order 9)

conduct of suit and towards progress of suit and

appears)

*ex parte* )]  
[See also (35) AIR 1935 All 898 (401) (Plaintiff

c  
20

Dismal—O 17 R 3 applies)

1. u. Present—His vakil asks for time—  
R 1904—Not conducting further—Decree passed

O. 17 R. 3  
Note 3

conflicting.<sup>8</sup> The rule has since been amended by the Allahabad High Court and the Chief Court of Oudh<sup>7</sup> giving a discretion to the Court to proceed to decide the suit on the merits. The Bombay<sup>8</sup> and the Madras<sup>9</sup> High Courts are agreed that in such cases the Court should proceed only under Rule 2. The Rangoon High Court has also taken a similar view.<sup>10</sup> On the other hand, the Calcutta,<sup>11</sup> Lahore<sup>12</sup> and Patna<sup>13</sup> High Courts take the view that the Court can proceed under this rule if there are materials on record to enable the Court to come to a decision on the merits and that otherwise the Court should proceed under Rule 2. Even according to the Patna High Court, this rule will apply only after the hearing of the case has commenced.<sup>14</sup> For the views held by the other High Courts see the undermentioned cases.<sup>15</sup>

Where the entire evidence is over and the case is posted to a day for the clearing up of a point or for the Court satisfying itself on a particular point before delivering judgment and the parties defaulted on that day and failed even to appeal the Bombay

- (25) AIR 1925 All 267 (269 270) 37 All 440  
(15) AIR 1918 All 139 (140) 37 All 460  
[But see (33) 25 All 191 (19-)]  
(20) AIR 1926 All 729 (730) (On the ground of costs directed not having been paid R 3 was held to apply—Difficulty of avoiding Rr 2 and 3—Recommended to Rule Committee for amendment)]  
6 (28) AIR 1923 Oudh 18 (19) (Where the defendant absents himself on the date fixed for evidence in a case the proper procedure for a Court is to proceed under O 17 R 3 and not under O 9 R 6 C P O)  
(25) AIR 1925 Oudh 278 (282) (Rule 3 applies where two elements exist viz (1) the adjournment must have been at the instance of the party (2) there must be materials on record to proceed to decide the suit)  
(25) AIR 1925 Oudh 337 (346) All Oudh Case 8 (When a plaintiff realising the weakness of his case absented himself on the date fixed for hearing and let the suit be dismissed for default the decision is one under O 9 R 3 even though the Court purported to act under O 17 R 3 and 4.)  
7 (33) AIR 1933 All 41 (41)  
(35) AIR 1935 All 210 (212)  
(34) AIR 1934 Oudh 171 (174) 9 Luck 586  
8 (07) 19 Mad L Jour 173 (474)  
(10) 5 Ind Cas 23 (24 25) 33 Mad 241  
(18) AIR 1915 Mad 143 (146) 41 Mal 256 (FB) (Overruling 84 Mad 97)  
(28) 109 Ind Cas 897 (897) (Mid)  
10 (37) AIR 1937 Rang 43\* (438) (Plaintiff absent at adjourned hearing—Failure to comply with Court's order to file list of witnesses—Suit dismissed for want of prosecution—Nevertheless dismissal is one under R 2 and can be set aside for sufficient cause)  
11 (07) 34 Cal 235 (737 738)  
(33) AIR 1933 Cal 412 (414) (Applicability of rule)  
(09) 35 Cal 1073 (1077)  
(18) AIR 1918 Cal 880 (831)  
(14) AIR 1914 Cal 860 (861) 41 Cal 706  
(33) AIR 1933 Cal 78 (74) (Plaintiff absent—Plaintiff absent—Dismissal—O 17 R 2 and not R 3 applicable)  
12 (24) AIR 1924 Lah 545 (546) 5 Lah 218  
(37) AIR 1932 Lah 477 (478)  
(19) AIR 1919 Lah 419 (420) 1919 Pun Re No 48 (Where default takes place within the meaning of both Rr 2 and 3 and there is not enough material on record to enable the Court to proceed to judgment the Court should proceed under Rule 2)  
(30) AIR 1932 Lah 477 (478) (Party absent—Decree—Ex parte decree and not an order under O 17 R 3)  
[See however (80) 1880 Pun Re No 41 p 69]  
13 (22) AIR 1922 Pat 2 (3) 6 Pat L Jour 813  
(18) AIR 1918 Pat 236 (237) 3 Pat L Jour 491 (Rule 3 contemplates material for decision prior to default)  
(20) AIR 1920 Pat 589 (590) 4 Pat L Jour 712  
14 (28) AIR 1928 Pat 167 (167) 7 Pat 236  
15 (10) 6 Ind Cas 851 (852) 3 S Ind L N 20b (Where at any adjourned hearing there is no appearance of the plaintiff and there are no views mentioned above)  
(33) AIR 1933 Nag 231 (235) 29 Nag L R 37 (D-)  
(19) AIR 1919 Sind 69 (90) 13 Sind I R 149 (When both of the conditions laid down in O 17 R 3 and 3 come into O 17 R 2 should have precedence for the order of non appearance have a natural precedence over the merits)

and Madras High Courts have held that the Court should proceed under Rule 3 and not under Rule 2<sup>10</sup>

O. 17 R. 3  
Notes 3-5

4. "To whom time has been granted" — Where a party is ordered to be present at an adjourned hearing it does not amount to a granting of time to the party to do any act within the meaning of this rule<sup>1</sup> Nor is an adjournment on the joint application of both the parties within this rule<sup>2</sup> The rule will not also apply where time was granted not to the party in default but to the opposite party<sup>3</sup> Further, the time must have been granted for the doing of an act which it was not the duty of the Court to do<sup>4</sup>

Where a party applied for adjournment of the case for getting a transfer thereof and the application was refused but the case was fixed for further evidence, it was held that this rule did not apply as no time can be said to have been granted to the party within the meaning of this rule<sup>5</sup>

When a case comes within the meaning of the language of this rule, the mere fact that the date fixed is a holiday (when the date has been expressly agreed upon) will not prevent the Court from proceeding under this rule<sup>6</sup>

5. When is party deemed to fail to do the act for which time has been granted. — At the adjourned hearing of a case, the witnesses on behalf of a party were absent though served and the party applied for warrants of arrest against them. The application was refused. Thereupon the pleader reported "no instructions and the suit was dismissed. It was held that the dismissal was not one under this rule<sup>1</sup> Where a party takes steps in time but the witnesses are not served owing to delay on the part of the Court's officers to serve them the party cannot be said to have committed default<sup>2</sup> Even if the steps are taken late but there is sufficient time to get the witnesses served the party cannot be said to be in default<sup>3</sup> He will be held to have committed a default if the steps are taken too late to get the witnesses served<sup>4</sup>

When a commission has been issued the non return of the commission is no failure on the part of a party<sup>5</sup>

16 (81) AIR 1931 Bom 111 (113 114)

(14) AIR 1914 Mad 831 (839)

(See also (14) AIR 1914 Mad 116 (116 117)

(Where all the evidence has been adduced and an adjournment was granted for the production of a succession certificate for a portion of the claim but the plaintiff failed to produce the same suit ought not to be dismissed under O 17 R 3 but should be disposed of on the merits under Rule 3 in respect of that portion of the claim for which succession certificate was not necessary and in respect of that portion for which the certificate was necessary the suit should have been dismissed))

#### Note 4

1 (66) 1906 Pun Re No 30 112

(27) AIR 1927 Lah 888 (888)

2 (87) 10 Mad 270 (271)

effect to its processes for compelling the attendance of the witnesses being thus made as much on its own motion as at the instance of the defendant or as at the instance of the plaintiff the case cannot be said to come under Act VIII of 1859 S 148 corresponding to O 17, R 3)

(24) AIR 1924 Lah 404 (404) (Do)

5 (23) AIR 1923 Lah 291 (291)

6 (66) 1906 Pun Re No 111 page 476

#### Note 5

1 (10) 5 Ind Cas 499 (499) (Cal) (34 Cal 235, Referred)

2 (24) AIR 1924 Lah 273 (272)

(25) AIR 1925 Lah 296 (296)

(17) AIR 1917 Lah 81 (281 282) (When once a party has given the address and other particulars of his witnesses and has also paid the expenses the Court is quite incompetent to proceed against that party if service of summon is not effected nor proceed under Rule 3 for party refusing to pay warrant costs when such order was passed illegally)

3 (25) AIR 1925 Oudh 304 (304)

4 (26) AIR 19 6 Lah 27 (26)

5 (7) AIR 1917 All 749 (750)

ments are made by a Court in order to give



O. 17 R. 3  
Notes 5-7

When time is to be regarded as the essence of the default, the party should have distinct notice of the time within which the act should be done<sup>6</sup>

6. "Any other act necessary to the further progress of the suit." — The act contemplated by this rule is one which must be necessary to the further progress of the suit<sup>1</sup>. An act which brings about a stay and thus arrests the further progress of the suit cannot be interpreted to be an act necessary to the further progress of the suit. A Court cannot therefore dismiss a suit for non prosecution because the party failed to produce a stay order within the period allowed<sup>2</sup>. As to what are such acts see the cases noted below<sup>3</sup> and as to what are not such acts, see the undermentioned decisions<sup>4</sup>. When the act is one ordered without jurisdiction a default in doing it will not attract the provisions of this rule<sup>5</sup>.

7. Remedy of a person aggrieved by an order under this Rule. — A decision under this rule is a decree. It will operate as *res judicata* and bar a second suit for the same relief<sup>1</sup>. But if the decision is not one properly within the rule there is no bar against a second suit<sup>2</sup>.

The remedy of a party aggrieved by an order under this rule is by way of appeal<sup>3</sup> or review<sup>4</sup> and not revision.<sup>5</sup> It has however, been held in a case before the Lahore High Court that a decree passed under this rule may nevertheless be an *ex parte* decree to which the provisions of Order 9 will apply<sup>6</sup>.

Where the order has been expressly passed under this rule, the remedy is by way of appeal only even though the Court had no power to proceed thereunder and

6 { 90 } 18 Ind 510 (511)

Note 5

1 { 91 } 8 Mad 259 (260)  
{ 99 } 21 Mad 403 (404) (Held that costs ordered to be paid was not a condition precedent to the hearing)

2 { 25 } AIR 1928 Nag 24 (26)  
3 { 12 } 17 Ind Cas 294 (295) (All) (Summons to respondent returned unserved and time given to appellants to take further steps)

{ 30 } AIR 1930 Oudh 351 (352) (*Ex parte* order set aside on condition of payment of costs—Costs not paid)

{ 19 } AIR 1919 Low Bur 189 (140) 9 Low Bur Rul 206 (Failure of appellant to take steps for preparation of Bench copies and translations of vernacular documents)

{ 22 } AIR 1922 Pat 292 (255) 6 Pat L Jour 650 (Where a date is fixed for appointment of a guardian of a minor defendant and the plaintiff takes no steps to get the guardian appointed the Court cannot dismiss the suit without giving the plaintiff an opportunity to adduce evidence at least against the original defendants in the suit)

4 { 20 } AIR 1926 Lah 571 (571) (A dismissal of suit for failure to amend plaint and pay costs of adjournment cannot fall under O. 17 R. 3)

{ 21 } AIR 1924 Lah 608 (609) (Non production of document which ought to be produced in Court by the plaintiff when plaint is presented does not attract operation of O. 17 R. 3)

{ 25 } AIR 1925 All 604 (604) (Parties agreeing to abide by oath affecting a third person to be taken in particular manner—Oath illegal under Oaths Act—Court fixing date for oath to be

taken—Oath not taken on that day—O. 17 R. 3 does not apply)

5 { 28 } AIR 1925 Pat 316 (317) (Dismissal of suit for failure to supply defendant with copy in a specific language)

Note 7

1 { 12 } 13 Ind Cas 172 (173) (Lah)

{ 87 } 10 Mad 272 (273)

{ 36 } AIR 1936 Lah 885 (886)

2 { 90 } 18 Ind 510 (511) (The decision will not be *res judicata* if the dismissal was due to non payment of court fees when no date was fixed for its payment)

{ 93 } 18 Mad 466 (467, 468) (The dismissal of suit for non production of a certificate of heirship is not a decision under this rule so as to bar a second suit on the same cause of action as *res judicata* as the want of succession certificate prevents an adjudication on the merits)

[But see { 85 } 1885 All W N 163 (163)]

3 { 1900 } 22 All CG (78) (FIR)

{ 12 } 16 Ind Cas 159 (160) 36 Bom 530

{ 24 } AIR 1924 Mad 43 (44)

{ 25 } AIR 1925 Oudh 278 (280)

{ 27 } AIR 1927 Rang 148 (149) 5 Rang 833

{ 37 } AIR 1935 Ind 210 (211) 58 Mad 817

{ 83 } AIR 1933 All 41 (42)

[See { 35 } AIR 1935 All 398 (402) (Same Court has no jurisdiction to restore the suit on the ground that there was no decision on merits)]

4 { 18 } AIR 1918 Mad 143 (145) 41 Mad 280 (FIR)

{ 70 } 6 Mad H O R 202 (704)

{ 93 } 11 C P L R 94 (91)

{ 33 } AIR 1933 All 41 (42)

5 { 11 } 12 Ind Cas 603 (601) 34 All 123

6 { 29 } AIR 1903 Lah 281 (291)

acted erroneously in doing so," and even though Rule 2 may have been mentioned by mistake instead of Rule 3<sup>8</sup>

O. 17 R. 3  
Note 7

But, where the rule under which the order is passed is *not stated*, then the Court must go into the matter and decide whether the order is really one under Rule 2 or Rule 3<sup>9</sup> The *substance* of the order will be examined for determining under which rule it falls In such a case, the guiding principle has been laid down to be that unless the facts and circumstances of the case clearly indicate that the order was one under this rule, the order should be treated as one under Rule 2<sup>10</sup> For cases in which the order was treated as one under this rule, see the cases noted below<sup>11</sup> For cases where it was treated as one under Rule 2, see the undermentioned decisions<sup>12</sup>

As to the power of an Appellate Court in such cases, see the cases cited below<sup>13</sup>

As to the effect of an appellate order in such cases see the undermentioned decisions<sup>14</sup>

the merits Held that the dismissal was one on the merits and not one for default and the decree was appealable )

(20) AIR 1920 Pat 600 (601, 602) 4 Pat L Jour 277

(20) AIR 1920 Pat 600 (601, 602) 4 Pat L Jour 277

(20) AIR 1920 Pat 600 (601, 602) 4 Pat L Jour 277

(20) AIR 1920 Pat 600 (601, 602) 4 Pat L Jour 277

(20) AIR 1920 Pat 600 (601, 602) 4 Pat L Jour 277

8 (25) AIR 1925 Oudh 495 (495)

9 (28) AIR 1928 Lah 427 (428)

present )

(38) AIR 1933 Cal 78 (74) (Suit decided on

12 (15) AIR 1915 Mad 16 (17) (Dismissal

11 (20) AIR 1920 Pat 600 (601, 602) 4 Pat L Jour 277

432) (Suit adjourned for plaintiff's witnesses—

and no revision )  
(26) AIR 1926 All 729 (730) (Date fixed for production of evidence — No evidence produced and costs ordered as condition precedent not paid — Pleader reported no instructions — Order 17 Rule 3)

(23) AIR 1923 All 492 (492) (When a case was called for hearing the plaintiff's pleader appeared

11 (07) 10 Oudh Cas 215 (246)

## ORDER XVIII.

## HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

**R. 1.** [S 179 Expln.] The plaintiff has the right to begin

Right to begin

unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin

[1877, S 179]

## Synopsis

1 Right to begin

2 Allegations

3 Admissions

4 Preliminary issue raised by defendant that the suit does not lie

5 Preliminary issue that the appeal does not lie

6 Applicability

## Other Topics (miscellaneous)

Application for restitution of moneys profits See Note 9 Two sets of defendants — Counsel when to be heard See Note 1

Facts See Note 8

Right to begin — Examples See Notes 1 and 2

Review application — Who is to begin See Note 9

Unless the defendant admits the facts alleged by the plaintiff See Note 3

**1 Right to begin** — The right to begin follows the *onus probandi* as provided by Sections 101 to 114 of the Evidence Act (I of 1872). As a general rule the plaintiff has to prove his claim by positive proof for the Court has to see whether there is proof of claim before it need enquire as to the truth or otherwise of the defence<sup>1</sup>. It is the duty of the parties to prove their case and the Judge has nothing to do with the getting up of a case<sup>2</sup> but the Court has jurisdiction on a proper occasion in the interest of justice to examine *de bene esse*, witnesses upon an *ex parte* application<sup>3</sup>. It must be pointed out that evidence need not always be led by the party who has the right to begin and on whom lies the burden it is open to him to sustain the *onus* by facts which he may elicit in cross examination of the other party's witnesses<sup>4</sup>. The *onus* is not in all cases and necessarily a question of law. How much or what evidence will discharge the *onus* is a question which depends upon the weight attached to the evidence<sup>5</sup>. In the case of two sets of defendants whose interests are the same both should address the Court before any evidence is taken<sup>6</sup> but the defendant supporting the plaintiff must begin before the other defendants. If on the issue or issues of fact the burden of proof is on the defendant, he has the right to begin<sup>7</sup>.

**2 Allegations** — Under Section 102 of the Evidence Act, the burden of proof rests on the party who would fail if no evidence at all were given on either side<sup>1</sup>. Thus

## Order 18 Rule 1 — Note 1

1 (28) AIR 19 3 All 693 (698)

(29) AIR 19 3 Lah 41 (40) (Suit to recover property alienated by father — Family Customary Law — Plaintiff must prove that his suit is within time)

2 (140) 1 K B 377 (332) Loeck and Zarta Key In re (1877) 11 Q B 377

3 (70) 5 Rang I R 952 (253)

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1 (70) 13 M & L 60 (65)



O 18 R. 1  
Notes 5-6

5. Preliminary issue that the appeal does not lie.— Where the respondent in an appeal objects that the appeal does not lie, the appellant must show that he has a right of appeal and has therefore the right to begin<sup>1</sup>

6. Applicability.— The procedure in regard to trial of suits as laid down in this Order is to be followed in proceedings under the undermentioned local and special Acts<sup>1</sup>

O. 18 R. 2

**R. 2.** [Ss. 179, 180.] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case

(3) The party beginning may then reply generally on the whole case.

[1877, Ss. 179, 180.]

#### Local Amendments

##### ALLAHABAD

For the present Rule 2 substitute the following

"2 (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the oral evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any) "

##### MADRAS

At the end of Rule 2, insert the following "explanation

"Explanation.—Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage "

##### NAGPUR

Add the following as sub-rule (4) to Rule 2

"(4) Notwithstanding anything contained in this rule the Court may order that the production of evidence or the address to the Court may be in any order which it may deem fit "

##### Note 5

1. ('84) S Bom 287 (259)

##### Note 6

1. The Madras Survey and Boundaries Act (VIII of 1923), S 23. The U P Court of Wards Act

(IV of 1912) S 57(2) The Bengal Settled Estates Act (III of 1901), S 8 (2). The Bengal Tenancy Act (VIII of 1885), S 107. The Madras Railway Protection Act (IV of 1886) S 15. The Calcutta Rent Act (III of 1920), S 24. The Bengal Court of Wards Act (IX of 1879), S 66

## OUDH

O. 18 R. 2  
Note 1

For the present Rule 2 substitute the following

"2 (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him and the nature of the evidence which each of his witnesses is expected to give and shall then produce his evidence in support of the issues which he is bound to prove

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any) "

## RANGOON

Add the following as a proviso to sub rule (2) of Rule 2

"Provided that the Court may, in its discretion, call upon the other party to proceed under this sub rule before the evidence of the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided "

## Synopsis

1 Scope of the Rule	3 "The other party."
2 Hearing	4 Arguments

1. **Scope of the Rule.** — On the day fixed for hearing the party having the right to begin must state his case, but this does not give him the right to introduce new pleas without the leave of Court. He has only the right to state his case, as has already been put forward.<sup>1</sup> It follows, as a consequence, that the Courts ought not to allow evidence to be given in regard to contentions not raised in the pleadings.<sup>2</sup>

It is not the duty of the Court to determine what witnesses shall be examined.<sup>3</sup> The parties must select their own witnesses and ask the Court to examine such of them as they tender.<sup>4</sup> It is, however, in the discretion of the Court to allow further evidence after the case has been closed.<sup>5</sup> But in such cases it behoves the Court of first instance to take care that a party whose case has been finished is not permitted, without good reason, to mend that case by fresh evidence after his adversary has succeeded in impeaching it.<sup>6</sup> But a document filed with the plaint when tendered after the close of the case, but before the other party began, can be admitted.<sup>7</sup>

Where the *onus* is on the plaintiff and he has failed to sustain it successfully the Court will act rightly in dismissing the suit without insisting on the defendant to go into the witness box,<sup>8</sup> but where the burden of proving some issues lies on the defendant, the plaintiff is entitled to reserve his case, and produce rebutting evidence after the defendant's evidence on those issues has been recorded.<sup>9</sup> Where a witness has been summoned and does not appear, the party calling him is entitled to call upon the Court to compel his attendance,<sup>10</sup> but it is not only illegal but improper and unfair to

## Order 18 Rule 2 — Note 1

1 (27) AIR 1927 Lah 615 (615)

2 (43) AIR 1923 Lah 363 (365)

3 (70) 13 Suth W R 185 (188)

4 (66) 11 Suth W R 231 (232)

(58) 4 Nag L R 123 (131)

(51) 1904 1 un Re No 61 p 175

(69) 11 Suth W R 218 (245)

(70) 11 Suth W R 185 (188)

[See (34) AIR 1934 Lab 317 (317)]

(69) 11 Suth W R 99 (99) ]

5 (69) 11 Suth W R 455 (456)

6 (67) 8 Suth W R 461 (463)

(70) 14 Suth W R 493 (495 496)

7 (66) 83 Cal 1845 (1849)

8 (18) 21 Ind Ors 96 (102) (Mad)

[But see (66) 5 Suth W R 179 (179)]

9 (11) 12 Ind Cas 862 (864) 1911 Pun Re

No 66

10 (02) 6 Cal W R 548 (550)

**O. 18 R 2**  
**Notes 1-4**

permit the defendant at the very outset of the case to be put into the witness box nominally as a plaintiff's witness. It is certainly in accord with justice that a party who has to defend a suit should hear what his opponent has to say before he himself is called upon to answer.<sup>11</sup>

Reasonable time must be given for either party to produce his evidence and the Court will exercise sound discretion if it allows the party to produce his evidence at any time before it proceeds to judgment.<sup>12</sup> Thus when the defendant's request for time to produce his witnesses was refused but the defendant produced them on the day the case was posted for judgment, it was held that it was a wrong exercise of discretion not to examine the witnesses before proceeding to judgment.<sup>13</sup>

A pleader is bound to call the witnesses his party wishes to examine and any threat on the part of the Court to report to the High Court the conduct of the pleader in examining such witnesses is highly improper.<sup>14</sup> Where a counsel refrains from calling evidence in deference to some observations from the Bench the Appellate Court ought not to reverse the decree of the first Court without allowing such evidence to be given which the first Court thought unnecessary.<sup>15</sup>

A Court is bound to allow the defendant to produce his evidence although it has already formed an opinion in favour of the defendant from the plaintiff's evidence itself. The Court is not entitled to dispose of the suit without calling on the defendant.<sup>16</sup>

**2 Hearing** — See Notes to O 8 R 1 and also the undermentioned cases.<sup>1</sup>

**3. "The other party"** — The other party means the party other than the one who has the right to begin and has begun. Where there are two sets of defendants and their interests are practically the same the rule is that after the plaintiff's case has been closed both the defendants should address the Court before any evidence is given by either set of defendants.<sup>2</sup>

But where a defendant or a set of defendants support the plaintiff's case wholly or in part the former must immediately follow the plaintiff and call his or their witnesses and then only can the other set of defendants who differ from the plaintiff be called upon to address the Court and produce their evidence.<sup>3</sup>

**4 Arguments** — It is in the option of the parties to argue their case when the evidence has been closed and it is for them to decide whether they will exercise that privilege or not<sup>4</sup> and a Court delivering judgment without hearing arguments is not acting irregularly where the parties having had the opportunity did not choose to make use of it.<sup>5</sup> Where new cases are quoted in reply the other party will be allowed to address the Court on such new cases and on the points not argued before the Court previously.<sup>6</sup>

A Judge who has not heard any part of the evidence and before whom no part of the proceedings has taken place is not justified in proceeding to judgment until

11 (08) 1908 Pun Re No 116 ■ 528

[See however (02) 26 Bom 392 (395-396)]

12 (93) 20 Cal 740 (743-745)

13 (93) 20 Cal 740 (743-745)

14 (01) ■ Bom L R 562 (563)

[See (33) AIR 1933 Bom 303 (304)]

15 (33) AIR 1933 Bom 303 (304) (Judges ought not to stop the parties from calling such evidence as they think proper unless the evidence is manifestly unnecessary)

16 (12) 17 Ind Cas 87 (87) 40 Cal 110

Note ■

1 (25) AIR 1925 AH 93 (99)

(20) AIR 1920 AH 207 (208) 42 AH 612

Note 3

1 (02) 29 Cal 32 (32)

2 (03) 32 Bom 599 (600-601-602)

Note 4

1 (20) AIR 1920 Lah 246 (247)

2 (24) AIR 1924 Lah 107 (107-108) 4 Lah 364

3 (83) 9 Cal 14 (2)

he has given the parties an opportunity of appearing before him and stating their case, a judgment so pronounced is bad in law and must be set aside \*

O. 18 R. 2  
Note 4

The practice of submitting written arguments by pleaders is not proper and in any case, must first be submitted to the other side and then to the Court \*

A party must be represented by *one* pleader or set of pleaders and cannot be represented *severally* by different pleaders.\*

### Local Amendment

#### CALCUTTA

*Insert the following as Rule 2A*

"2A Notwithstanding anything contained in clauses (1) and (2) of Rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit "

O. 18 R. 2A  
(Calcutta)

### R. 3. [S. 180.] Where there are several issues, the

O. 18 R. 3

**Evidence where several issues.** burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

[1877, S. 180.]

### Local Amendments

#### ALLAHABAD

*For the present Rule 3, substitute the following*

"3 (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party, and, in the latter case, the party beginning may state his case in the manner aforesaid and produce evidence on those issues after the other party has produced all his evidence

(2) After both parties have produced their evidence, the party beginning may address the Court on the whole case, the other party may then address the Court on the whole case, and the party beginning may reply generally on the whole case, provided that in doing so he shall not, without the leave of the Court, raise questions which should have been raised in the opening address "

#### UDAH

Same as that of the Allahabad High Court, above, except that sub-rule (2) is numbered as (3) and the following is inserted as sub rule (2)

4. (1904) 1904 Pun Re No 91, p 345  
5. (1921) AIR 1921 Cal 426 (426)

(28) AIR 1923 Mad 1130 (1131)  
6 (71) 8 Bom II C II A C 241 (244)



**O. 18 R. 3  
Note 1**

"(2) The substance of the statement of the case provided for by Rules 2 and 3 (1) above shall be taken down by or under the personal direction and superintendence of the Judge and shall form part of the proceedings"

**1. Scope of the Rule.** — Where there are several issues the burden of proving some of which lies on the other party, the party beginning may at his option —

(1) produce his evidence on those issues, or

(2) reserve it by way of answer to the evidence produced by the other party

In the "latter" case, the party beginning may, after the other party has produced his evidence, produce his rebutting evidence<sup>1</sup> It is in the discretion of the Court to give adjournments for the purpose<sup>2</sup> A party trying to prove a point not raised in his pleadings cannot object to the opposite party tendering rebutting evidence as to that point<sup>3</sup>

**O. 18 R. 4**

**R. 4. [S. 181.]** The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

[1877, S. 181; 1859, S. 172.]

*Synopsis*

**1 Examination of witnesses**

**2 Open Court**

**3 Power of the Appellate Court to examine witnesses**

*Other Topics (miscellaneous)*

Evidence of the witnesses in attendance See Note 1 Waiver of rules of procedure for examination See Note 1

Examination to be on oath See Note 2

Pardanashin woman and exempted persons —

Examination in open Court See Note 2

Witnesses not examined properly — Court should interfere See Note 2

**1. Examination of witnesses.** — A party has a right to have all the witnesses tendered by him examined by the Court<sup>1</sup> The Court cannot ordinarily refuse to examine them<sup>2</sup> on the ground that their names do not find a place in the witness list,<sup>3</sup> or on the ground that they were not present at the previous hearing<sup>4</sup> But if it clearly appears that the object of summoning them is merely to obstruct or

**Order III Rule 3 — Note 1**

1 (1877) 9 Bom 146 (149, 150)

2. (26) AIR 1926 Nag 486 (487)

3 (14) AIR 1914 Oudh 52 (65)

**Order III Rule 4 — Note 1**

1 ('67) 8 Suth W R 364 (365)

(71) 16 Suth W R 109 (110)

(73) 20 Suth W R 203 (204)

(75) 23 Suth W R 63 (64)

(88) 1888 Bom P J 210

(83) 9 Bom 146 (149, 150)

2. (67) 8 Suth W R 505 (505)

(1841) 2 Moo Ind App 424 (427) (P C)

(87) 9 All 339 (340)

(95) 17 All 29 (32)

(96) 19 Mad 375 (331) (Case under the Criminal Procedure Code)

(69) 12 Suth W R 229 (229)

(26) AIR 1926 Lah 450 (450)

(34) AIR 1934 Lah 317 (317)

3 (69) 12 Suth W R 455 (456)

4. (97) 10 O P L R 92 (93)

(93) 1900) 1893 1900 Low Bur Rul 998.

delay justice the Court can refuse to examine them<sup>5</sup> and whenever it so refuses it must record its reasons for such refusal<sup>6</sup>

O 18 R 4  
Notes 1-2

Where the witness to be examined is an infant or a person of advanced age the Court may hold an examination on the *voir dire* as to his competency to give evidence<sup>7</sup> But this examination must be held before the actual examination commences<sup>8</sup> Courts of course have always the power to examine any of the parties to the suit and compel their attendance<sup>9</sup> It is also in the discretion of the Court to allow a party to call further evidence after he has closed his case<sup>10</sup>

The examination of a witness is not complete without any opportunity being allowed for his cross examination by the other side<sup>11</sup> A court cannot fix any time limit for cross examination<sup>12</sup> though it has full power to prevent any abuse of the rights of cross examination<sup>13</sup> A co defendant who is represented by a separate vakil may cross examine another defendant in order to discredit the evidence given by him in plaintiff's favour<sup>14</sup> Refusal by the trial Court to examine the witnesses tendered by a party before delivery of judgment may amount to a substantial error or defect of procedure which may have affected the decision of the case on the merits and is a ground for second appeal under Section 100 clause (c)<sup>15</sup>

**2 Open Court** — The parties have a right to have the evidence of witnesses taken in *open Court* : *i.e.* *publicly*<sup>1</sup> All witnesses should without distinction give their evidence from the witness box it is not desirable that anyone should give his evidence on the *dais* by the side of the Judge<sup>2</sup> The following may be deemed to be exceptions to the rule that the examination of witnesses should be in open Court —

(1) *Pardanus* : in women and other persons who are exempted from personal appearance in Court should not be examined in open Court<sup>3</sup> See also Sections 132 and 133 *ante*

(2) Where witnesses are examined on commission<sup>4</sup>

The Court should not as a rule interfere in the examination of the witnesses except where it is found that they are not properly examined through the incompetency of those who have the management of the case<sup>5</sup>

The Oaths Act provides imperatively that no person shall testify except on *oath* or *affirmation* : As to the effect of the omission to take the oath or affirmation see the *Oaths Act and the undermentioned cases*<sup>6</sup>

5 (72) 17 *Suth W R* 172 (173)

(74) 21 *Suth W R* 196 (198)

(1853) 6 *Moo Ind App* 237 (247) (PC) (Witness should not be examined in the absence of the parties)

(25) *AIR* 1925 *Mad* 881 (381)

2 (21) 63 *Ind Cas* 461 (469) (Lah)

3 (83) 5 *All 99* (94) (Case under the Criminal Procedure Code)

(94) 21 *Cal* 583 (589 590) (Do)

4 See Order 26 below

5 (68) 1 *Beng L R* (S N) 90 (c)

[See (36) *AIR* 1936 *Lah* 183 (183) (Court

8 (07) 11 *Cal W N* 51 (53)

[But see (14) *AIR* 1914 *Cal* 276 (279) 41 *Cal* 406]

9 (68) 10 *Suth W R* 280 (289)

10 (67) 8 *Suth W R* 461 (463)

11 (68) 9 *Suth W R* 587 (588) (Unless con-

tacted to)

(06) 30 *Bom* 593 (535 536)

(71) 16 *Su h W R* 257 (258)

12 (10) 8 *Ind Cas* 418 (421) (Oudh)

13 (22) *AIR* 1922 *Oudh* 124 (128)

14 (1863) 1 *Mad H R* 456 (456)

15 (93) 20 *Cal* 740 (743 744)

Note 2

1 (25) *AIR* 1919 5 *Pat* 438 (439)

[See also (36) *AIR* 1936 *Lah* 887 (890) (Judge can put questions to witnesses in order to get at truth)]

6 (49) 10 *All 907* (21) (S 6 of the Oaths Act

18 R 4  
Notes 2-3

The parties may agree to the evidence being given in a particular manner and such consent will bind them<sup>7</sup> except where the evidence amounts to nothing or is manifestly untrue<sup>8</sup> or where the evidence is legally inadmissible<sup>9</sup>

**3 Power of the Appellate Court to examine witnesses** — Where the Court of first instance refuses to examine the witnesses tendered by a party, they may be examined by the Appellate Court<sup>1</sup> But the objection to the rejection of witnesses must be taken at the earliest possible opportunity and if not so taken, the High Court will refuse to interfere<sup>2</sup> It has been held that the procedure of an Appellate Court calling for an expert witness to prove the handwriting of the attestors is illegal<sup>3</sup> See also Order 41 Rules 27 and 33 *infra*

18 R 5

**\*R. 5. [S 182]** In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

[1877, S 182, 1859, S 172]

a The provisions of Rules 5, 6, 7, 8, 9, 11, 13, 14, 15 and 16 of this Order so far as they relate to the manner of taking evidence do not apply to the Chief Court of Oudh. *See* Oudh Chief Courts Act (U P A of 1925) s 16 (2)

### Local Amendment

#### RANGOON

The following shall be *substitute* 1 for Rule 5

In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the Judge not ordinarily in the form of question and answer but in that of a narrative and when completed shall be read over

is imperative and not merely directory)

(78) 2 Cal L Rep 471 (47") (Refusal to make the oath or solemn affirmation in a particular manner — Presumption)

(90) 14 All 141 (145) (Do)

(38) 22 Bom 680 (683) (Do)

(74) 21 Suth W R Or 81 (32)

(75) 14 Beng L R 204 (296, 297)

(1864) 2 Mad H C R 216 (247) (Member of the Church of England is not exempted from taking an oath in a Court of justice in India)

(1862) 1 Mad H C R 89n (Mahomedan witness though suffering from a disease which disqualifies him from taking an oath on the koran must be sworn in the regular way or not at all)

(53) 10 Suth W R 294 (294)

(58) 22 Bom 291 (293) (Officer to be bound by oath)

(1900) 27 Cal 229 (231)

(96) 18 All 46 (49)

(97) 23 Mad 231 (236, 237)

(08) 31 Mad 1 (9)

7 (06) 30 Bom 109 (112)

(15) AIR 1915 Mad 762 (763)

(15) AIR 1915 Mad 793 (794, 795) 33 Mad 160

(See however (70) 13 Suth W R 103 (103)]

8 (69) 11 Suth W R 110 (111)

9 (1865) 11 Suth W R 252 (253, 254)

(60) 5 Suth W R 234 (234)

#### Note 3

1 (51) 5 Cal 608 (711)

(98) 28 Bom 253 (254)

2 (0) 2 All H C R 909 (210)

(70) 22 W P H C R 906 (206, 207)

(82) 6 Bom 524 (527)

(66) 6 Suth W R 215 (215)

(56) 6 Suth W R 374 (324)

(69) 11 Suth W R 959 (290)

(69) 12 Suth W R 373 (374)

(71) 15 Suth W R 57 (59)

(70) 14 Suth W R 419 (420)

3 (68) 9 Suth W R 68 (69)

or translated to the witness by such person as the Judge may direct, provided that the Judge may, if he thinks fit, require the evidence to be read over in his own presence

Such person shall, after reading over the deposition to the witness, append a certificate at the foot of the deposition form as follows

Read over \_\_\_\_\_ by me in Burmese or \_\_\_\_\_ (as the case may be) and acknowledged  
 Interpreted \_\_\_\_\_  
 correct \_\_\_\_\_

(Signature)  
 Interpreter or Clerk

The Judge shall, if necessary, correct the deposition and shall sign it

### Synopsis

- |  |  |
|--|--|
| 1. Scope and applicability of the Rule<br>2. Effect of evidence taken in the absence of parties. | 3 "Shall be read over"<br>4. Signature of witness<br>5 Signature of Judge. |
|--|--|

**1. Scope and applicability of the Rule.** — This rule applies to all proceedings<sup>1</sup> except that it does not apply to Chartered High Courts<sup>2</sup> and to the Chief Court of Oudh<sup>3</sup> in the exercise of their original jurisdiction and to Courts constituted under the Provincial Small Cause Courts Act<sup>4</sup>. But it applies to proceedings conducted by commissioners for partition appointed by the original side of the High Court<sup>5</sup>. See Order 26 Rule 17

An objection that the depositions of witnesses were not taken in the manner prescribed must be taken at the earliest possible opportunity and not in second appeal<sup>6</sup>

The notes by a Munsif as to the age or description of the witness in the heading of the deposition do not form part of the evidence<sup>7</sup>

**2. Effect of evidence taken in the absence of parties** — The examination of a material witness in the absence of the other party is a material irregularity which will vitiate the procedure if objection to the same is taken at the proper time<sup>1</sup>. Where no opportunity was given to a party to examine his witness, or to rebut the evidence or cross examine the witness of the opposite party then that evidence is not admissible for or against him unless consented to<sup>2</sup>. Where the defendant fails to appear without lawful excuse, the Judge may at once enter judgment against the defendant, but where the Court takes the evidence of the plaintiff, the defendant who has appeared is entitled

#### Order III Rule 5 — Note 1

1. ('84) AIR 1934 Cal 737 (739) 61 Cal 488  
 (Witness examined by a commissioner for partition appointed by the original side of High Court)  
 (71) 15 Suth W R O O 16 (18) (Insolvency proceedings)  
 (67) 5 Bom H CROC 63 (64) (Witness examined

Vizagapatam Act XXIV of 1939 (R 16)

2. See Order 49 Rule 3  
 3. See the U P (Oudh Courts) Act IV of 1920, S 16 (2). So also Rules 6 to 9 11, 13 to 16 of this Order are not applicable  
 4. See O 50 R 1 (b)  
 [See also (25) AIR 1925 Nag 412 (413, 414)]  
 5. (24) AIR 1934 Cal 737 (739) 61 Cal 489  
 6. (72) 18 Suth W R 112 (113)

Note For observations on the improper manner in which evidence is generally taken by the lower Courts see (82) 4 All 249 (250 251)

7. (19) AIR 1919 Cal 502 (503)  
 (04) 26 All 104 (118) 31 Ind App 39 (P C)

#### Note 2

- the I and Acquisition Act)  
 (75) 24 Suth W R 162 (163) (Probate proceedings)  
 (23) AIR 1923 Oudh 119 (120) (Witness examined on commission)

Note The procedure of this rule is applied to proceedings under the Bengal Land Registration Act II of 1906 (534) and the Madras, Gujrat and

Q. 18 R. 5  
Notes 2-6

to cross examine him<sup>3</sup> The admission of a fact dispenses with the proof thereof and such portion of the statement as is an admission can always be treated as evidence without the whole statement being treated as such<sup>4</sup>

3 "Shall be read over" — There is a conflict of opinion as to whether a deposition *not read over* to the witness is admissible in evidence against him in a subsequent trial for perjury or forgery The High Courts of Calcutta<sup>1</sup> Lahore<sup>2</sup> and Madras<sup>3</sup> have held that it is not while the Judicial Commissioner's Court of Nagpur has held that it is admissible<sup>4</sup> But the fact that the deposition was read over by the witness himself<sup>5</sup> or that the reading over of the deposition was not in the presence of the Judge<sup>6</sup> or that a certificate as to the reading over to the witness was not appended by the Judge<sup>7</sup> or the non observance of some other formality<sup>8</sup> will not render the evidence inadmissible in evidence

4 Signature of witness — There is no obligation upon witnesses to affix their signature or mark after their evidence is read over to them It is however generally the practice to have their signatures<sup>1</sup> But see Rule 16 *infra* where such signature is obligatory

5 Signature of Judge — It is essential that the Judge should sign the deposition so read over to the witness A prosecution for perjury on the basis of such deposition cannot otherwise be sustained<sup>1</sup>

Q. 18 R. 6

**R. 6. [S 183]** Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given

[1877, S 183, 1859, S 172]

### Synopsis

1 Applicability | 2 Shall be interpreted See Note 5 to Rule 5

1 Applicability — This rule does not apply to the Chartered High Courts (see Q 49 R 3) Nor does it apply to cases governed by S 19 of the Oudh Laws Act<sup>1</sup> But it applies to proceedings conducted by commissioners for partition appointed by the Court on the original side of the High Court<sup>2</sup>

3 (69) 2 Beng L R App 12 (13)

4 (71) 16 S th W R 257 (258)

Note 3

1 (24) AIR 1924 Cal 705 (707 709) 51 Cal 236

(Dissenting from the observations of the majority in A I R 1918 Cal 289)

(14) AIR 1914 Cal 789 (790) 42 Cal 740

(81) 6 Cal 762 (763)

(08) 12 Cal W N 845 (847)

2 (17) AIR 1917 Lah 192 (193) 1917 Pun Re Cr No 12

3 (19) AIP 1919 Mad 45 (47) 111 Mad 561

(05) 28 Mad 308 (309 310)

4 (23) AIR 1923 Nag 39 (40) 18 Nag L R 192

5 (19) AIR 1919 Cal 514 (515) 46 Cal 895

6 (10) 7 Ind Crs 414 (415) 34 Ind 141

(18) AIR 1918 Mad 334 (334)

7 (03) 2 Cal L Jour 496 (497)

(See (70) 2 N W P H C R 241 (243))

8 (29) AIR 1929 Cal 78 (80) 55 Cal 1094 (Dissenting from the majority)

(19) AIR 1919 Lah 348 (349) 1918 Pun Re Cr No 28

Note 4

1 (13) 16 Ind Crs 521 (521 522) 1912 Pun Re Cr No 8

Note 5

1 (81) 6 Cal 762 (763)

Order 18 Rule 11 — Note 1

1 (31) AIR 1931 Oudh 285 (285)

2 (31) AIR 1934 Cal 737 (739) 61 Cal 488

2. "Shall be interpreted" — See Note 3 to Rule 5 above

O 18 R.  
Note 2

### Local Amendment

#### RANGOON

The following shall be inserted as Rule 6A

' 6A Where there are no interpreters paid by Government, and it is found necessary to employ an interpreter in a civil case he shall be paid such fee ordinarily not exceeding Rs 2 *per diem* as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required and shall be treated as costs in the case. All payments of interpreters fees shall be made through the Court and duly entered in Bailiff's Register II

O 18 R 6A  
(Rangoon)

R. 7. [S 185A (3)] Evidence taken down under section

Evidence under  
Section 138

138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule

O. 18 R. 7

R. 8. [S 184] Where the evidence is not taken down in

Memorandum when  
evidence not taken  
down by Judge

writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record

O. 18 R. 8

[1877, S 184, 1859, S 172]

### Local Amendments

#### POUDH

Add the following proviso

' Provided that such memorandum shall not be necessary in the case of a Judge who has obtained the previous sanction of the Chief Court to dictate evidence in open Court

#### RANGOON

Rule 8 shall be deleted

### Synopsis

- 1 Applicability
- 2 Memorandum of evidence
- 3 Effect of non compliance

1 **Applicability.** — This rule does not apply to Chartered High Courts see Order 49 Rule 3. For a local repeal of this rule and Rules 9 and 13 of this Order, see the undermentioned Act<sup>1</sup>

Order 18 Rule 8 — Note 1

1 The C P Laws Act (II of 1879) Section 11

O. 18 R. 8  
Notes 2-3

**2. Memorandum of evidence** — Where a Judge does not take down the whole of the evidence himself, he is bound to make a memorandum of evidence and record every material answer made by the witness in the examination in chief, in the cross examination and in reply to questions by the Court. It should be written down in consecutive sentences<sup>1</sup>. Where there is a conflict between the Judge's memorandum and the recorded deposition of a witness, the Court must be guided by the latter and not the former<sup>2</sup>. In cases governed by this rule, there must be either one or two records of evidence. If it is on record it must be in Judge's own handwriting, if otherwise, there must be a memorandum of evidence<sup>3</sup>.

**3. Effect of non-compliance** — Failure to make a memorandum of evidence does not vitiate the proceedings if evidence is taken down in the language in which it is given<sup>1</sup>.

O. 18 R. 9

**R. 9. [S 185]** Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down [1877, S 185, 1859, S 172]

**1. Applicability** — This rule corresponding to Section 185 of the Code of 1877, does not apply to enquiries under the Central Provinces Laws Act<sup>1</sup>.

O. 18 R. 10

**R. 10. [S 186]** The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing [1877, S. 186, 1859, S 172]

**1 Scope of the Rule** — This rule does not apply to Chartered High Courts see Order 49 Rule 3

Note 2

(86) 1886 Pan Re No 45 page 53

Note 3

1 (68) 9 Suth W R Cr 69 (69)

Order 18 Rule 3 — Note 1

is necessary)

(72) 9 Bom H C R 307 (309-310)

(63) 5 Bom H C R O C 63 (64)

1 See The Central Provinces Laws Act (XX of 1873) Section 11 inserted by Central Provinces Laws (Amendment) Act (II of 1879)

**R. 11. [S. 187.]** Where any question put to a witness is **O. 18 R. 11**

Questions objected to  
and allowed by Court.

objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

[1877, S. 187 ; 1859, S. 172.]

### *Synopsis*

#### 1. Scope and applicability | 2. Objection, when to be taken

**1. Scope and applicability.** — This rule does not apply to Chartered High Courts see Order 49 Rule 3. When a question put to a witness is objected to, the proper course for the Court is to allow the question to be recorded and then give its ruling whether such question is allowed or disallowed. It is improper for the Court to allow the question to be put to the witness subject to objection<sup>1</sup>.

**2. Objection, when to be taken.** — Objection as to admissibility of evidence has to be taken in the Court of first instance and if not so done, the Appellate Court will not entertain any such objection<sup>1</sup> and where evidence of doubtful *admissibility* has been loosely received, the Privy Council will deal with the case as it appears to it just and will not allow any mere technical objection to prevail as to its admissibility<sup>2</sup>. But an erroneous omission to object to irrelevant evidence will not make it relevant and will therefore be disregarded<sup>3</sup>.

**R. 12. [S. 188.]** The Court may record such remarks as it **O. 18 R. 12**

Remarks on demeanour  
of witnesses

thinks material respecting the demeanour of  
any witness while under examination

[ 1877, S. 188; 1859, S. 172 ]

**1. Remarks on demeanour.** — Under this rule the Court may record such remarks about the demeanour of a witness as it thinks fit and the same cannot be expunged under the cloak of an amendment<sup>1</sup>. But where a witness stated his age to be 24 but the Judge made a note in his deposition that his age "appeared to be 18 or 19" it was held that the note could not be considered to be evidence in the case<sup>2</sup>. The Court's belief that the evidence is biased, is not a valid ground for refusing to record it<sup>3</sup>. The evidence of a defendant called to give evidence on the plaintiff's side cannot be judged under different principles merely because he is a defendant<sup>4</sup>.

#### Order 18 Rule 11 — Note 1

1 (86) AIR 1936 Lah 183 (185)

#### Note 2

1 (68) 10 Suth W R 90 (91)

(1816) 4 Moo In l App 259 (284 285 296) (P.C.)

(1859) 22 Cal 147 (144 146)

(01) 31 Cal 155 (157 158)

(01) 28 Cal 147 (144 146)

(26) AIR 1926 Cal 752 (754) (Final decision on  
objection must be recorded before Court proceeds

#### Order 18 Rule 12 — Note 1

1 (27) AIR 1922 All 107 (110) 41 All 401

2 (19) AIR 1919 Cal 502 (503)

3 (23) AIR 1923 Nag 59 (60)

4 (27) 2 Cal W N 99



O. 18 R. 13

**R. 13.** [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum of evidence  
in unappealable cases.

[1877, S. 189; 1859, S. 172.]

**1. Scope of the Rule.** — A Judge is bound under this rule, to make a memorandum of the substance of what each witness deposes<sup>1</sup> A short abstract of the whole evidence<sup>2</sup> or a mere reference to the evidence in the judgment<sup>3</sup> is not sufficient compliance with the rule

This rule does not apply to Chartered High Courts see O 49 R 3 As to the applicability of this rule to enquiries under various local or special enactments, see the undermentioned Acts<sup>4</sup>

O. 18 R. 14

**R. 14.** [S. 190.] (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record.

[1877, S. 190; 1859, S. 172.]

#### Local Amendments

#### ODUH

In sub rule (1), between the words "is" and "unable", insert "not authorized by the Chief Court to dictate and is"

#### RANGOON

In sub-rule (1) for the words "this Order" the word and figures "Rule 13" shall be substituted.

**1. Applicability.** — This rule does not apply to Chartered High Courts: see Order 49 Rule 3 (1)

#### Order 18 Rule 13 — Note 1

1. (9C) 1 Cal W N 223n (229n, 230n)
- (21) AIR 1921 Cal 659 (558)
- (16) AIR 1916 Mad 547 (548)
- (183) AIR 1939 Pesh 46 (47) (Small cause suit)
2. (05) 9 Cal W N 418 (419).

(05) 9 Cal W N 420 (421)

3. (28) AIR 1933 Pesh 46 (47)

4. The Oria Tenancy Act (II of 1913), Sec 193 (h), The O. P. Laws Act (XX of 1875), Sec 11, The North West Frontier Province Law and Justice Regulation (VII of 1901), Sec 46 (2)

**R. 15. [S. 191.]** (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

Power to deal with evidence taken before another Judge.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

[1877, S. 191.]

### Synopsis

1. Applicability.
2. Scope of the Rule.
3. Sub-rule (2).

### Other Topics (miscellaneous)

New plaintiff substituted — De novo trial See Successor, when bound to hear arguments de novo See Note 2

**1. Applicability.** — This rule does not apply to the Chartered High Courts see O 49 R 3

**2. Scope of the Rule.** — Under Section 191 of the Code of 1882, as it stood before 1888, it was held that the successor of the Judge who was removed was bound to fix a date for the entire hearing and trial of the case before himself and that such trial should proceed in the ordinary way except that the parties would be allowed to use the evidence already taken as evidence in the case<sup>1</sup> This view, however, was dissented from by a Full Bench in *Jadu Ras v Kanizak Hussain*<sup>2</sup> and it was held that Section 191 empowered the Judge to make use of the materials collected by the predecessor as evidence in the case without being bound to fix a day for commencing the trial *de novo* In order to give effect to this latter view, the old Section 191 was replaced by a new Section by Act VII of 1888, empowering the Judge to proceed with the suit from the stage at which the predecessor left it That Section has been substantially re enacted in this rule

#### Order 18 Rule III — Note 2

- 1 (85) 8 All 85 (37)  
(87) 7 All 857 (59, 60)

2. (86) 8 All 576 (591, 600, 611) (F B)

See also the following cases under the previous Codes

- (74) 21 Suth W R 196 (195)  
(70) 19 Suth W R 184 (185)  
(70) 19 Suth W R 76 (77 78)  
(71) 15 Suth W R 348 (349) (Where such an agreement has been entered into the witnesses should not be re examined without some good reason)

- (1864) 1 Suth W R 809 (311) (Do)  
(66) 4 Bom H C R A C 93 (100 101)  
(87) 1897 All W N 13 (18) (Trial by Munsif completed except delivery of judgment — Transfer of suit by District Judge — Judgment delivered by Munsif who did not take evidence — Judgment must be set aside)  
(63) 3 Bang L R A C 105 (106) (Judge dying after hearing and deciding a case — Only record of decision being entry in Court order book — Co-ordinate Court cannot take up and re hear the case but High Court will on ground of want of record of reasons for the decision reverse the order and remand the case for rehearing)

O. 18 R. 15  
Notes 2-3

It is not competent for any *co ordinate Court* to hear the case under this rule.<sup>3</sup> Thus an Additional Munsif has no jurisdiction to deliver judgment in a case in which the evidence was taken by the Principal Munsif.<sup>4</sup>

An opinion reduced to writing by a Judge but not pronounced by him is not a judgment but a mere memorandum and the successor is bound to hear arguments or give the parties an opportunity of being heard before the judgment is given.<sup>5</sup>

Where a *neo* plaintiff is added after the removal of the predecessor this rule has no application and the successor is bound to grant a *de novo* trial.

3 Sub-rule (2) — See the undermentioned cases.<sup>1</sup>

## O. 18 R. 16

## R. 16. [S 192] (1) Where a witness is about to leave the

jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

[1877, S 192; 1859, S 173]

## Synopsis

## 1 Applicability of the Rule

## 2 Scope of the Rule

1 **Applicability of the Rule** — This rule does not apply to Chartered High Courts see Order 49 Rule 3

2 **Scope of the Rule** — This rule provides for the *de bene esse* examination of a witness about to leave the jurisdiction of the Court.<sup>1</sup>

The evidence taken under this rule should be signed by the witness after being read over to him.

3 (CJ) 8 Beng L R A C 105 (106)

4 (57) 1857 All W N 13 (13)

5 (68) 3 South W R 1 (180)

(69) 12 South W R 204 (21)

6 (57) 1857 Pun R No 110 p 281

(01) 1,041 Iun R No 31 p 315

(07) 4 Low Bur Rul 258 (258 260 261)

(05) 1,001 Iun R No 11 p 19

(24) AIR 13 4 Lah 107 (103) 4 Lah 364

1 (06) 10 Cal W N 12 (13)

(02) 26 Mad 503 (506)

Order 18 Rule 16 — Note 2

1 (70) 5 Beng L R O C 250 (253) (Such examination must be taken by Court and not under commission)

**R. 17. [S. 193.]** The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit. **O. 18 R. 17**

Court may recall and examine witness

**1. Scope of the Rule.**—This rule provides for the recalling of witnesses after their examination has once been finished, but a witness examined by the plaintiff cannot be recalled as witness on the *defendant's* side without the leave of the Court.<sup>1</sup> Nor can a witness dispensed with by the plaintiff be recalled under this rule.<sup>2</sup>

**R. 18. [New.]** The Court may at any stage of a suit inspect any property or thing concerning which any question may arise. **O. 18 R. 18**

Power of Court to inspect.

**1. Scope of the Rule.**—This rule enables the Court to inspect any property or thing though it may issue a commission for that purpose.<sup>1</sup> The object of this provision is to enable the tribunal to understand questions that are being raised and to follow and apply the evidence.<sup>2</sup> But a judgment should not be based solely on the basis of such personal local inspection.<sup>3</sup> So also, a Judge is not entitled to use the impression formed by him from the local inspection to contradict a witness<sup>4</sup> or to decide whether the plaintiff's evidence or the defendant's evidence is true.<sup>5</sup> A Judge is not entitled to substitute his own view formed as a result of local inspection, for the evidence in the case.<sup>6</sup> Though the Code nowhere lays down that it is obligatory on the Judge to record the result of the local enquiry,<sup>7</sup> yet it is desirable that the result of such inspection should be recorded in the proceedings and not left for notice till judgment.<sup>8</sup>

[See also (32) AIR 1932 Bom 400 (405) (It should ordinarily be held in Court and preferably before the Judge who is ultimately to hear and decide suit)]

without putting points observed by him to the parties and eliciting their answers cannot be upheld)

(1939) AIR 1939 Mad 61 (64) (Finding based mainly on local inspection not binding in second appeal)

**Order 18 Rule 17 — Note 1**

1. (1868) 2 Ind Jur (N S) 160

2. (71) 15 South W R 848 (349)

**Order 18 Rule 18 — Note 1**

1. (21) AIR 1921 Mad 323 (323) 44 Mad 640

(97) 1 Cal W N 682 (685)

(66) 33 Cal 133 (195)

(12) 14 Ind Cas 877 (378 379) (Cal)

(14) 24 Ind Cas 618 (620) (Cal)

(82) 9 Cal 363 (365 366)

(16) AIR 1916 Pat 334 (335)

[See (26) AIR 1926 Cal 660 (660)]

[See also (66) 30 Bom 109 (112) (Local inspection by consent of parties)]

O. 18 R. 18  
Note 1

A Munsif is not bound to get the sanction of the District Judge before he makes an inspection. Sanction is, however, necessary for the levy of money for the expenses of such inspection.<sup>9</sup>

Where, at the instance of the plaintiff, a Munsif held a local inspection and, in the course thereof, at the instance of both the parties, he examined a person whose statements he used as confirming his impression formed independently of them, it was held that the parties could not turn round and say that the Munsif ought not to have used those statements.<sup>10</sup> But, it is not a justifiable procedure for a Judge at such local inspection to welcome the presence of crowds of anonymous villagers and indulge in informal inquiries amongst the people in those crowds for the purpose of guidance in deciding the rights of the parties.<sup>11</sup>

### Local Amendment

#### ALLAHABAD

Add the following rule at the end of O 18

O. 18 R. 19  
(Allahabad)

"19 (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings"

## ORDER XIX.

### AFFIDAVITS

O. 18 R. 1

**R. 1.** [S. 194.] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Power to order any point to be proved by affidavit

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit

[1877, S. 194; Cf. R. S. C., O. 37 R. 1. See O. 11.]

### Synopsis

1. Affidavits, essentials of.
2. Stamp duty, if necessary.
3. Court-fee, if necessary.
4. Cross-examination of deponent of affidavit.

5. Agreement to take evidence by affidavit.
- Necessity for affidavits on matters of record or questions of law.
7. Applicability.

9. (14) AIR 1914 Mad 640 (640)

10. (18) AIR 1918 Pat 633 (634)

[See also (28) AIR 1928 All 497 (498, 499)]

11. (39) AIR 1939 Mad 61 (64) (Judge not

to convert himself into an unofficial investigator and inquire of all and sundry regarding their views on the rights of the parties with the object of founding a judgment on what he has heard)

**1. Affidavits, essentials of.**—An affidavit is a declaration as to facts, made in writing and sworn before a person having authority to administer an oath<sup>1</sup> The officer authorized must be *on duty* at the time when the oath is administered<sup>2</sup> But the want of the seal of the Magistrate before whom it is sworn does not make it bad.<sup>3</sup> The deponent may, instead of signing his name, affix a mark or a stamp bearing his name<sup>4</sup>

Under the rules of the Supreme Court in England as also under the Rules of Practice framed by the High Courts in India, every affidavit should be drawn up in the first person and divided into paragraphs consecutively numbered, each paragraph dealing with a specific portion of the subject as nearly as may be<sup>5</sup> It should also state correctly the description, and true place of the abode of the deponent<sup>6</sup> Any person acquainted with the facts of the case may give the affidavit<sup>7</sup> An affidavit should not contain any *inferences* but only *facts*<sup>8</sup> The contents must be read over to the deponent in a language which he understands and vouched by him to be correct<sup>9</sup>

**2. Stamp duty, if necessary.**—An affidavit for the immediate purpose of being used or filed in any Court or before the officer of any Court, is exempt from stamp duty<sup>1</sup>

**3. Court-fee, if necessary.**—No court-fee is payable on an affidavit filed in Court See also Court-fees Act, Section 19 (xiv) Under Chapter 13, Rule 3 of the Appellate Side Rules of the High Court of Calcutta, a court-fee of Rs 2 is prescribed for an affidavit<sup>1</sup>

**4. Cross-examination of deponent of affidavit.**—Where the adverse party *bona fide* desires the production of the deponent for cross-examination, the Court has no power, under this rule, to order that the affidavit may be read at the hearing on proof of certain facts<sup>1</sup> The Court will refuse to act on an affidavit, when the deponent cannot be cross-examined<sup>2</sup>

On principle, no cross-examination is allowed on affidavits in support of a petition for sanction under Section 195 of the Criminal Procedure Code, and sanction should be given when the affidavit discloses materials for a *prima facie* case<sup>3</sup>

**5. Agreement to take evidence by affidavit.**—When parties agree to take evidence by affidavit, it does not preclude them from taking oral evidence for

**Order 19 Rule 1 — Note 1**

1. (10) ■ Ind Cas 897 (897, 898) 4 Sind L R 88  
(A statement before a foreign Court authorized to administer oaths—Affidavit in this case was not

9. (14) AIR 1914 All 197 (199) 36 All 13

**Note 2**

1. See Stamp Act (II of 1899), Sch 1, Art 4  
[See also ('88) 12 Bom 276 (277)]

**Note 3**

1. (32) AIR 1932 Cal 160 (160) 58 Cal 1339

**Note 4**

1. (26) AIR 1926 All 161 (163) (Proof of documents by affidavit)  
(89) AIR 1939 Mad 927 (928) (1933) 2 Mad LJour 399 (400)

[See also (21) AIR 1921 Mad 881 (882) (Showing answers to interrogatories)]

2. (36) AIR 1936 All 671 (672) (Deponent not subjected to cross-examination—Affidavit is not evidence)

[See (10) 8 Ind Cas 897 (899) 4 Sind L R 88

what was argued in a case sworn by a person who did not know the language in which the argument was made is worthless)

8. (04) ■ Bom L R 701 (711)

O. 19 R. 1  
Notes 5-7

supplementing the same except where the agreement specifies that the evidence is upon affidavits alone<sup>1</sup>

**6. Necessity for affidavits on matters of record or questions of law.**—An affidavit is of no weight when it is simply a party's opinion on a question of law<sup>1</sup>. It is superfluous when the facts deposed to therein are already a matter of record<sup>2</sup>.

**7 Applicability.**—This rule enables any Court to order that any fact may be proved by affidavit. Therefore where on the day of the first hearing of a suit, the defendant does not appear though served, the execution of the document which is sued upon may be proved by an affidavit without calling a witness<sup>1</sup>. The power to take affidavits in proof of facts is extended to enquiries under the undermentioned local or special Acts<sup>2</sup>.

O. 19 R. 2

**R. 2. [S 195]** (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross examination of the deponent

Power to order attendance of deponent for cross examination

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs

[Cf R S O, O 38 R 1 See Ss 132, 133 and O 11]

### Synopsis

1 'May be given by affidavit'

2 Stay of execution  
3 Rule to show cause

4 Application to declare a person a tout

5 Affidavit of documents

**1 "May be given by affidavit"**—When evidence by affidavit is given great care should be taken to see that they represent the real facts<sup>1</sup>. Thus when contributories of a company in liquidation complain of misapplication of the funds by the liquidators and apply to make an officer of the company liable for such misappropriation they must definitely set out the sum misapplied and the grounds of the charge in the affidavit<sup>2</sup>. In motions to vary a commissioner's report affidavits should be filed only when the Court orders them or for advancing a special fact with the permission of the Court<sup>3</sup>. A party in a suit for dissolution of marriage is not entitled to give evidence by affidavit<sup>4</sup>.

Legal practitioners are officers of the Court and when called upon to speak

#### Note 5

1 (1879) 47 L J Ch 536 (536) *Glossop v Heston* and *Ileworth Local Board*

#### Note 6

1 (14) AIR 1914 Oudh 206 (207) (Whether a particular property is talukdari property)

2 (5) S C 146 (149)

(3) S Cal L Jour 303 (312) 31 Cal 146

#### Note 7

1 (33) AIR 1933 Mad 164 (164)

2 The Charitable and Religious Trusts Act (XIV of 1900) S 11 (1)

(35) AIR 1935 Nag 125 (125) (C P Land Revenue Act)

See also The Indian Elections Offices and Enquiries Act (XXI of 1920) S 5 and the Presidency Towns Insolvency Act (III of 1909) S 117

#### Order 19 Rule 2 — Note 1

1 (1910) 129 L T 263 *Ramtharn v Cecil* (See remarks of Eve J)

2 (35) 19 Bom 69 (94)

3 (75) 1 Bom 158 (160 161)

4 (91) 1691 Pun Re No 13 p 59

(35) 62 Cal 541 (515)

to facts relating to the case in which they are engaged, should not be asked to file affidavits. Their statements should be accepted.<sup>5</sup>

O. 11 R. 2  
Notes 1-8

**2. Stay of execution.** — An application for stay of execution should be supported by an affidavit.<sup>1</sup>

**3. Rule to show cause.** — An application for a rule to show cause must be supported by an affidavit.<sup>1</sup>

**4. Application to declare a person a tout.** — Though it is open to a Court in an application under the Legal Practitioners Act to act on an affidavit to declare a person a tout, it is desirable that Courts should hear oral evidence.<sup>1</sup>

**5. Affidavit of documents.** — The production of documents can be resisted by a party by claiming privilege and the grounds of privilege must be sufficiently disclosed in the affidavit of documents. If the affidavit of documents does not sufficiently set out the plea, a party may supplement the same by a separate affidavit.<sup>1</sup> Similarly, when a party claims to seal up a portion of a document on the ground that it is irrelevant to the issue, the affidavit of documents must clearly specify such portions and the grounds on which he claims to seal them.<sup>2</sup>

### R. 3. [S. 196.] (1) Affidavits shall be confined to such

O. 19 R. 3

Matters to which affidavits shall be confined

facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

[1877, S. 196; R. S. C, O. 38 R. 3.]

### Synopsis

1. *Statements as to belief must contain grounds thereof*
2. *Scandalous and irrelevant matter.*

**1. Statements as to belief must contain grounds thereof.** — The grounds of belief must be stated with sufficient clearness to enable a Court to judge whether it would be safe to act on the deponent's belief.<sup>1</sup> Thus, where in an interlocutory application for injunction to restrain the publication of a libel the affidavit in support

5. (28) AIR 1928 Mad 690 (692)

Note 2

1 (91) 15 Bom 536 (537)

Note 3

1 (69) 12 Suth W R 413 (413)

(80) 5 Cal 605 (611)

Note 4

1 (03) 26 Mad 596 (597)

Note 5

1 (95) 111 Cal 105 (110)

2. (93) 90 Cal 597 (593)

Order 19 Rule 3 — Note 1

1 (1900) 2 Ch 753 (754-55) Re J L Young

Manufacturing Co

(1841) 2 Ch 269 (269) Boudard v Ferryman

(1901) 1 K B 532 (535-536) Lumley v Osborne



**O. 19 R 3**  
**Notes 1-2**

of the application stated that the documents complained of were to the best of his knowledge information and belief, utterly untrue but no grounds for his belief were shown it was held insufficient<sup>2</sup> An affidavit is defective if the deponent does not say which part is based on information and which on belief or if he does not state the grounds of his belief<sup>3</sup> Though ordinarily, evidence on information and belief is admissible in interlocutory applications intended to maintain things in *status quo* till the rights of the parties are decided yet in England if the application is only interlocutory in form but really aiming at finally disposing of the rights of the parties it will be inadmissible<sup>4</sup>

**2 Scandalous and irrelevant matter** — If an affidavit contains scandalous and irrelevant allegations it may be ordered to be taken off the file or the particular passage may be expunged<sup>1</sup>

### Local Amendments

#### ALLAHABAD

Add the following Rules

**O 19 R 4**  
**(Allahabad)**

**4** Affidavits shall be entitled *In the Court of ——— at ——— (naming such Court)* If the affidavit be in support of or in opposition to an application respecting any case in the Court it shall also be entitled in such case If there be no such case, it shall be entitled *In the matter of the petition of*

**O 19 R 5**  
**(Allahabad)**

**5** Affidavits shall be divided into paragraphs and every paragraph shall be numbered consecutively and as nearly as may be shall be confined to a distinct portion of the subject

**O 19 R 6**  
**(Allahabad)**

**6** Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly and where necessary for this purpose it shall contain the full name the name of his father of his caste or religious persuasion his rank or degree in life his profession calling occupation or trade and the true place of his residence

**O 19 R 7**  
**(Allahabad)**

**7** Unless it be otherwise provided an affidavit may be made by any person having cognizance of the facts deposed to Two or more persons may join in an affidavit each shall depose separately to those facts which are within his own knowledge and such facts shall be stated in separate paragraphs

**O 19 R 8**  
**(Allahabad)**

**8** When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively using the words I affirm or I make oath and say

**O 19 R 9**  
**(Allahabad)**

**9** Except in interlocutory proceedings affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove In interlocutory

(07) 9 Bom L R 540 (542)

(10) 6 Ind Cas 666 (667) 37 Cal 259

(09) 4 Ind Cas 380 (382) (Cal)

(19) AIR 1919 Cal 970 (971)

(14) AIR 1914 Mad 366 (367)

(21) AIR 1921 Pat 312 (313)

(06) AIR 19 6 Pat 51 (55)

in contempt proceedings based on information  
—Source of information not given )

**3** (34) AIR 1934 Cal 694 (696) 61 Cal 814

**4** (1878) 9 Ch D 259 (266 269) Gilber v  
Endean

#### Note 2

**1** (1855) 3 W R (Eng) 633 Goddard v Parr  
(1910) 1910 W N 128 In re Jessop (A case in  
which the C A refused to strike out extracts  
from letters marked without prejudice )

(1878) 1878 W N 101 (101) Osmaston v Association of Land Financiers

(1891) 1891 W N 69 (69) Warner v Mosse

(1879) 11 Ch D 1 (12 13) Cracknell v Janssen

(09) 4 Ind Cas 390 (391) (Cal)

davit )

**2** (1892) 20 Ch D 501 (503) In Quarty Hill Con

solidated Collimating Co v Ba H

(See also (30) AIR 1932 Cal 255 (256) Affidavit

proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

O. 19 R. 9  
(Allahabad)

10 When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

O. 19 R. 10  
(Allahabad)

11. Every person making an affidavit for use in a Civil Court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

O. 19 R. 11  
(Allahabad)

11A Such identification may be made by a person —

- (a) personally acquainted with the person to be identified, or
- (b) satisfied, from papers in that person's possession or otherwise, of his identity

O. 19 R. 11A  
(Allahabad)

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified —

#### FORM

I (name, address and description), declare that the person verifying this petition (or making this affidavit) and alleging himself to be *A B* has satisfied me (here state by what means, *e g*, from papers in his possession or otherwise) that he is *A B*.

12 No verification of a petition and no affidavit purporting to have been made by a *pardanshin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition, or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

O. 19 R. 12  
(Allahabad)

13 The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

O. 19 R. 13  
(Allahabad)

14 The person before whom an affidavit is made shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place

O. 19 R. 14  
(Allahabad)

**O 19 R 14** when and where it was made and shall for the purpose of identification mark and  
(Allahabad) initial any exhibits referred to in the affidavit

**O 19 R 15** 15 If it be found necessary to correct any clerical error in any affidavit such  
(Allahabad) correction may be made in the presence of the person before whom the affidavit is about to be made and before but not after the affidavit is made. Every correction so made shall be initialed by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words figure or figures in respect of which the correction may have been made

### RANGOON

Add the following Rules 4 to 12

**O 19 R 4** 4 The officer administering the oath to the declarant of an affidavit should  
(Rangoon) Mode of taking oath or first make the declarant take the oath or affirmation. Then affirmation by declarant of he should make the declarant repeat the whole of the state affidavit ment written in the affidavit as coming from him. Then the declarant should sign the affidavit. Lastly the officer administering the oath should sign and date it

**O 19 R 5** 5 Every affidavit to be used in a Court of Justice should be entitled In the  
(Rangoon) Form of affidavit ——— Court of ——— at ———, naming the Court. If there is a case in Court the affidavit in support of or in opposition to an application respecting it must also be entitled In the case of ———. If there is no case in the Court the affidavit should be entitled In the matter of the petition of

**O 19 R 6** 6 Every affidavit containing any statement of facts shall be divided into para-  
(Rangoon) Mode of writing affida graphs and every paragraph shall be numbered consecutively and as nearly as may be shall be confined to a distinct portion of the subject

**O 19 R 7** 7 Every person other than a plaintiff or defendant in a suit in which the  
(Rangoon) Address of person making application is made making an affidavit shall be described in affidavit such a manner as will serve to identify him clearly, that is to say by the statement of his full name the name of his father his profession or trade and the place of his residence

**O 19 R 8** 8 When the declarant in any affidavit speaks to any fact within his own  
(Rangoon) Mode of speaking by knowledge he must do so directly and positively using the declarant to fact within his knowledge words I affirm (or make oath) and say

**O 19 R 9** 9 When the particular fact is not within the declarant's own knowledge but  
(Rangoon) Mode of speaking by is stated from information obtained from others the declarant declarant to fact not within must use the expression I am informed (and if such be the his own knowledge case should add and verily believe it to be true) or he may state the source from which he received such information. When the statement rests on facts disclosed in documents or copies of documents procured from any Court of Justice or other source the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents

**O 19 R 10** 10 Every person making an affidavit if not personally known to the commis-  
(Rangoon) Identification of person sioner shall be identified to the commissioner by some person making affidavit not person known to him and the commissioner shall specify at the ally known to commis- foot of the petition or of the affidavit (as the case may be) sioner the name and description of him by whom the identification is made as well as the time and place of the identification and of the making of the affidavit

O. 19 R. 11  
(Rangoon)

11 If any person making an affidavit is ignorant of the language in which it is written, or appears to the commissioner to be illiterate or not fully to understand the contents of the affidavit, the commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained, and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the commissioner shall state in his certificate, the name of the interpreter, and the fact that he was sworn to interpret truly.

12 In administering oaths and affirmations to declarants the commissioner shall be guided by the provisions of the Indian Oaths Act, 1873.

O. 19 R. 12  
(Rangoon)

## ORDER XX.

### JUDGMENT AND DECREE

\*R. 1. [S. 198] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders. O. 20 R. 1

Judgment when pronounced

[ 1877, S. 198 ; 1859, S. 183 ]

a The provisions of Rules 1, 3, 4 and 5 of this Order do not apply to the Chief Court of Oudh and the Oudh Chief Courts Act (U. P. IV of 1925) Section 16 (2)

### Local Amendment

#### MADRAS

The existing Rule 1 is re numbered as sub rule (1) and the following is added as sub rule (2)

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court

### Synopsis

- |  |  |
|--|--|
| 1 Scope of the Order                       | 6 When judgment may be pronounced.       |
| 2 Chartered High Courts                    | 7. Holiday                               |
| 3 "After the case has been heard"          | 8 "Or on some future day"                |
| 4 "Shall pronounce judgment in open Court" | 9 Notice to parties                      |
| 5 "Judgment," meaning of                   | 10 Non-compliance with Rules 1, 2 and 3. |

### Other Topics (miscellaneous)

Judgment on evidence taken before another Judge See Note 3  
Pronounce in English See Note 4

1. Scope of the Order. — Rules 1 to 6 of this Order deal with judgments and Rules 7 to 19 with decrees. Rule 20 enacts that the parties shall be entitled to obtain certified copies of the judgment and decree on application made by them and at their

O. 20 R. 1  
Notes 9-10

judgment<sup>7</sup> But it is not necessary that the parties should be present at the time of the delivery of the judgment and a suit cannot be dismissed on the ground that the parties were not present at the time of the delivery of the judgment<sup>8</sup> Nor is a Court bound to communicate the result of a case to the parties<sup>9</sup>

Where there is nothing on the record to show that the notice was not given to the parties or their pleaders, it must be presumed that they did receive such notice<sup>10</sup>

The provisions of this rule apply also to cases where a judgment is pronounced by a successor under the next rule<sup>11</sup>

**10. Non-compliance with Rules 1, 2 and 3.**—A judgment not pronounced at all is not a valid judgment,<sup>1</sup> but the non compliance with this rule and with Rr 2 and 3 as to the manner in which it is to be pronounced, dated and signed is only an irregularity within the meaning of Section 99 of the Code and does not afford a ground for the reversal in appeal of the decree based on the judgment in the absence of prejudice<sup>2</sup> A decree that follows such a judgment is valid until set aside on appeal<sup>3</sup>

O. 20 R. 2

Power to pronounce  
judgment written by  
Judge's predecessor

**R. 2. [S 199]** A Judge may pronounce a judgment written but not pronounced by his predecessor

[1877, S 200, 1859, S 184]

### Synopsis

1 Rule does not apply to Chartered High Courts

2 "Written but not pronounced by his predecessor"

3 "May pronounce"

4 Non compliance with Rules 1, 2 and 3.  
See Note 10 to Rule 1

### Other Topics (miscellaneous)

Judgment dated and recorded by predecessor when  
can be pronounced by successor See Note 3  
Rule whether applies to an order See Note 2

Rule, whether mandatory See Note 2  
Successor if can pronounce a separate judgment  
See Note 3

**1. Rule does not apply to Chartered High Courts**—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction see Order 49 Rule 3

7 (35) AIR 1938 Lah 707 (708) (Limitation for appeal runs from such date—AIR 1925 All 293 Followed)

(34) AIR 1934 Lah 763 (764) (Omission to sign decretal order to be accidental and no prejudice)

11 (12) 17 Ind Cas 278 (279) (Mad)  
Note 10

1 (67) 9 Enth W R 1 (5 30) (Written opinions

irregularity }  
[See (35) AIR 1935 Lah 895 (896) (Non-compliance is irregularity only so far as an appeal on merits is concerned—For purposes of limitation non compliance cannot be regarded as mere irregularity and limitation for appeal from decree will not run until the judgment is announced to the parties)]

3 (25) AIR 1925 All 293 (295) 47 All 332

2. "Written but not pronounced by his predecessor."—The object of the Legislature in enacting this rule is that the judgment should be that of the Judge *who heard the case* though it may be delivered by another, in order, therefore, that this rule may apply, it is necessary that the predecessor must have *written* the judgment<sup>1</sup> There is a difference of opinion, however, as to whether it should also be *signed* by the predecessor According to the High Court of Calcutta, the judgment has, under the provisions of Rule 3, *infra*, to be signed at the time of pronouncing it by the successor and therefore it is not necessary that the predecessor should have signed it<sup>2</sup> The High Court of Patna has, on the other hand, expressed the view that Rule 3 applies only to cases where the judgment is delivered by the *very Judge who wrote it* and not to cases coming under Rule 2, where the judgment is written by one officer and is pronounced by another<sup>3</sup> It seems to follow from this that the predecessor must have written and also signed the judgment<sup>4</sup>

There is also a difference of opinion on the question whether it is necessary for the predecessor to have written the judgment at a time *when he had still jurisdiction over the suit* The general consensus of opinion is that it is not<sup>5</sup> Thus, when a District Judge retired from office on October 4, 1927, and the judgment was signed by him on October 9, 1927, and the same was pronounced in Court by his successor on October 17, 1927, it was held that the judgment was valid in law<sup>6</sup> A contrary view has however, been expressed in the undermentioned cases<sup>7</sup>

Can a judgment be pronounced by the predecessor after his transfer or after he has left his judicial post? According to the Chief Court of the Punjab, there is no illegality in adopting such a course<sup>8</sup> According to the High Court of Rangoon the pronouncement of the judgment is a material part of the trial and cannot be performed by any person other than a *Judge of the Court in which the suit was tried*<sup>9</sup> It would seem to follow from this that a Judge who has ceased to be the Judge of the Court in which the suit was tried cannot pronounce a judgment therein though it had been written by himself

3 "May pronounce."—The rule is not mandatory and the successor is not bound in all cases to pronounce the judgment written by the predecessor, he may, if he sees reason to do so refuse to pronounce that judgment and may deliver a judgment according to his own view of the case<sup>1</sup> Where a judgment is signed and dated by the

#### Order 20 Rule 2 — Note 2

- 1 (85) 7 All 857 (859)
- 2 (04) 31 Cal 1037 (1064)
- 3 (20) AIR 1920 Pat 578 (581) 5 Pat L Jour 147
- 4 (85) 7 All 857 (859)
- 5 (18) 19 Ind Cas 785 (786) 35 All 868
- (01) 1904 All W N 181 (181)
- (20) AIR 1920 All 832 (810) 42 All 362 (Argument heard by acting Subordinate Judge subsequently reverted as Munsif—Judgment written after reversion)
- (06) 30 Bom 211 (213) (Judgment written by a Judge after his transfer)
- (09) 35 Cal 756 (761) (Judgment after Judge had left the judicial post)
- (07) 31 Cal 233 (235) (Judgment written when Judge was on leave)
- (72) 8 Ben L R 35 (Judgment written by a

- (12) 14 Ind Cas 871 (372) (Lah) (Order on a particular issue pronounced by successor after he ceased to have jurisdiction)
- (97 01) 2 Upp Bur Rul 246 (Judgment written by a Judge after making over charge of his office)
- (36) AIR 1936 Rang 147 (147) 14 Rang 186 (17)
- (Judgment written by an ex Judge after he has ceased to be a Judge is valid as a judgment)
- (31) AIR 1931 All 90 (91) 53 All 133
- 7 (94) 7 C P L R 18 (19)
- (19) AIR 1919 Lah 265 (269) 1919 Pun Re No 80 (Judgment written after transfer)
- 8 (16) AIR 1916 Lah 78 (78) 1916 Pun Re No 80 (Judgment or order written and pronounced by Judge after he gave over charge of his office)
- 9 (24) AIR 1921 Rang 353 (359) 4 Upp Bur Rul 171

#### Note 3

- 1 (14) AIR 1924 Rang 353 (359) 4 Upp Bur Rul 171
- (11) ■ Int L Cas 1096 (1096) ■ All 229

O. 20 R. 2 predecessor himself and there is nothing to show that it was not pronounced by him,  
Notes 3-4 the successor cannot proceed to pronounce it for a second time<sup>2</sup>

4. Non-compliance with Rules 1, 2 and 3. — See Note 10 to Rule 1 above

O. 20 R. 3

**R. 3. [S. 202.]** The Judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

[1877, Ss. 201, 202 and 203; 1859, S. 185.]

#### Local Amendment

#### MADRAS

*Substitute the following for Rule 3*

'3 The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review, provided also that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge"

#### Synopsis

1. Rule does not apply to Chartered High Courts
2. Applicability of the Rule.
3. "Shall not afterwards be altered or added to."
4. "Save as provided by Section 152 or on review."
5. Non-compliance with Rules 1 to 3.

1. Rule does not apply to Chartered High Courts. — This Rule does not apply to Chartered High Courts<sup>1</sup> or to the Chief Court of Oudh<sup>2</sup> in the exercise of the ordinary or extraordinary original civil jurisdiction

But, the principle underlying the rule applies, viz., that a decree once passed is immutable, subject to review or to any subsequent order or decree which may be passed on appeal and subject to the provisions of O 20 R 11, sub rule (2)<sup>3</sup>

2. Applicability of the Rule. — There is a conflict of opinion as to whether this rule, in so far as it requires the Judge to sign and date the judgment at the time of pronouncing it, applies to cases where the successor pronounces the judgment of the predecessor under the provisions of this rule. See also Note 2 to Rule 2 above

3. "Shall not afterwards be altered or added to." — The jurisdiction of the Court to reconsider its order continues so long as the order has not been perfected

Order 20 Rule 3 — Note 1

1. See O 49 R 3

2. See the U P Act IV of 1925, S. 16 (2)

3. (137) AIR 1937 Cal 222 (224) (Consent decree cannot be varied even by consent of parties AIR 1916 Mad 604 Followed)

under this Rule,<sup>1</sup> but ceases once the judgment is signed, except as provided by Section 152 or on review.<sup>2</sup> The Court cannot therefore, after the judgment is signed, alter it, or add to it, in any manner, except as provided by this rule, and this even with the consent of the parties.<sup>3</sup> Thus it cannot alter the grounds on which the judgment proceeded,<sup>4</sup> or add findings on issues omitted to be decided by the judgment.<sup>5</sup> Nor can a successor alter the judgment which had been pronounced by his predecessor on any point.<sup>6</sup> Where a Judge pronounces a judgment but suspends the drawing up of the decree till a succession certificate is produced by the plaintiff, he cannot, on the plaintiff's failure to produce the certificate, cancel the judgment and deliver a different one inconsistent with the former.<sup>7</sup>

The words "after such revision as may be deemed necessary" in the rule substituted by the High Court of Madras, do not authorise the Judge to revise the transcript and to substitute fresh words for the words originally dictated, they do not contemplate a revision of the *effective part* of the judgment but should be of the nature referred to in Section 152, and one relating to clerical and arithmetical mistakes arising from any accidental slip or omission.<sup>8</sup>

Where, on an application to set aside an execution sale, a conditional order is passed providing that the sale would be set aside if the decretal amount is paid within a certain date and that otherwise, the application would stand dismissed, the order is final in itself and no further reference to the Court is necessary for the purpose of implementing it. Hence, after such an order is passed, the Court has no jurisdiction to alter the order except on review.<sup>9</sup> See also Notes to Section 148 *ante*.

4. "Save as provided by Section 152 or on review."—This rule recognises two exceptions to the general rule that a Judge cannot, after he has once signed the judgment, reconsider the matter over again—

- (1) Under Section 152 of the Code, clerical or arithmetical mistakes in judgments, decrees or orders or errors due to accidental slips or omissions can be corrected by the Court.<sup>1</sup> See also Note 2 to Section 152.
- (2) Under O. 47 R. 1 the Court may grant a review of the judgment where the conditions of that rule are satisfied. See Order 47 Rule 1.<sup>2</sup>

#### Note 3

1. (1900) 4 Ind Cas 441 (442) (Cal)

2. (1900) 4 Ind Cas 441 (442) (Cal)

3. (1900) 4 Ind Cas 441 (442) (Cal)

4. (1900) 4 Ind Cas 441 (442) (Cal)

5. (1900) 4 Ind Cas 441 (442) (Cal)

6. (1900) 4 Ind Cas 441 (442) (Cal)

7. (1900) 4 Ind Cas 441 (442) (Cal)

8. (1900) 4 Ind Cas 441 (442) (Cal)

9. (1900) 4 Ind Cas 441 (442) (Cal)

10. (1900) 4 Ind Cas 441 (442) (Cal)

11. (1900) 4 Ind Cas 441 (442) (Cal)

12. (1900) 4 Ind Cas 441 (442) (Cal)

13. (1900) 4 Ind Cas 441 (442) (Cal)

14. (1900) 4 Ind Cas 441 (442) (Cal)

15. (1900) 4 Ind Cas 441 (442) (Cal)

16. (1900) 4 Ind Cas 441 (442) (Cal)

17. (1900) 4 Ind Cas 441 (442) (Cal)

18. (1900) 4 Ind Cas 441 (442) (Cal)

19. (1900) 4 Ind Cas 441 (442) (Cal)

(33) AIR 1933 Oudh 241 (242) E Luck 502  
(Order of Sub-Judge in appeal allowing plaintiff to amend plaint on payment of deficit court fee and costs—Court has no power to further extend time)

3 (1900) 24 Mad 1 (10 11, 13) 27 Ind App 197 (PC)

(25) AIR 1925 Mad 457 (458 459)

4 (1901) 7 Bom W R 266 (267)

5. (1902) 4 Bom L W 129 (132)

6 (189) 16 Cal 749 (752) 16 Ind App 104 (PC)

(25) AIR 1925 Pat 47 (47, 48) 3 Pat 654

[But see (18) AIR 1918 Lon Bur 7 (8)]

7. (1909) 31 All 153 (155)

8 (23) AIR 1923 Mad 663 (664)

9 (39) AIR 1939 Cal 581 (581) 1 LdR (1939) 1 Cal 468

#### Note 4

1. See Note 3 to § 152

(1908) 1903 Pun L W No 40

[See also (39) 2 Oudh Cas 235 (237, 239)

(1907) 6 Cal L Jour 22 (24 25)]

2. (190) 5 Ind Cas 443 (444) 13 Oudh Cas 23

(31) 136 Ind Cas 233 (254) (Oudh)

(81) 1481 All W N 67 (67)

(61) 1881 All W N 95 (95) 3 All 616



O. 20 R. 3  
Notes 4-5

It has been held in the undermentioned cases<sup>3</sup> that where a Court has passed an order under a misapprehension of facts it is open to it under its inherent powers to set aside such order when the true facts are brought to light and that this rule has no application to such cases

As to whether and how far questions decided by an order of remand can be re opened at the hearing after return of the findings after remand see Rules 23 and 26 of Order 41

**5. Non-compliance with Rules 1 to 3** — The failure to date an order is no doubt an irregularity but it does not invalidate the order and does not prevent it from having a legal operation from the date on which it is made the date can be proved by other evidence<sup>1</sup> Similarly, it has been held that an accidental omission to sign an order is only an irregularity<sup>2</sup> See also Note 10 to Rule 1

O. 20 R. 4

**R. 4. [S 203] (1)** Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon

**(2)** Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision

[1877, Ss 201, 202, 203; 1859, S 185]

### Synopsis

- |  |                                   |
|--|-----------------------------------|
| 1 Rule does not apply to Chartered High Courts | 5 Appreciation of evidence        |
| 2 'Judgment' meaning of sub section (2)        | 6 Contents of judgments           |
| 3 Object of judgments                          | 7 Construction of judgments       |
| 4 Personal knowledge                           | 8 Judgments of Small Cause Courts |
|  | 9 Other judgments                 |

### Other Topics (miscellaneous)

- |  |   |
|--|---|
| Judgment adopting reasons of analogous judgment See Note 9 | Oral testimony weight of — Considerations See Note 5  |
| Need not contain See Note 8                                |   |
| On what materials the judgment is to be based See Note 11  | Unsatisfactory and unintelligible judgment See Note 6 |

**1. Rule does not apply to Chartered High Courts** — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction see O 49 R 3 It has accordingly been held by the High Court of Bombay that though in an ordinary case a Judge in the exercise of such jurisdiction should give his reasons for his decision the absence of reasons would not detract from the legal validity of the decision<sup>1</sup> The rule would of course apply to Chartered High Courts in the exercise of their appellate jurisdiction<sup>2</sup> The rule does

3 (34) AIR 1934 All 297 (1934)  
(34) AIR 1934 Nag 234 (285) 31 Nag L R 53  
Note 5

1  
■

has not been appealed against)

### Order 20 Rule 4 — Note 1

- 1 (27) AIR 1927 Bom 119 (115) 51 Bom 267  
[See also (33) AIR 1933 Mad 510 (11) (Petition struck off is not legal document)]  
2 (79) = Mad 67 (70) 6 Ind App 170 (P C)  
(89) 11 All 460 (469 470) 16 Ind App 205 (P C)  
(67) 6 Cal W R 63 (66) (P C)  
(69) 11 Cal W R 33 (33) (P C)

not apply to the Chief Court of Oudh in the exercise of its ordinary or extraordinary original civil jurisdiction<sup>2</sup>

O. 20 R. 4  
Notes 1-5

2. "Judgment," meaning of. — See Section 2, sub section (9), *ante*

3. Object of judgments. — The object of insisting upon a judgment in respect of a decision of the Court is to enable an appellate or revisional Court to find out whether the Judge has applied his mind to the case, and whether the decree or order is according to law

4. Personal knowledge. — A Judge cannot import his own private knowledge or opinion into a case but must decide it on the evidence before him<sup>1</sup> If he intends to use his personal knowledge, he is bound to give evidence like any other witness<sup>2</sup> A judgment based upon such knowledge without any reference to the evidence in the case is not one in accordance with law and is liable to be set aside<sup>3</sup>

5. Appreciation of evidence. — It is a fundamental principle that the decision of a Court rests, not upon mere suspicion, or surmises or conjectures, but upon legal grounds established by *legal testimony*<sup>1</sup> A judgment, therefore, based on the evidence of witnesses whom the opposite party had no opportunity to cross examine,<sup>2</sup> or based on evidence recorded in a different suit,<sup>3</sup> is not a judgment that can be maintained

An omission to make special mention of the oral evidence,<sup>4</sup> or to refer to every detail in the evidence,<sup>5</sup> does not warrant a presumption that the evidence has not been adequately or reasonably considered, but where a Judge makes only a colourable pretence of considering the evidence without really having done so, the judgment cannot be accepted as a proper one<sup>6</sup>

On questions of fact, a judgment of the Court of the first instance must, except as provided by O 18 R 15 be based upon an examination of the evidence taken before the Judge himself, who delivers the judgment<sup>7</sup> It must be based upon a consideration of the whole evidence on both sides and not merely upon some isolated piece of evidence<sup>8</sup> In considering the evidence, the following points may be usefully mentioned —

(1) It is not the proper way of appreciating the evidence to approach it with prejudice and suspect everything and everybody<sup>9</sup>

(2) The mere fact that a witness is related to a party or supports the party does not necessarily make his evidence interested or unreliable nor does the rejection of a portion of his testimony vitiate the whole testimony on that ground alone<sup>10</sup>

[See also (34) AIR 1934 Cal 571 (577)]  
S. See the U P Act IV of 1925, § 16 (2)

Note 4

1 (76) 25 Suth W R 152 (153)

1 Luck 403 (P C) (Discussion about speculative theories built on medical books without any facts established by the evidence)  
(25) AIR 1925 Oudh 171 (172)

2 (1841 46) 3 Moo Ind App 215 (260) (P C)  
(67) 7 Suth W R 189 (189)

3 (11) 10 Ind Cas 955 (955) 33 Cal 133  
(23) AIR 13 3 Cal 311 (312)

Note 5

1 (66) 11 Moo Ind App 23 (44) (P C)  
(32) AIR 1932 I C 202 (207) (P C)  
(26) AIR 1926 P C 37 (100) 29 Oudh Cas 305

2 (68) 9 Suth W R 537 (538)  
3. (25) AIR 1925 Mad 230 (230)  
4 (20) AIR 1920 Cal 859 (870)  
5 (31) AIR 1931 All 210 (210)  
(28) AIR 1929 Oudh 450 (450)  
(17) AIR 1917 Pat 288 (289)  
6 (17) AIR 1917 Pat 288 (289)



to give reasons except in unimportant cases.<sup>2</sup> But the judgment must set out *the points for determination* and the decision on each of those points.<sup>3</sup> A mere statement such as 'issue not proved, suit dismissed,'<sup>4</sup> or 'the plaintiff fails, suit dismissed,'<sup>5</sup> or 'claim decreed with costs'<sup>6</sup> or a general statement after setting out the points 'I find all the issues for the plaintiff' without dealing with each point separately<sup>7</sup> is not a valid judgment.

The judgment must also be sufficiently intelligible<sup>8</sup> and must indicate clearly that the Judge has applied his mind to the case and that the decree or order is according to law.<sup>9</sup> The test whether this rule has been used or abused lies in fact in the answer to the question whether the judgment has been made intelligible. When the Judge has to deal with a question of fact he need not give anything more than his actual decision on the question, namely his answer to it. But in cases involving difficult questions of law or mixed questions of fact and law, the Judge should set out so much of his reasoning as will make clear the road by which he has reached the conclusion.<sup>10</sup>

The mere fact that the judgment of a Small Cause Court does not set out the points for determination is however no ground for setting it aside, if otherwise the judgment is intelligible and the Judge has applied his mind to the case.<sup>11</sup>

**9. Other judgments.** — Clause 2 of this rule requires that a judgment of a Court other than a Small Cause Court should contain—

- (1) a concise statement of the case,
- (2) the points for determination
- (3) the decision thereon and

bound to deal elaborately with the arguments etc. in the case he is bound to state reasons for his decision and such reasons should not be arbitrary. The view that Small Cause Court is bound to state reasons for decision is directly against the words of this rule and hence not correct.]

2 (23) AIR 1933 Rang 252 (252) 1 Rang 274 (83) AIR 1933 Sind 62 (65) (It is desirable

(28) 108 Ind Cas 886 (387) (Lah)  
(80) AIR 1930 All 837 (837)  
(13) 18 Ind Cas 216 (216) (Lah)  
(01) 1901 Pun Re No 57 page 180  
(91) 111 All 533 (536)  
(99) 23 Bom 334 (336)  
(28) AIR 1933 All 688 (688) (People must be

thereon there is sufficient compliance with the law.)

10 (32) AIR 1933 Mad 336 (310 313) 55 Mad 671

issues only does not necessarily indicate the points to be determined although in some cases it may well do so. Each case must be judged by itself.)

4 (96) 108 Ind Cas 886 (387) (Lah)  
(13) 18 Ind Cas 216 (216) (Lah)  
(99) 23 Bom 334 (337)

5. (J6) 111 Mad L Jour 50 (51)

6 (25) AIR 1925 Oudh 183 (184)

7 (20) AIR 1925 Mad 1279 (1279)

8 (30) AIR 1932 Oudh 143 (144) 7 Luck 506

(20) AIR 1922 Pat 337 (337 335)

record summary of evidence on which it relies in its judgment.)

11 (17) AIR 1917 Low Bur 84 (34)

(97) 1892 All W N 160 (160)

**O. 20 R. 4**  
**Note 9**

(4) the reasons for such decision <sup>1</sup>

In writing judgments in appealable cases, the provisions of this rule should be strictly followed <sup>2</sup>

The judgment should state not merely the finding on the point raised, but must also state what the evidence consists of, and how it proves the plaintiff's or defendant's case <sup>3</sup> A judgment unsupported by reasons cannot be accepted as legally binding on the parties <sup>4</sup> But a judgment is not defective merely because specific issues were not framed, if all the points arising have in fact been determined <sup>5</sup> Nor is a judgment bad, merely because it does not fully state the reasons for its conclusion but states that it adopts the reasons given in a judgment in a previous suit between the same parties, the evidence being almost the same <sup>6</sup>

As to the judgments of Criminal Courts, see Sections 265 and 366 to 372 of the Criminal Procedure Code and the undermentioned cases <sup>7</sup>

**O. 20 R. 5**

**R. 5. [S. 204.]** In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

[1877, S. 204; 1859, S. 186.]

### *Synopsis*

1. Chartered High Courts.
2. Decision on each issue necessary.
3. Object of judgment See Note 8 to Rule 4

### *Other Topics (miscellaneous)*

Appealable cases—Findings on unnecessary points : "Sufficient for the decision of the suit" See Note 2

**Note 9**  
1 (05) 9 Cal W N 60 (66)

4. (95) 19 Bom 323 (326)  
(84) 8 Bom 368 (371)  
(90) 14 Bom 452 (454)

does not mean that Judge has not considered it )  
(1864) 1 Suth W R 214 (215) (Decision under  
§ 359 of Act VIII of 1859)  
(71) 15 Suth W N 130 (131) (Do)  
(76) AIR 1926 Cal 1221 (1221) (The rule will  
apply to *ex parte* cases also)

(See (34) AIR 1931 Mad 8 (8) (Order of a Dis-  
trict Munsif under S. 73 of the Madras Village  
Courts Act is not governed by this Code and  
therefore order is not defective if reasons are not  
stated))

2. (07) 1907 Pun L R No. 27.  
3. (1865) 11 Suth W R 176 (177)

[See also (38) AIR 1938 Nag 204 (206) (Hotly  
contested suit—Trial Judge must deal with  
facts and evidence elaborately and arrive at  
proper findings on issues)]

(91) 1891 Bom P J 201 (205)  
(96) 1896 Bom P J 260  
(17) 17 Cal 149 (150)

5. (09) 4 Ind Cas 1124 (1124) (Mad)  
(11) 10 Ind Cas 291 (291) (Mad)

6. (12) 15 Ind Cas 434 (434) (Mad)

7. (86) 13 Cal 110 (111)  
(1865) 11 Cal 419 (450)  
(91) 15 Pom 11 (12 13)

(93) 20 Cal 373 (357)  
(93) 22 Cal 241 (243)  
(96) 1 Cal W N 169 (170)  
(97) 19 All 506 (509) (FB)

**1. Chartered High Courts.** — This rule does not apply to Chartered High Courts<sup>1</sup> or to the Chief Court of Oudh<sup>2</sup> in the exercise of the ordinary or extraordinary original civil jurisdiction

O. 20 R. 3  
Notes 1-3

**2. Decision on each issue necessary.** — It is imperative upon the Court to pronounce its findings upon all such issues as may be necessary for the disposal of the suit<sup>1</sup> There should be a finding on each issue *separately* and not on all issues together<sup>2</sup> In appealable cases, it is always desirable that the Court should, as far as may be practicable, pronounce its opinion on all the important points which have been raised in the case (whether such findings are necessary or unnecessary for the decision of the case),<sup>3</sup> and this is ordinarily expected in cases where evidence has been allowed to be given on all the issues<sup>4</sup> The concluding words of the rule do not preclude the Judge from giving his findings on all the issues, though some of them may be unnecessary for the decision of the case,<sup>5</sup> though such findings should not form part of the Court's decree<sup>6</sup>

**3. Object of judgment.** — See Note 3 to Rule 4

**R. 6. [S. 206.] (1)** The decree shall agree with the judgment;

O. 20 R. 6

Contents of decree.

it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) [S. 221.] The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

[1877, *Cf.* S. 257; 1859, S. 189; *Cf.* S. 206.]

Order 20 Rule 5 — Note 1

1. See Order 49 Rule 3

2. See the U P Act (IV of 1825), S. 16 (2)

Note 2

1. (81) 4 Mad 134 (136)

(81) 4 Mad 134 (136)

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O. 20 R. 6  
Notes 1-3

## LAHORE

## Local Amendments

After sub rule (1) *add* the following

(1A) In addition to the particulars mentioned in clause (1), the decree shall contain the addresses of the plaintiff and the defendant as given in O 7 R 19 and O 8 R 11 or as subsequently altered under O 7 R 24 and O 8 R 12 respectively

## MADRAS

After sub rule (2) the following be *inserted* in sub rule (2A)

(2A) In all cases in which an element of champerty or maintenance is proved the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant

## Synopsis

- |                                    |   |
|------------------------------------|---|
| 1 Chartered High Courts            | 7 Decree not in accordance with the judgment          |
| 2 Scope of the Rule                | 8 Set off of costs towards sums admitted or found due |
| 3 Form and contents of decree      | 9 Appeal See Note 19 to Section 152                   |
| 4 Amendment of decree              | 10 Revision   |
| 5 Construction of decree           |   |
| 6 Provision for costs—Sub rule (2) |   |

## Other Topics (miscellaneous)

Decree for accounts — Construction See Note 5  
Decree in respect of a religious office — Construction See Note 5  
Form of decrees in particular cases See Note 8

Prospective decree — Irregular See Note 8  
Suit against legal representative See Note 8  
Suit for ejectment — Applicability of doctrine of penalties See Note 5

**1. Chartered High Courts** — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction<sup>1</sup> (see Order 49 Rule 3)

As to the applicability of this rule to proceedings under certain Tenancy Acts see the undermentioned Acts<sup>2</sup>

**2 Scope of the Rule** — It is imperative that the decree should agree with the judgment<sup>1</sup> As has been seen in Note 6 to Section 152 *ante* where the decree does not agree with the judgment the Court has an inherent power to amend it so as to bring it into conformity with the judgment<sup>2</sup> Where however, the decree does agree with the judgment it cannot subsequently be altered or added to by the Court passing it except under Section 152 *ante* or under Rule 11 *infra*<sup>3</sup>

Where a decree or any part of a decree is passed by consent of parties it should always so appear on the face of the decree when drawn up<sup>4</sup>

Where a judgment is pronounced, the decree must automatically follow it and the Court has no power to direct that the preparation of the decree be stopped until the payment of deficit court fees<sup>5</sup>

**3 Form and contents of decree** — Decrees drawn up in suits should contain all the particulars required by this rule<sup>1</sup> and should use the forms prescribed in

## Order 20 Rule 6 — Note 1

1 (88) 19 Bom 174 (185)

2 (1901) 19 Bom 174 (185)

1 (24) AIR 1914 All 818 (871) 46 All 864

2 [See also (23) AIR 1913 Rang 113 (114) 4 Upp Bar Rul 185]]

3 (41) 14 Mad L Jour 359 (367)

(85) 7 All 276 (280)

(10) 13 Oudh Cas 28 (30 31)

[See also (41) 4 Oudh Cas 82 (84)]

4 (31) AIR 1931 P C 107 (109) 27 Nag L R 139 (P C)

5 (32) AIR 1931 Pat 273 (281) 11 Pat 537

Note 3

1 (79) 2 All 342 (344)





O. 20 R. 6  
Notes 3-4

The decree must be quite *distinct* from the judgment<sup>7</sup> and must be self contained and capable of execution without reference to any other documents<sup>8</sup>. A copy of the judgment with the schedule of costs appended thereto does not constitute a proper decree<sup>9</sup>.

In preparing a decree, Courts ought to clearly define and specify what their intentions are<sup>10</sup>. The parties and their pleaders should also see that the decrees are properly drawn up<sup>11</sup>.

Courts in India cannot make a decree of non suit<sup>12</sup>. No decree need be drawn up in matters which are not civil suits,<sup>13</sup> or in cases of orders passed under Section 47 of the Code<sup>14</sup>. But the Court will not be deterred from making a decree by the mere fact that there may be difficulties in carrying it out<sup>15</sup> or because there is no specific provision for passing a decree in the particular case<sup>16</sup>.

In the case of appellate decrees, it will be always expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm and thus avoid the necessity of reference to the superseded decree<sup>17</sup>.

**4 Amendment of decree.**—See Section 152 *ante*, and the undermentioned cases<sup>1</sup>.

*Suit by co sharer or purchaser from co sharer for possession*

- (90) 12 All 536 (559) (Suit for joint possession)
- (98) 20 Bom 627 (829)
- (03) 15 All 412 (418) (Decree for joint possession may be given if the plaintiff asks for it and evidence shows that he is entitled to it)
- (06) 20 Bom 569 (570) (Exclusive possession can only be awarded on proof of exclusive title)
- (15) AIR 1915 Lah 310 (310)
- (04) 20 All 588 (590 591) (FB)
- (05) 27 All 88 (90)
- (05) 27 All 153 (155)
- (05) 2 All L Jour 481 (482)
- (04) 1894 All W N 166 (167)
- (77) 1 Bom 35 (36)
- (96) 20 Bom 467 (468)
- (78) 2 Bom 676 (678)
- (95) 19 Bom 36 (40)

(90) 18 All 344 (347) (However, in this case reference was made to pleadings in the suit to ascertain meaning of the decree)

(68) 10 Suth W R 497 (488)

(See also (71) 15 Suth W R 154 (153))

11 (69) 10 Suth W R 96 (97)

(72) 18 Suth W R 303 (301)

(73) 20 Suth W R 111 (112)

(86) 8 All 492 (495)

(82) 8 Cal 687 (699)

(14) AIR 1914 Bom 23 (24) Bom 331

(See however (25) AIR 1925 Rang 215 (216)

(Decree not properly drawn up—Party not responsible))

12 (87) 9 All 690 (697)

13. (See (88) 11 Mad 26 (35) 14 Ind App 160 (P C))

14 (02) 5 Cal W N 283 (284)

15 (1863) 1 Mad H O R 415 (417)

16 (03) 30 All 290 (295 296) (Dismissal of appeal under O 41 R 11 is a decree)

17 (73) 14 Moo Ind App 465 (492)

## Note 4

1 No amendment where decree is in accordance with judgment

(98) 20 All 337 (333) (Decree erroneous but in accordance with judgment)

(82) 1893 All W N 72 (73)

(00) 1906 All W N 220 (221)

No limitation for bringing decree in accordance with judgment

(85) 7 All 276 (250)

Decree not agreeing with judgment—Person

(94) 18 Bom 452 (453)

(94) 18 Bom 679 (683)

7. (20) AIR 1920 Lah 395 (396) 1 Lah 223 (Paragraph in judgment not in form of decree not decree)

8 (12) 15 Ind Cas 735 (738) (Cal)

(79) 4 Cal 62 (72)

(82) 8 Cal 975 (979)

(See (69) 12 Suth W R 99 (99))

9 (71) 15 Suth W R 326 (327)

10. (68) 10 Suth W R 96 (97)

(67) 7 Suth W R 2 (3)

(81) 6 Cal 319 (323) (Verbal findings should be embodied in the decree)

(75) 24 Suth W R 479 (479)

(14) AIR 1914 Cal 784 (784) (Meaning doubtful—Decree was set aside)

Amendment should be after notice to parties—Decree affirmed on appeal—What decree should be amended

**5 Construction of decree.**—See Notes 76 and 77 to Section 47 *ante*, and the cases noted below <sup>1</sup>

**O. 20 R. 6**  
**Notes 5-6**

**6. Provision for costs.**—**Sub-rule (2)**—Ordinarily the judgment does not set forth the actual amount of the costs awarded in the suit <sup>1</sup> The *decree* must, however, state specifically the actual amount of costs, and by whom and in what proportions they are to be paid and no costs can be recovered unless they are so mentioned <sup>2</sup> A mere specification of the costs alone without any allotment of responsibility is not a sufficient compliance with the rule <sup>3</sup>

(70) 14 Suth W R 96 (76) (Decree confirmed by High Court—Lower Court cannot make any alteration in it not even to correct a clerical error)

(97) 94 Cal 759 (76<sup>o</sup>)  
*What Court can amend*  
*decree*

<sup>1</sup> *Decree must be construed on its own terms*

(87) 11 Bom 537 (589)  
(82) AIR 1932 Oudh 77 (78) 7 Luck 421  
(Language of decree plain—Court cannot look at its judgment to interpret decree)

(84) 6 All 80 (83)  
(1865) 4 Suth W R Misc 20 (20)

(72) 17 Suth W R 19 (20)  
(98) AIR 1925 Pat 291 (293)

(91) 18 Cal 108 (110) (P C)  
(70) 1 Bom 158 (16<sup>o</sup>)

(11) 12 Ind Cas 334 (335) (Mad) (If principles apply whether decree is declaratory or executory)

*Where ambiguous reference may be made to the record*

(91) 13 All 819 (344)  
(91) 18 Bom 542 (545)  
(92) 19 Cal 159 (172) 18 Ind App 165 (P C)

*Decree*  
(12) 13 Ind Cas 8<sup>o</sup> (83) (Cal)

(71) 15 Suth W R 530 (530)  
(73) 19 Suth W R 813 (814)

(90) 13 Mad 313 (315)  
(91) 14 Mad 20 (30 32)

(98) 21 Mad 344 (361) 25 Ind App 102 (P C)  
(16) AIR 1916 Mad 50 (521) (Mortgage decree drawn up as money decree by mistake—Decree can be amended)

(87) 11 Bom 177 (179)  
  
in the jurisdiction of another Court)

(73) 19 Suth W R 251 (251 252<sup>o</sup>)  
(94) 20 All 53 (53) (P C)

(87) 9 All 413 (419 490) (A decree takes priority in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces)

(91) 13 All 288 (289 290) (F B)

*Declaratory decree—Executability*

(88) 12 Bom 416 (418)

(78) 4 Cal L Rep 97 (99)

(92) 15 Mad 286 (287)

*Where the decree amounts to a money decree—*

(74) 21 Suth W R 150 (151 152)

(81) 3 All 216 (219 220 221)

(80) 2 All 345 (348 349)

(80) 2 All 342 (344)

(79) 5 Cal L Rep 176 (178) (Declaration that plaintiff is entitled to obtain possession on payment of a certain sum is not a money decree)

*Miscellaneous*

*from lower court a construction of decree*

(88) 1<sup>o</sup> Bom 23 (25 26) (Mention as to when a particular right is to become enforceable is not a condition precedent)

(16) AIR 1916 Mad 790 (793) (Courts are not bound to construe a decree in the mode in which the parties intended it to operate)

(86) 10 Bom 435 (437) (Doctrine of penalties does not apply to stipulations contained in decrees)

(15) AIR 1915 Cal 8 (8) (Direction in a mortgage decree to realize balance personally does not come within Art 182 (7) Limitation Act)

(73) 19 Suth W R 41 (42) (P C)

(72) 17 Suth W R 175 (175)

(94) 20 All 53 (53) (P C)

<sup>1</sup> (1900) 21 Mad 25 (26) (Order determining costs must be treated as continuation or completion of the judgment)

<sup>2</sup> (70) 11 Suth W R 23 (73 24)

(83) AIR 1933 Pat 135 (138 139) (Even when suit is dismissed decree ought to be prepared showing amount of costs and giving directions in respect thereto even if each party has to bear its own costs)

(70) 14 Suth W R 357 (358) (Costs are not consequential upon partial relief being granted in suit)

<sup>3</sup> (71) 15 Suth W R 4 (5)

**O. 20 R. 6**  
**Notes 5-9**

But it is not necessary in an *appellate* decree to state specifically the sums which go to make up the costs of the first Court <sup>4</sup>

Where, in a suit against a minor, the Court considers that the guardian should be personally ordered to pay the costs it should be so stated in the decree or order <sup>5</sup>

The usual practice is that unless the judgment awards separate costs to the several defendants in a suit, the decree should not award separate costs to them <sup>6</sup>

See also Section 30 *ante*

**7 Decree not in accordance with the judgment** — Where the judgment awards costs without specifying the actual amount the costs must be calculated according to law <sup>1</sup> Where therefore the assessment of costs is not according to law <sup>2</sup> or where the decree awards costs in a case in which the judgment is silent <sup>3</sup> or where the decree awards interest at a higher rate than that specified in the judgment, <sup>4</sup> the decree to that extent is at variance with the judgment and can be amended under the provisions of Section 153 of the Code or under the Court's inherent powers See Section 102 Note 6

As to whether interest which is inadvertently omitted in the decree though mentioned in the judgment can be awarded in execution see the case noted below <sup>5</sup>

**8 Set-off of costs towards sums admitted or found due** — Where in a suit by A against B a decree is passed against B for payment of a certain sum of money to A but A is ordered to pay the costs of B B can set off the amount of costs against the amount payable by him to A <sup>1</sup> It has been held that costs made payable under different orders in the same suit may be set off against each other <sup>2</sup>

A set off cannot be allowed for costs not *actually awarded* <sup>3</sup> nor for sums of money which one party might get from the other on the latter's applying for delivery of possession <sup>4</sup>

See also the undermentioned case <sup>5</sup>

**9 Appeal** — See Note 19 to Section 153 *ante*

(79) 18 Suth W R 286 (298) (But the Court need not go into particulars or append to the judgment a schedule setting forth different items of costs)

4 (74) 21 Suth W R 74 (75)

■ (4) 21 Suth W R 288 (298)

(76) 25 Suth W R 316 (316) (No expression of opinion in the judgment can import any such liability for costs into the decree)

6 (35) AIR 1935 Pat 41 (41)

#### Note 7

1 (04) 7 Oudh Cas 43 (45)

2 (04) 7 Oudh Cas 43 (45)

(32) AIR 1932 All 337 (340) 54 All 490 (Decree taxing them improperly — Decree differs from judgment)

(01) 1901 All W R 24 (26) (Costs incorrectly assessed by the ministerial officers)

3 (24) 4 Mad L Jour 260 (291)

4 [See (03) 7 All 455 (456)]

5 (20) AIR 1930 Cal 349 (350)

#### Note 8

1 (14) AIR 1914 Oudh 416 (417) (Suit for sale on mortgage)

(93) 17 Bom 32 (34) (Suit for redemption)

(79) 4 Cal 740 (744) (Do)

(81) 6 All 351 (357) (Pre-emption suit)

(12) 15 Ind Cas 327 (335) 34 All 696 (Do)

(06) 28 All 676 (677, 678) (Do)

(1900) 3 Oudh Cas 323 (374) (Do)

(03) 6 Oudh Cas 93 (21) (Decree for possession on payment of a sum to defendant — Award of costs also to the plaintiff)

2 (83) 9 Cal 797 (801, 807) 10 Ind App 113 (PC)

3 (11) 16 Suth W R 309 (309)

4 (07) 11 Cal W N 121

5 (20) AIR 1930 Bom 516 (517) 55 Bom 377 (Where the petitioning creditor's petition is ordered to be dismissed with costs, no set off is permissible to the creditor against the money ordered to be paid to him at least to the extent of the sum for costs of the attorneys of the debtor)

10 Revision — See Note 20 to Section 152 Note 21 to Section 115 and also the undermentioned cases<sup>1</sup>

Q 20 R 6  
Note 10

**R. 7. [S 205]** The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree

Q 20 R 7

[1877, Ss 204, 205, 206, 1859, S 189]

### Synopsis

1 Chartered High Courts

3 Limitation

2 Date of the decree

4 Registration Act Section 77

**1 Chartered High Courts** — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction<sup>1</sup> but it has been held by the High Court of Madras<sup>2</sup> that even in cases of decrees passed on the original side of the High Court the practice is to make the decree bear the same date as the judgment

**2 Date of the decree** — The date of the decree and the date of the *signing* of the decree are two different things. The date of the decree must correspond to the date on which the judgment is pronounced no matter what the date of the signing of the decree may happen to be<sup>1</sup>. The reason is that it is on the date of the judgment that the Court must be deemed to have expressed what the decree is<sup>2</sup>. The decree therefore though drawn up afterwards *relates back to*<sup>3</sup> and operates from<sup>4</sup> the date of the judgment. Thus where one of the plaintiffs dies subsequent to the date of delivery of judgment but before the decree is actually drawn up this fact does not affect the validity of the decree<sup>5</sup>. Where however a Court gives a judgment but refuses or is unable to give a decree till a condition is performed and draws up a decree after the performance of the condition it must be held that the judgment given is only a provisional one which does not become operative until the decree is prepared and that the latter date is the *date of the judgment* as well as of the *decree*<sup>6</sup>. See also the undermentioned cases<sup>7</sup>.

#### Note 10

1 (98) 11 Oudh Cas 209 (210) (Can interfere when lower Court declined to correct clerical error)

(94) 4 Mad L Jour 280 (281) (Mistaken instruction of a rule of practice is a ground for interference)

#### Order 20 Rule 7 — Note 1

1 See Order 49 Rule 2

2 (18) 21 Ind Cas 515 (515) (Mad)

#### Note 2

1 (30) 12 Ind Cas 67

(21) 65 Ind Cas 650 (652) (Cal)

4 (05) 37 C 1483 (491)

(91) 14 Mad 150 (152)

5 (0) 6 Cal W N 196 (196)

6 (16) AIR 1916 Snd (3) 9 Cal L R 11

[See also (0) 3 Cal 43 (43)]

(85) 8 Mad 13 (139)

(79) 4 Cal 62 (63 633)

(8) 14 C 0 (54)]

7 (31) AIR 113 Cal 33 (10) (Thro. 114)

O. 20 R. 7  
Notes 3-4

**3. Limitation.** — Section 12 of the Limitation Act provides that, in computing the period of limitation for *appeal* or for *review*, the time requisite for obtaining a copy of the decree shall be excluded. Suppose now that the decree is actually signed on a date subsequent to that on which the judgment is pronounced, and a party applies for copies of the decree and judgment after the date of the signing of the decree. Can the period between the pronouncing of the judgment and the signing of the decree be excluded in computing the period of limitation, in addition to the period actually taken in obtaining the copies? On this point there has been a conflict of opinion. According to the practice of the Calcutta High Court, such period should be excluded as being part of the time requisite for obtaining the copy.<sup>1</sup> This practice has been followed by the High Court of Patna.<sup>2</sup> All the other High Courts have, on the other hand, held that such period cannot be excluded in computing the period of limitation.<sup>3</sup> In *Pramathanath Roy v William Arthur Lee*,<sup>4</sup> it was held by their Lordships of the Privy Council that no period can be regarded as requisite under the Limitation Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain an order, and that there is no warrant for the proposition that the time *actually consumed* in obtaining the decree must be deducted. Their Lordships referred to the Calcutta view but did not decide as to the correctness or otherwise thereof.

Section 12, sub section 2 of the Limitation Act does not apply to applications for *execution* of a decree and even according to the Calcutta<sup>5</sup> and Patna<sup>6</sup> High Courts, the period of limitation for an application for execution of a decree runs from the date of the judgment and not from the date on which the decree is drawn up and signed.

**4. Registration Act, Section 77.** — It has been held by the High Court of Madras<sup>1</sup> that for the purposes of Section 77 of the Registration Act the period of 30 days is to be reckoned not from the time when the judgment is pronounced, but from the time when the decree is actually drawn up and signed.

### Local Amendment

#### ALLAHABAD

Add the following new Rule 7A

'7A A Court other than a Court subordinate to the District Court exercising insolvency jurisdiction passing an order under Section 47 or Section 144 of the Code of Civil Procedure or one against which an appeal is allowed by Section 104 or Rule 1

take of Court decree dated wrongly.—If execution application in time from wrong date but barred from correct date.—Held execution is in time and act of Court should not prejudice a party.) (35) AIR 1935 Cal 125 (126) (Decree not drawn up on non judicial stamp paper — Non judicial paper subsequently annexed defaced and names of parties and cause title of case put down—Decree is in order and can be executed.)

#### Note 3

1. (86) 13 Cal 104 (107)
- (72) 18 South W R 51 L (512)
- (63) 82 Cal 173 (177)
- (1) AIR 1916 Pat 267 (267) 1 Pat L Jour 473 (EB)
- (19) AIR 1919 Pat 506 (507)
3. (10) 12 All 461 (463 469 473) (FB)
- (33) AIR 1933 Nag 125 (127) 29 Nag L R 220 (Drawing from AIR 1924 Nag 271)
- (29) Bom 442 (446)
- (95) 23 Mad 371 (376 377)

- (15) AIR 1915 Mad 808 (808) (Even though time was granted for payment of entire court fees)
- (1900) 13 C P L R 78 (79 80)
- (26) AIR 1926 Nag 349 (349 350) 22 Nag L R 60 (Explaining AIR 1924 Nag 471)
- (25) AIR 1935 Oudh 600 (601)
- (05) 3 Low Bur Rul 62 (63, 65) (FB)
4. (20) AIR 1922 P C 352 (353) 49 Ind App 807 49 Cal 999 (FC)
5. (24) AIR 1924 Cal 351 (352)
- (95) 25 Cal 109 (110)
- (93) 1 Cal W N 93 (94)
- (03) 3 Ind Cas 391 (392) (Cal)
- (10) 5 Ind Cas 660 (662) (Cal) (Court has power to reconstruct a decree lost by fire)
- (13) 19 Ind Cas 420 (410) (Cal)
- [See also (17) AIR 1917 P C 85 (85) (FC) (A decision and r S 45 C P C)]
6. (20) AIR 1920 Pat 111 (111) 5 Pat L Jour 490, Note 4
1. (15) AIR 1915 Mad 865 (866) 33 Mad 221.

O. 20 R. 7A  
(Allahabad)

of Order 43, or an order in any case, against which an appeal is allowed by law, shall draw up a formal order embodying its adjudication and the memorandum of costs incurred by the parties"

O. 20 R. 7A  
(Allahabad)

**R. 8. [New.]** Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

O. 20 R. 8

*Procedure where Judge has vacated office before signing decree.*

**1. Scope and applicability.** — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction see Order 49 Rule 3, clause 5

Where the decree was imperfect, and the Judge who pronounced it had left the district and it was impossible to draw up a decree from the judgment, it was held in the undermentioned case<sup>1</sup> that there is no alternative but to order a new trial

**R. 9. [S. 207.]** Where the subject-matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

O. 20 R. 9

*Decree for recovery of immovable property*

[1877, S. 207; 1859, S. 190]

### Synopsis

1. Scope of the Rule. | 2 Decree for possession of land

#### Other Topics (miscellaneous)

Decree discrepant in area and boundaries, whether invalid See Note 1 | Decree for possession of village — What passes under See Note 2

**1. Scope of the Rule.** — In suits relating to immovable property the decree should contain a description of the property *sufficient to identify* the same, and where it can be identified by *boundaries* or by *survey numbers*, the decree should specify such boundaries or numbers. The reason is that otherwise the decree may in many cases become impossible of execution by reason of the indefiniteness of the property dealt with by it<sup>1</sup>

Order 20 Rule 8 — Note 1

1. (73) 13 South W R 267 (269)

Order 20 Rule 9 — Note 1

1. (76) 23 South W R 93 (40)

(75) 23 South W R 285 (285)

(73) 19 South W R 41 (41)

(69) 12 South W R 93 (99) (111) 11 South W R 111 (111) taken in the execution of part of the decree

(77) 18 South W R 31 (31)

(7) 14 South W R 473 (473)

(74) 4 Cal GJ (72)

(41) 11 All 30 (33)

O. 20 R. 9  
Notes 1-2

But the omission to comply with the strict letter of the rule does not render the decree invalid.<sup>2</sup> The Court can ascertain the subject upon which the decree operates, from the acts and conduct of the parties.<sup>3</sup>

**2. Decree for possession of land.** — A decree for possession of a village passes with it the village account books and other documents relating to the management of the village.<sup>1</sup> Similarly, it will pass with it any buildings or other constructions erected thereon<sup>2</sup> except where the defendant is not a trespasser and is entitled under law to remove the building.<sup>3</sup>

O. 20 R. 10

**R. 10.** [S. 208.] Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

Decree for delivery of moveable property.

[1877, S. 208; 1859, S. 191.]

### Synopsis

#### 1. Scope of the Rule | 2. "Amount of money to be paid."

**1. Scope of the Rule.** — A person entitled to the delivery of moveable property from another is not bound to sue for the delivery of the property itself, he may sue for the value thereof.<sup>1</sup> Even if he does sue for the delivery of the property, the decree need not always be for the delivery of the property in the first instance, the Court may, in proper cases, decree only the value of the property as damages.<sup>2</sup> Thus, where the defendant is not in possession of the property claimed, the Court need not decree delivery thereof but may pass a decree for the value of such property.<sup>3</sup> But where the Court considers it proper to direct a restoration of the property, the decree should also state the amount of money to be paid as an alternative if delivery cannot be had.<sup>4</sup>

The giving of the alternative remedy does not, however, give the decree-holder any option of refusing to take delivery of the property, and of insisting upon the money portion of the decree. He cannot execute his decree without having recourse to the procedure prescribed by O. 21 R. 31.<sup>5</sup> Nor can the judgment debtor claim any option

(68) 10 Suth W R 96 (97) (Decree for possession of a share of lands without specifying the share by boundaries is only a decree for an undivided share)

[See (73) 20 Suth W R 142 (142)]

2. (81) 5 Bom 208 (213)

(67) 1905 Pan Re Do 74 p. 237 (Decreed as the property in suit where plaintiff gives all the necessary details)

(71) 16 Suth W R 171 (172) (Boundaries deleted in the plaint no longer in evidence — Evidence may be taken to ascertain their former position)

(30) 3 Cal W N 237n

(69) 9 Suth W R 91 (96)

[See (10) 11 Ind Cas 911 (912) 4 Suth L R 154]

3. (92) 19 Cal 312 (321 322) 19 Ind App 69 (PC)

(74) 22 Suth W R 530 (531) (12 W R 22 F explained)

(14) AIR 1914 Cal 775 (775)

(17) AIR 1917 Cal 407 (409) (There is no error in leaving the ascertainment of boundaries to be decided in execution proceedings)

#### Note 2

1. (87) 11 Bom 495 (497)

2. (156) 2 Suth W R 123 (125)

(82) 8 Cal 591 (590 591)

3. (66) 6 Suth W R 223 (229) (FD)

(64) 27 Mad 211 (217)

#### Order 20 Rule 10 — Note 1

1. [See (21) AIR 1924 Nag 176 (178)]

2. [See (10) 11 Ind Cas 911 (912) 4 Suth L R 154]

of either surrendering the property or paying the money decreed.<sup>6</sup>

The words "moveable property" in the rule mean *specific* moveable property such as is referred to in Articles 48 and 49 of the Limitation Act<sup>7</sup> A suit for the recovery of a certain quantity of grain payable under a *karar* for maintenance is not one for specific moveable property within the meaning of this rule<sup>8</sup>

No decree can be passed under this rule for delivery of property against *several* defendants jointly, unless there is a *combination* among them, if it is found that any one of them took possession of the property, the decree should be made against him only, and to the extent of the property taken by him<sup>9</sup>

2. "Amount of money to be paid."—The money to be paid as an alternative is the value of the property together with damages for the time the plaintiff has been kept out of it<sup>1</sup> Where the plaintiff valued the property claimed at Rs. 1360 and produced evidence to show that this was the value, but the defendant simply refused to accept the valuation and would not produce the articles, which he did not deny were in his possession, it was held that, under the circumstances, the valuation made by the plaintiff ought to be accepted by the Court<sup>2</sup>

Where a decree is passed in terms of an award ordering delivery of moveable property, and a part of such property is lost subsequently before delivery, the decree cannot be modified by the Court by inserting in it an order to pay the value of the property so lost.<sup>3</sup>

If there is a dispute as to the property claimed the Court must, of course, determine it before passing the decree it cannot leave the matter to be settled in execution<sup>4</sup>

## R. 11. [S. 210.] (1) Where and in so far as a decree is O. 20 R. 11

Decree may direct payment by instalments.

for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Order, after decree, for payment by instalments.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the

### Note 2

(35) AIR 1935 Cal 59 (51) C1 Cal 711

(1903) 13 Mad L Jour 444 (444)

6 (1903) 13 Mad L Jour 444 (444)

7. (1899) 22 Mad 476 (481)

8. (1924) AIR 1924 Nag 176 (176)

9. (1899) 1 Ind C 205 (206, 207) (Cal)

1 (73) 19 South W R 123 (125)

(1) 16 South W R 240 (243 244)

(1897) 1907 All W N 227 (227)

1 Strang 505 1 Sm L C 356 (1903) 1 Ind 43

Eng Rep 114 Arron v Dalmarie

3 (193) 17 Bom 655 (641)

4. (75) 7 N W P H C R 75 (77)



O 20 R 11 judgment debtor, or the taking of security from him, or otherwise,  
Note 1 as it thinks fit

[1877, S 210, 1859, S 194]

### Local Amendments

#### MADRAS

Substitute the following for Rule 11

11 (1) Where and in so far as a decree is for the payment of money the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments with or without interest notwithstanding anything contained in the contract under which money is payable

(2) After the passing of any such decree the Court may on the application of the judgment debtor and after notice to the decree holder order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest the attachment of the property of the judgment debtor or the taking of security from him or otherwise as it thinks fit

#### NAGPUR

In sub rule (2) for the words and with the consent of the decree holder the words and after notice to the decree holder shall be substituted

#### RANGOON

In sub rule (2) for the words and with the consent of the decree holder substitute the words and after notice to the decree holder

#### SIND

In sub rule (2) for the words and with the consent of the decree holder substitute the words and after notice to the decree holder

### Synopsis

- 1 Legislative changes
- 2 Scope of the Rule
- 3 Decree must be for the payment of money
- 4 The Court
- 5 Postponement of payment
- 6 Order for payment by instalments
- 7 Sufficient reason
- 8 Notwithstanding anything contained in the contract under which the money is payable

- 9 With or without interest
- 10 Order for instalments after decree —  
Sub rule (2)
- 11 Taking of security
- 12 Limitation for application under sub rule (2)
- 13 1 — , , , . . .
- 14 1 —

### Other Topics (miscellaneous)

Appeal — Court fee See Note 14

Decrees under O 34 R 1 — Applicability of rule  
See Note 3

Decree with a default clause — Limitation See  
Note 13

Default clause — Waiver See Note 13

Instalment decree — When not to be passed See  
Note 7

Proper Court to act under this rule See Note 4

Rent decrees under the Bengal Tenancy Act —

Applicability of rule See Note 2

Rule whether applies to mortgage decrees See  
Note 2

#### 1 Legislative changes —

1 The words shall be postponed in sub rules (1) and (2) are new. The sense of these words in the old rule is

2 The words "notwithstanding anything contained payable are also  
new See Note 7 below

O. 30 R. 11  
Notes 1-3

3 For the words 'in all decrees the words 'where and in so far as a decree have been substituted

4 The proviso in the old Section has been omitted

2 **Scope of the Rule** — Where a decree in a suit is for the payment of money, the Court may, under this rule order the payment of the decree amount to be postponed or to be made in instalments<sup>1</sup> If it decides to pass such order *at the time of passing the decree*, it may do so if there are sufficient grounds therefor [sub rule (1)] *After the passing of the decree* it can pass such an order only if the decree holder gives his consent thereto [sub rule (2)]<sup>2</sup>

The rule applies to decrees for the *payment of money* It does not apply to decrees for recovery of money by sale of property, as in the case of mortgage decrees<sup>3</sup> But, independently of this rule a decree may, in a suit on a mortgage or for partition, be passed on a *compromise* between the parties providing for payment by instalments and for sale of the mortgaged property in default<sup>4</sup>

This rule does not apply to cases coming under the Dekkhan Agriculturists' Relief Act<sup>5</sup> or rent decrees under the Bengal Tenancy Act<sup>6</sup> In a suit for arrears of rent under the Agra Tenancy Act against a person other than a permanent tenure holder or a fixed rate tenant the Revenue Court cannot make a decree payable by instalments under this rule<sup>7</sup> But it has been held that the provisions of the U P Agriculturists Relief Act relating to instalment decrees do not derogate from the provisions of this rule and that the Court can pass an instalment decree under this rule even where such decree would not be permissible under the provisions of the Agriculturists Relief Act<sup>8</sup>

This rule is not in any way controlled by the provisions of the Imperial Bank Act which limit the powers of the Bank in the matter of advancing loans on longer terms than six months and therefore a Court cannot refuse to exercise the discretion vested in it under this rule simply on the ground that such a course would postpone the realization of the dues by the Bank for over six months<sup>9</sup>

3 **Decree must be for the payment of money.** — A decree for deficiency passed under O 34 R 6 of the Code is only a decree for the payment of money within the meaning of this rule<sup>1</sup>

#### Note 2

- 1 See also (07) 31 Bom 348 (353)  
2 (81) 3 All 803 (811). (Decree holder's remedy)

(See also (79) 2 All 129 (132 133) (*Quare*)  
(79) 3 Bom 202 (203) (Where it is not clear whether a decree was passed simply for recovery of money))

(See however (13) 90 Ind Cas 8 (10) (Lab.)  
4 (16) AIR 1916 All 331 (331) (Partition)

(See (07) 34 Cal 596 (590 601)

(25) AIR 1925 Bom 500 (503)

5 (See (90) 19 Bom 318 (320))

6 (07) 11 Cal W N 857 (858)

7 (37) AIR 1937 All 436 (437) 54 All 571

8 (35) AIR 1935 All 52 (57) (Instalment is only over a period of 4 years permissible under the Agriculturists Relief Act — Courts can grant under this rule in favour of a long period)

9 (34) AIR 1933 Cal 340 (331 33)

#### Note 3

1 (11) 11 Ir-1 Cas 36 (76) (Cil)

3 (79) 2 All 370 (372)

(81) 8 Bom 604 (605)

(83) 7 Bom 332 (333)

(80) 1880 Bom 1 J 90

(87) 1887 Ind R No 49 p 105

(09) 2 All 649 (651) (Decree in suit to enforce a lien on an annuity R 3 Bankar)

O. 20 R. 11  
Notes 4-7

4. "The Court." — It is the Court which *passed the decree* that can act under this rule<sup>1</sup> In cases coming under the Dekkhan Agriculturists' Relief Act, however, it is provided by Section 15B of that Act that the Court which *carries out the decree* can order the payment by instalments or extend the time for payment<sup>2</sup>

5. Postponement of payment. — Under Section 210 of the old Code, there was a conflict of opinion as to whether the Court could make an order *postponing* the payment under a decree<sup>1</sup> The introduction of the words "shall be postponed" in this rule makes it clear that such an order can be passed

A judgment-debtor who has enjoyed the benefit of the arrangement for delay in execution by virtue of an order passed under this rule cannot subsequently resile from such arrangement<sup>2</sup>

6. Order for payment by instalments. — A decree payable in instalments on a certain condition (*e g*, that the defendant should mortgage certain property by way of security) is not illegal on that ground<sup>1</sup> As to the construction of decrees for payment of money in instalments, see the undermentioned cases<sup>2</sup> See also Note 2 above

7. Sufficient reason. — The Court has a discretion, under this rule, to order payment of the decree amount in instalments But such discretion should, as in the case of the exercise of all discretions under the Code, be exercised in a *judicial* and not in an arbitrary manner<sup>1</sup> The onus is on the defendant to show that he is entitled to the indulgence under this rule<sup>2</sup> Where he has opposed the claim on frivolous grounds and effected a fraudulent conveyance of his property, subsequent to the institution of

#### Note 4

1. (18) AIR 1918 Mad 1174 (1175) 40 Mad 283 (FD)
- (34) AIR 1934 Rang 165 (166) 12 Rang 320 (Court to which decree is transferred for execution cannot pass instalment order under this rule)
- (84) AIR 1934 Rang 197 (198) (Do)

- (33) AIR 1933 All 90 (90) 54 All 539
- (33) AIR 1933 Nag 330 (331)
- (34) AIR 1934 Pesh 2 (3) (No special reason for special indulgence—Normal course should be followed)
- (1862) 1 Hyde 98 (98)
- 2 Hvy 68
- (36) AIR 1936 Lah 51 (55) (Discretion of the Court is to be exercised within bounds and not in a manner so as to constitute a virtual denial of the creditors' rights)
- (35) AIR 1935 Rang 495 (495) (The discretion to order payment of a decretal amount by instalments must never be exercised so as to constitute a virtual denial of the decree holder's rights)
- (35) AIR 1935 Cal 550 (560) (Even a Small

1. (10) 5 Ind Cas 421 (422) (Mad) (Yes, under its inherent power)
- (84) 7 Mad 152 (154, 155) (Order postponing period of payment is not a nullity)
- (80) 2 All 642 (650) (No)
2. (12) 13 Ind Cas 204 (205) (Mad)

#### Note 6

#### Note 7

1. (40) 1 Ind Cas 552 (552, 553) (Cal)

Court is not entitled to presume debtor's inability to pay in a lump sum)

- (35) AIR 1935 Cal 559 (560) (Simply because instalment is prayed for and the claim is not contested, that does not entitle a debtor to get an instalment decree as a matter of course. Con

the suit, he deserves no consideration at the hands of the Court, especially where the interest agreed upon between the parties is moderate.<sup>3</sup> Nor should a decree be passed the effect of which is to stay execution unconditionally,<sup>4</sup> or to make the instalments extend over a long period without guaranteeing satisfaction on making any provision for the payment of interest.<sup>5</sup> Again, the mere fact that the defendant is unable to pay or is hard pressed or embarrassed,<sup>6</sup> or that his estate is under the management of the Court of Wards,<sup>7</sup> or that he is expecting to get a cross decree against the plaintiff in a pending litigation which would enable him to claim a set off,<sup>8</sup> is not a sufficient reason to enable the Court to order payment by instalments or to postpone payment.

Where, however, the rate of interest is exorbitant or unconscionable,<sup>9</sup> or where the decree for immediate payment will deprive the defendant of his means of livelihood,<sup>10</sup> or where the defendant has made payments towards principal and interest, which exceed the principal sum,<sup>11</sup> a decree for instalments can be properly passed. Again, a lender who abandons his proper remedy in order to avoid the consequence of the original contract is not entitled to the relief prayed for under this rule, if it would be a hardship to the judgment debtor.<sup>12</sup>

**8. "Notwithstanding anything contained in the contract under which the money is payable."**—Where an instalment bond provided for payment by instalments, with a default clause to the effect that the whole sum would be due immediately on default, and a suit was brought for the whole amount on default, it was held by the Bombay High Court under Section 210 of the old Code, that the Court had no jurisdiction to ignore the express contract of the parties as to the consequences of such default and pass a decree for instalments.<sup>1</sup> The introduction of the words 'notwithstanding anything contained in the contract under which the money is payable' in the present rule now makes it clear that the Court has a discretion to pass a decree for instalments notwithstanding the contract between the parties. In their Statement of Objects and Reasons, the Special Committee observe as follows:

The Committee have added words to sub rule (1) of this rule in order to override the ruling of the Bombay High Court in the case of *Raghu Goind v Diphchand* (I L R 4 Bombay 96), as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India.

**9. "With or without interest."**—The granting or refusal of interest, and the rate at which it is to be granted on the instalments ordered to be paid, are in the

considerations which should guide the Court in allowing instalments stated.)

3. (23) 71 Ind Cas 303 (304) (Pesh)

[See also (37) AIR 1937 Lah 16 (17) (A debtor making defaults in payment of instalments as provided by the bond executed by him is not entitled to a provision for payment of the default amount by instalments, more so when there is no evidence to show that he is unable to pay the amount)]

4. (25) AIR 1925 Mad 908 (909)

5. (CC) 1 Agr 270 (271) (Instalments extend ing over 20 years)

(33) AIR 1933 All 90 (90) 54 All 539 (Court passing decree for Rs. 644 and ordering that defendant should pay in six monthly instalments of Rs. 60 each and allowing no future interest—It is not proper exercise of discretion.)

(76) 2 All 123 (132) (Instalments extending over 10 years)

(66) 1 Agr 116 (117) (Instalments hardly sufficient to cover interest)

(35) AIR 1935 Cal 559 (560)

6. (25) AIR 1925 Mad 908 (909)

(33) AIR 1933 Nag 330 (331)

(78) 2 All 129 (131 134)

(66) 2 Nag L R 179 (187)

(10) 6 Ind Cas 552 (553) (Cal)

(82) 1882 All W N 102 (103)

(35) AIR 1935 Cal 559 (560)

7. (23) AIR 1913 Lah 256 (256)

8. (26) AIR 1926 Lah 604 (605) 7 Lab 393

9. (07) 31 Bom 314 (353)

10. (25) AIR 1925 Rang 83 (83)

11. (11) 11 Ind Cas 491 (493) (Low Bur)

12. (1900 02) 1 Low Bur Rul 41 (41) (Equitable mortgage)

#### Note 8

1. (20) 4 Bom 96 (100)

2. *Har J*

[See also (01) 1901 Pun L R 50 157]

O. 20 R. 11  
Notes 9-11

*discretion* of the Court<sup>1</sup> Where no interest is provided for in an instalment decree, it must, under the provisions of Section 34 of the Code, be deemed to have been refused, and cannot be granted by the executing Court<sup>2</sup> Where, however, interest is provided for in the decree, but the *rate* is not mentioned, the Court can, in execution, grant the usual *court rate* of interest<sup>3</sup> The High Court of Rangoon has held in the undermentioned case<sup>4</sup> that where a decree allows interest, to disallow it in passing an order under this rule would be without jurisdiction

**10. Order for instalments after decree — Sub-rule (2).** — As has been seen in Note 2 *ante*, no order for instalments can be made after the passing of the decree under this sub rule, unless the decree holder gives his *consent* thereto But the consent need not be an express one It was held in the undermentioned case<sup>1</sup> that the non opposition by the decree holder after notice to him may amount to consent within this rule

An order for postponement or for instalments under this sub rule does not amount to a variation of the decree itself<sup>2</sup> and can be made in execution proceedings<sup>3</sup> or even when an appeal is pending from the decree<sup>4</sup> Nor does the rule direct the decree to be amended by virtue of such order<sup>5</sup> Where default is committed in the payment of instalments ordered to be paid, the Court can grant relief against forfeiture,<sup>6</sup> though it cannot alter the terms of the decree either with regard to the decretal amount or the rate of interest which is to be paid thereon<sup>7</sup>

Where parties agree after decree that the decretal amount should be paid by instalments and the Court, accepting the compromise, passes an order striking off the execution proceedings, the Court must be deemed to have passed an order under the provisions of this sub rule<sup>8</sup> But, unless recognized by the Court in some form, the arrangement between the parties will not, by itself, amount to a direction by the Court under this rule<sup>9</sup> and cannot be enforced in execution<sup>10</sup> Where the Court has recognized the compromise between the parties for payment by instalments, it cannot, on default of payment in any of the instalments, refuse to execute the decree and drive the plaintiff to a separate suit<sup>11</sup>

**11. Taking of security.** — The security that may be taken under sub rule (2) for the due performance of the decree can be enforced in *execution* and O. 34 R. 14 is no

#### Note 9

1. (79) 11 Bom 202 (203) (Six per cent interest awarded — High Court refused to interfere)

2. See Note 17 to Section 34

[See also (70) 14 Suth W R 324 (324)]

3. See Note 17 to Section 34

[See also (80) 11 Cal L Rep 231 (232)]

4. (83) AIR 1933 Rang 323 (325)

#### Note 10

1. (84) 7 Mad 152 (154, 155)

2. (78) 2 Cal L Rep 143 (146)

[See however (34) AIR 1932 All 273 (260) 54 All 573 (FB)]

3. (24) AIR 1924 Bom 118 (119)

4. (27) AIR 1927 Mad 416 (419, 420)

5. (17) AIR 1917 Mad 168 (169) [Such order, however was held in substance to be amending the decree — This view it is submitted, is not correct — A decree cannot be varied or altered except under S. 152 or on review]

6. (22) AIR 1922 Bom 170 (171) 46 Bom 463

(25) AIR 1925 Bom 404 (405)

7. (26) AIR 1926 Bom 368 (368)

8. (23) AIR 1923 Lah 881 (882)

(85) 11 Cal 143 (145)

(07) 5 Cal L Jour 25 (26, 27)

(84) 6 All 16 (17)

(1900) 1900 Pun Ra No 96, page 289 [Application after decree for an order for payment by instalments was treated as one under this sub rule]

[See also (34) AIR 1932 All 273 (260) 54 All 573 (FB)]

7. (26) AIR 1926 Bom 368 (368)  
8. (23) AIR 1923 Lah 881 (882)  
(85) 11 Cal 143 (145)  
(07) 5 Cal L Jour 25 (26, 27)  
(84) 6 All 16 (17)  
(1900) 1900 Pun Ra No 96, page 289 [Application after decree for an order for payment by instalments was treated as one under this sub rule]  
[See also (34) AIR 1932 All 273 (260) 54 All 573 (FB)]

not an order under this rule 11

[See also (34) AIR 1935 Mad 17 (20)]

9. (87) 14 Cal 348 (350)

10. (81) 11 All 585 (583, 589) (FB)

(84) 11 All 623 (625)

11. (33) AIR 1933 Lah 754 (759)

(87) AIR 1937 Cal 226 (237) [Decree holder can enforce terms by execution]

bar thereto '1

Where by an order under sub rule (2) the judgment debtor was to execute a mortgage to the decree holder the subsequent adjudication of the judgment debtor as an insolvent cannot affect the rights of the decree holder to have the mortgage executed in his favour<sup>2</sup>

**12 Limitation for application under sub-rule (2)** — An application under sub rule (2) for postponement or for payment in instalments of the decree amount should be made within six months of the decree under Article 17, Schedule I of the Limitation Act<sup>1</sup> But if an order for instalments is actually passed on a time barred application it is not a nullity<sup>2</sup> It must be assumed that the Court by oversight decided the question of limitation wrongly<sup>3</sup> Where there has been an appeal from a decree the time for the application for an order for instalments runs only from the date of the decree of the *Appellate Court* even though the latter confirmed the judgment of the lower Court and dismissed the appeal<sup>4</sup>

13 Limitation for execution of decree passed under this Rule — See the Authors Commentaries on the Limitation Act Notes to Article 18<sup>o</sup> clause 7

**14 Appeal** — An order passed under this rule *refusing* to allow the payment of the decretal amount in instalments is not appealable under O 43 R 1. It must be regarded as a matter separate from and not forming part of the decree<sup>1</sup>. An order *granting a decree for instalments or postponing the time for payment of the decretal amount* under sub rule (1) will of course be incorporated in the decree itself and can therefore be attacked in an appeal against the decree<sup>2</sup>. If however it is not so incorporated the order will not be appealable<sup>3</sup>. An order for instalments made under sub rule (2) must necessarily be one made *after* the decree and on the *consent* of the decree holder. No appeal can lie against such consent order<sup>4</sup>. In Rangoon however by virtue of the amendment of sub rule (2) an order can be passed after decree for payment in instalments after notice to the decree holder and *with or without consent*. The order not being a *consent* order and being one in execution discharge or satisfaction of the decree within the meaning of Section 4<sup>5</sup> is appealable as a decree<sup>6</sup>.

As to the court fee payable on a memorandum of appeal against an instalment decree see the undermentioned case<sup>6</sup>

**Note 11**

- 1 (26) AIR 1926 Mad 191 (197 200)  
 (25) AIR 1925 Bom 503 (510)  
 (70) 14 Suth W R 374 (324) (Sale of property in  
 execut on s to be preferred to realization through  
 a re e r)  
 2 (24) AIR 1925 Rang 189 (190 191) o Rang  
 678

**Note 11**

- 1 [See also § 14 Cal 348 (350)]  
 2 (4) AIR 129; 1 Ah 342 344)  
 3 (4) 14 1 1u Re No 2<sup>nd</sup> 19 1 67)  
 4 2 (7) AIR 1937 Cal 394 (397) (The proper  
 5 ren 1 is the person who by its to the  
 6 to take appropriate steps for getting the order  
 7 set aside a 1 o l o m as that order not set  
 8 a 1 o t i s g o n h m )  
 9 3 (32) AIR 193 Ah 3 (31) 54 AH 5 3 (FB)  
 10 4 (52) AIR 193 B 1 1 35)

**Note 14**

- 1 (28) AIR 19 8 Lah 931 (931)  
 (13) 20 Ind Cas 6 3 (673) Lo v Bur Rul 71  
 2 (31) AIR 1931 R ng 152 (15 )  
 (33) AIR 1933 Pesh 31 (33)  
 (22) AIR 19 3 Lah 355 (355) (High Court will

- 6 14 AIR J14 I h 0 (30) 1915 Fun Re  
No 1 (ort-fep abe s d'fren e lo  
t r b b n m e a e l a d t al  
nents)

**Q 20 E 11**  
**Notes 11-14**

O. 20 R. 12

**R. 12.** [Ss 211, 212 ] (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits,<sup>2</sup> the Court may pass a decree —

Decree for possession  
and mesne profits

- (a) for the possession of the property ,
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits,
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until —
  - (i) the delivery of possession to the decree holder,
  - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree holder through the Court,<sup>10</sup> or
  - (iii) the expiration of three years from the date of the decree,<sup>11</sup> whichever event first occurs

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry

[ 1877, Ss 211, 212, 1859, Ss 196, 197 See Ss 2 (12), 144 ]

#### Local Amendment

#### MADRAS

Add the following sub rule (3)

(3) Where an Appellate Court directs such an inquiry it may direct the Court of first instance to make the inquiry and in every case the Court of first instance shall on the application of the decree holder inquire and pass the final decree

#### Synopsis

- |  |   |
|--|---|
| 1 Legislative changes  | 9 Right to apply for ascertainment of future mesne profits when arises                  |
| 2 Scope of the Rule  | 10 Notice of relinquishment — Clause (c)  |
| 3 Rule applies only where specific interest in land is claimed       | 11 Three years from the date of the decree  |
| 4 Enquiry as to mesne profits is no longer a proceeding in execution | 12 Limitation   |
| 5 Mesne profits  | 13 Res judicata   |
| 6 Interest forming part of mesne profits                             | 14 Order after preliminary decree determining period and mode of accounting if a decree |
| 7 Value of mesne profits if affects jurisdiction                     | 15 Appeal   |
| 8 Court fees   |   |

#### Other Topics (miscellaneous)

- |   |  |
|---|--|
| Calculation of mesne profits—Cultivat on expenses deduction of See Note 5 | Decree for mesne profits against co sharers See Note 8       |
| Case remanded by Appellate Court — Procedure See Note 15                  | Decree for mesne profits — When becomes operative See Note 9 |
| * Decree See Note 2   |  |

First application for mesne profits dismissed for default — Subsequent application, if main maintainable. See Note 4  
Form of decree for possession and mesne profits See Note 2  
Mesne profits—Court, whether could award more than is claimed See Note 5  
Non mention of period during which mesne profits are awarded—Effect See Note 11

Persons liable for mesne profits See Note 5  
Relinquishment without notice — Whether amounts to delivery. See Note 10  
Suit by a member of a joint Hindu family — Rule, if applicable See Note 3  
Suit for mesne profits alone See Notes 2 and 13  
'The Court' See Note 2

### 1. Legislative changes. —

1 The provisions of Section 244, clauses (a) and (b) of the Code of 1882, which enacted that any question relating to the ascertainment of mesne profits as to which the decree directed an enquiry, were to be determined by the *executing Court*, have been omitted under the present Code. The result is that such an enquiry is no longer a proceeding *in execution* but is one *in suit*.<sup>1</sup> The substantial change under the new Code is, as pointed out by Sir John Wallis, C J., "that the award of mesne profits in all cases is to be by a *preliminary decree* and that when ascertained, they are to be embodied in a *final decree*, whereas under Sections 211 and 212 (of the old Code) they were to be ascertained in execution"<sup>2</sup> In other respects this rule corresponds to Sections 211 and 212 of the old Code, except that sub-clause (ii) in clause (c) has been newly added for the benefit of the judgment-debtor

2 The Explanation to Section 211 of the old Code which contained the definition of 'mesne profits' has been re-enacted in Section 2 clause (12) of the present Code

2. **Scope of the Rule.** — This rule deals with the decree to be passed in a suit for possession of immovable property and for rent or mesne profits, past and future, against a person in *wrongful possession* of such property. It does not apply to suits for *mesne profits alone*<sup>1</sup> or for damages which are not *mesne profits*<sup>2</sup> But a suit for a declaration of title and in the *alternative* for possession and mesne profits is within this rule<sup>3</sup>

In so far as this rule enables the Court to pass a decree for *future* mesne profits (i.e., profits accruing subsequent to the institution of the suit) it is an exception to the general rule that a Court has no jurisdiction to give the plaintiff a decree on a cause of action that had not accrued to him at the date of the suit<sup>4</sup> The object of enabling the Court to pass such a decree is to avoid multiplicity of suits<sup>5</sup> But the rule

### Order 20 Rule 12 — Note 1

1. (31) AIR 1931 Pat 1 (4)
2. (18) AIR 1918 Mad 494 (496) 41 Mad 189 (F B) (On reference)
- (25) AIR 1925 All 589 (589) ; 47 All 543
- (26) AIR 1926 Pat 218 (223 229) 5 Pat 361 (F B)

#### Note 2

1. (72) 9 Bom H C R 7 (9) (Decision under Sec 197 of Act VIII of 1859)
2. (35) AIR 1935 All 186 (187) (Pro-pective damages on tort must be given in decree itself and cannot be determined in execution—Order of Court in decree that it will be determined in execution does not give executing Court jurisdiction to determine it—O 20 R 12 has no application)
- (14) AIR 1914 Cal 579 (579) (Suit for injunction and damages.)
- (28) AIR 1928 Pat 515 (566) 7 Pat 491
- (34) AIR 1935 All 445 (446) 1 L R (1935) All C 4 (There is no provision in O 20, C P Code for the passing of a preliminary decree in a suit

for a decree in execution of a preliminary decree in a suit

1. The principle of *ejusdem generis* must be governed by the principle of *ejusdem generis* (See (68) 1 Beng L R 167 (169) (Bengal Rent Act, of 1859—Share in an *unauchok* jumma

3. [See (11) 10 Ind Cys 117 (117) (Cal)]
4. (29) AIR 1928 Pat 565 (566) 7 Pat 491
- (26) AIR 1926 Nag 260 (262)
- (40) AIR 1930 Mad 90 (33 37) 53 Mad 634
- (21) AIR 1921 Lah 85 (85) 2 Lah 333
- (97) AIR 1937 Ma 146 (146) 11 R (1937) Ma 12-1
5. (26) AIR 1928 Pat 218 (229) 5 Pat 361 (F B)
- (99) 21 All 425 (432)



O. 20 R. 12  
Notes 2-3

is only a *directory* and not a *mandatory* one. It does not compel the plaintiff to claim future mesne profits. Nor is the Court bound to pass a decree for such mesne profits<sup>6</sup> (See Note 13 *infra*). Ordinarily, a decree for mesne profits can only follow a decree for possession and when the plaintiff fails to obtain a decree for possession, a claim for mesne profits should not be allowed<sup>7</sup>. In cases falling within this rule, the Court may pass —

- (1) a decree for possession of the immovable property, (this is a *final* decree and subject to just objections, is capable of being executed)
- (2) either a final decree for *past mesne profits*, or rent<sup>8</sup> or a preliminary decree for such profits, directing an enquiry as to the amount thereof, and
- (3) a preliminary decree, directing an enquiry as to the amount of *future mesne profits*

In the undermentioned case<sup>9</sup> it was held by the Madras High Court that in the case of past mesne profits, it is optional with the Court to direct an enquiry into such mesne profits and that the Court can at once pass a final decree without directing any enquiry but that in the case of mesne profits subsequent to the institution of the suit, it is obligatory on the Court to direct an enquiry and to pass only a preliminary decree in the first instance and then a final decree. But the same High Court has in a later decision<sup>10</sup> dissented from this view and held that where it is unnecessary to have any enquiry, it is open to the Court to dispense with such enquiry even in the case of mesne profits subsequent to the institution of the suit, and at once pass a final and executable decree in respect of such profits.

When a Court passes a preliminary decree under this rule and directs an enquiry as to mesne profits, it should, at the same time, decide the basis upon which the mesne profits are to be assessed<sup>11</sup>.

Where an enquiry is directed as mentioned above, a final decree in respect of such mesne profits is to be passed in accordance with the result of such enquiry<sup>12</sup>.

A decree ordering the delivery of possession and directing an enquiry as to mesne profits will thus be partly preliminary and partly final<sup>13</sup>. Where a decree is passed for past and future mesne profits *without directing an enquiry*, the decree is not preliminary but final<sup>14</sup>.

As to the proper way of framing a decree under this rule, see Form No 33, Appendix D, Schedule I<sup>15</sup>.

**8. Rule applies only where specific interest in land is claimed.** — This rule applies only to suits for land or other property in which the plaintiff has a *specific*

(See also (21) AIR 1921 Lah 85 (88) 2 Lah 883  
(Claim not contested—Must be granted)  
(23) AIR 1923 Mad 168 (169) (Do Absence of

9. (37) AIR 1937 Mad 46 (48) . I L R (1937) Mad 284

10. (39) AIR 1938 Mad 727 (729) . I L R (1938) Mad 1050

11. (34) AIR 1934 Cal 503 (504)

12. (31) AIR 1931 Mad 717 (718) 51 Mad 9-0

13. (29) AIR 1929 Cal 333 (333, 334)

(14) AIR 1914 Cal 601 (601)

(14) AIR 1914 Mad 526 (532) . 18 Ind Cas 5-6 (591) 37 Mad 185

(14) AIR 1914 Cal 60 (63)

(16) AIR 1916 Mad 767 (767) (Decree for possession alone can be executed)

14. (25) AIR 1915 Mad 1276 (1276)

15. (18) AIR 1918 Cal 742 (743)

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not necessary where the exact amount has been ascertained }

*interest* It will not apply, for instance to a suit by a member of a Hindu joint family, for a partition of the joint property inasmuch as the plaintiff has no specific interest in such property until decree,<sup>1</sup> and the defendants cannot be said to be in wrongful possession of any property of the plaintiff Where however the family has been living under a *clear arrangement* that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares, the right to mesne profits will arise if the enjoyment of those shares is in any way disturbed.<sup>2</sup>

Apart from this rule however, a member of a joint Hindu family who is *excluded* from participation in the profits of the family property may be entitled to *an account* of the management of the property from the persons in possession and to a share of such profits. Such a right is not a right to *mesne profits* received by a person in wrongful possession but is appurtenant to the plaintiff's right under Hindu law in his share of the lands.<sup>3</sup> In fact a member of a Hindu family suing for partition and for profits is really suing for *an account of the profits received* by the manager or the persons in possession, so that the proceeds so received by the latter which are also divisible property, may be divided and his share therein also given to him.<sup>4</sup>

4 Enquiry as to mesne profits is no longer a proceeding in execution —

The assessment of mesne profits is under the present rule, a proceeding in the suit and it has nothing to do with the execution department<sup>1</sup> The enquiry is a continuation of the suit which results in a final decree. No application for the ascertainment of mesne profits can be entertained in the execution department under the present Code<sup>2</sup> But if the Court passing the decree erroneously gives a direction to the plaintiff to apply for the ascertainment of mesne profits in execution is such a direction *ultra vires* and is the executing Court bound to ascertain such profits? The High Court of Calcutta held in the undermentioned case<sup>3</sup> that such a direction is *ultra vires* and that the

### Note 3

- 1 (80) 14 Cal 493 (509) 14 Ind App 87 (P C)  
 (75) 1 Bom 561 (570)  
 (13) 21 In L Cas 590 (591) 9 Nag L R 145  
 [But see (19) AIR 1919 Mad 868 (868) (Where  
 the point was conceded the suit does not seem  
 to be one for partition between coparceners)]  
 2 (89) 10 Cal 837 (410) 16 Ind App 71 (P C)  
 3 (28) AIR 1923 Mad 147 (149 150) 46 Mad 47  
 (93) 17 Bom 271 (279)  
 (84) 7 Ma L 564 (569) (Manager bound to account  
 to infant plaintiff suing for partition)  
 4 (28) AIR 1923 Mad 147 (149) 46 Mad 47  
 (78) 2 Mad 128 (137)  
 (80) 5 Bom 589 (593)  
 [See (95) 19 Bom 532 (536 537) (The words  
 "meane profits" in this decision must be taken  
 to have been used only in the sense of a right  
 to account)]  
 [See also (82) 11 Ma L 36 (38 239) 9 Ind App  
 125 (PC)]

#### Note 4

- 1 (31) AIR 1931 All 598 (539)  
(14) AIR 1931 All 405 (407)  
18 11 2 5

- 2 (25) AIR 1945 All 588 (58J) 47 All 548  
(34) AIR 1931 All 465 (467)  
(78) AIR 1929 Bom 36 (937) 52 Bom 360  
(09) 4 Ind Cas 1040 (1011) 33 Mad 78  
(27) AIR 1907 Mad 71 (79)  
(26) AIR 19 G Cal 175 (175)  
(10) 5 Ind Cas 272 (273) (Cal)  
(17) AIR 1917 Pat 331 (335) 1 Pat L Jour 391  
(25) AIR 1975 P G 117 (117) 4 Pat 507 52 Ind  
App 188 (PC) (Under old Code one in execution)  
(03) 25 All 385 (387)  
(91) 18 All 53 (64 65) 17 Ind App 150 (PC)  
(99) 4 Bom 345 (349 350)  
(80) 8 Mad 137 (139)  
(92) 19 Cal 187 (196)  
(86) 14 Cal 50 (53 54)  
(0) 6 Cal L Jour 462 (467)  
(79) 4 Cal 6 9 (632)  
(76) 25 Suth W R 20 (200)  
(74) 1 Suth W R 21 (213)  
(14) AIR 1914 Cal 60 (63)  
(33) AIR 1938 Bom 3 0 (371)

under

4 (18) AIR 1318 (174) (See and apply  
to first case) It is a principle of law that  
first of all the facts are to be ascertained and  
then the law is to be applied to them.

insert into it and not be contained in the  
degree 1)

O. 20 R. 12  
Notes 3-4

Q. 20 E 12  
Notes 4-5

executing Court can decline to carry out the direction. But in a recent case<sup>5</sup> the same High Court has held that such a decree might be a wrong decree but is valid so long as it is not corrected by proper proceedings. The High Courts of Bombay<sup>6</sup> and Madras<sup>7</sup> have on the other hand held that the decree is not a nullity but that the case was one of a mere irregularity in the exercise of jurisdiction and that the executing Court is bound to enquire into the mesne profits as per the direction in the decree. It has been held by the Allahabad High Court<sup>8</sup> that a direction by the trial Court to the executing Court to ascertain mesne profits is a nullity.

Applying the principle laid down by the Judicial Committee in *Lachminarai v. Balmakund*<sup>9</sup> that when once a preliminary decree has been passed the suit cannot be dismissed unless and until the decree is varied or reversed in appeal, the High Courts of Madras<sup>10</sup> and Patna<sup>11</sup> have held that a suit cannot be dismissed for default in prosecuting an application for the ascertainment of mesne profits under this rule.

After a preliminary decree the practice is that the suit is adjourned to a definite date for further hearing.<sup>12</sup>

**5 Mesne profits** — The expression : mesne profits is defined by Section 2 clause (12) *ante* as

The profits which a person in *wrongful* possession of property actually received or might with ordinary diligence have received therefrom together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.

The object of awarding a decree for mesne profits is to *compensate* the person entitled to be in possession for his having been kept out of possession and thus deprived of the profits of the property.<sup>1</sup> Hence it is only a person who is entitled to actual possession that can claim mesne profits.<sup>2</sup> On the other hand the very foundation of the cause of action for mesne profits is *wrongful possession* of the defendant.<sup>3</sup> No decree

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(The Court which is directed to make the inquiry in execution is not entitled to determine the amount and not pass an order for its recovery. It is for the trial Court to pass a final decree for recovery of the amount due.)

7 (30) AIR 1930 Mad 80 (31-35) 53 Mad 833

8 (38) AIR 1938 All 445 (446) ILR (1938) All 658

9 (24) AIR 1924 P C 198 (900) 4 Pat 61 51 Ind App 391 (PC)

The order is on the cases before the decision

(16) AIR 1916 Mad 828 (390)

(34) 21 Cal 214 (247) (Trosper liable to person entitled to possession on though not owner)

(88) 12 Bom 416 (416) (Mesne profits is different from a pecuniary payment; *eternum* — Word mesne implies *interim* and *salutem* as well as *a quo* the terminus being the date of decree)

(35) AIR 1935 L h 379 (840 381)

(See (35) AIR 1935 Pat 80 (81) (Mesne profit

2 (35) AIR 1935 L h 379 (350)

12 (35) AIR 1935 Mad 1165 (1165)

Note 5

1 (01) 11 All 252 (255)

(38) 11 South W R 83 (4)

(39) 11 South W R 2 (2)

(40) 9 South W R 45 (455)

as  
related

for mesne profits can therefore be passed against a person who is *not in possession* at all,<sup>4</sup> or who is in *rightful possession*.<sup>5</sup> But possession through another such as a tenant is sufficient to create liability for mesne profits if such possession is wrongful.<sup>6</sup>

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Note II

The following cases are instances of *rightful* possession —

- (1) The possession of a possessory mortgagee so long as the mortgage subsists<sup>7</sup>
- (2) The possession of the defendant against whom a conditional decree has been passed to the effect that on payment of a certain sum the plaintiff is to get possession and such payment has not been made<sup>8</sup>
- (3) The possession of a co sharer of joint property, in the absence of proof of ouster or exclusion of another co sharer<sup>9</sup>
- (4) The possession of a person who has entered on the land as a trespasser, but from whom the owner has accepted rent<sup>10</sup>

The following cases are instances of *wrongful* possession —

- (1) The possession of a mortgagor after the date of a foreclosure decree against him<sup>11</sup>
- (2) The possession of a person declared by a decree to be in wrongful possession<sup>12</sup>

- (16) AIR 1916 Mad 497 (408)  
 (72 92) 1872 1899 Low Bur Rul 401  
 (67) 7 Suth W R 220 (776 228)  
 (66) 5 Suth W R 219 (220)  
 (67) 8 Suth W R 172 (174)  
 (89) AIR 1939 Nag 23 (20) (Plaintiff in claim  
 suit establishing his title to property—Possession  
 of auction purchaser becomes wrongful so far as  
 mesne profits are concerned—Plaintiff is enti-  
 tled to claim mesne profits from him)  
 (36) AIR 1930 Cal 629 (637) (Where a settlement

session in execution of decree subsequently set aside]]

- 6 (36) AIR 1936 Cal 620 (637) (Where a settlement by the Government is *ultra vires* the possession of the person claiming under the Government is wrongful possession and the Government is liable for mesne profits to the person dispossessed)

that possession in order to be wrongful for purposes of a claim for mesne profits must have been obtained in consequence of some improper act.)

- 4 (17) AIR 1917 All 117 (118)

[See (36) AIR 1936 Mad 187 (187) (Plaintiff obtaining decree for possession against defendant — Defendant obtaining stay of execution is liable for mesne profits till possession is delivered although he may not himself be in

awarded though not mesne profits )

- (71) ■ Beng L R App 70 (71 72)  
(68) 3 Agra 11 (12)  
(26) AIR 1926 Cal 660 (661)  
(14) AIR 1914 Cal 209 (210) (Where there is only

sion under revenue sale not wrongful — No liability for damages but to an account of stewardship)

- (36) AIR 1936 Pom 276 (277) (Possession of parcel including land with notice of prior contract for sale of land to another person is not wrongful)

[See also (O) 3 C 1 L J 11 1-2 (185 186) (Pca

- 10 (21) AIR 1974 P C 213 (715) 46 All 29 51  
11 (79) 12 South W R 33 (36)  
(74) 22 South W R 533 (510)  
(89) 12 Cal L Rep 479 (13 4 1)  
12 (1965) 4 South W P M c 4 pp 7 (-)

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Note 5

- (3) The possession of a defaulter after the confirmation of the sale of the property under the Bengal Revenue Sales Act<sup>13</sup>
- (4) The possession of a person against whom a decree for possession has been passed<sup>14</sup>
- (5) The possession of the vendee after the pre-emptor has become entitled to possession that is, immediately on depositing the purchase money<sup>15</sup>

Where *A*, the manager of a joint Hindu family, alienates the family property for no necessity to *X*, and at the instance of *B*, another member of the family, the sale is held not binding on him, is *X* liable for any mesne profits and if so from what date? If, as has been seen in Note 3 *ante*, *B* can have no specific interest in the family property until partition and consequently cannot sue the manager for past mesne profits under this rule, it is conceived, he cannot also on the same grounds claim mesne profits from a purchaser from the manager until partition. It will also follow that after the institution of a suit by *B* for partition and mesne profits, his share becomes a specified interest from that date and mesne profits can be awarded against the purchaser from that date. This is the result arrived at in the undermentioned cases<sup>16</sup> but the grounds of the decision therein, it is respectfully submitted, are not correct. These cases proceed on the view that possession under a voidable sale is rightful possession until set aside and that therefore mesne profits can be awarded only from the institution of the suit where the plaintiff repudiates the transaction. Where a transaction is held not binding on a person and is therefore set aside against him, it must be deemed to be not binding on him from the very beginning of the transaction and not merely from the date of suit. In *Satgur Prasad v Harnarain Das*,<sup>17</sup> where *A* sued *B* for setting aside a deed executed by *A* to *B* on the ground of undue influence and fraud, it was held by their Lordships of the Privy Council that if the document was set aside, the defendant would be liable for mesne profits from the date when he got into possession under the deed, and not merely from the institution of the suit. It has been held by the Madras High Court<sup>18</sup> that, after the above decision of the Privy Council, it cannot be laid down as a general proposition that, where a person is in possession of property under a voidable transaction and a suit is brought against him to avoid the transaction and to get possession, there is no right to claim mesne profits prior to the date of the suit and that it must depend upon the circumstances of each case whether the plaintiff has been guilty of such conduct as to disentitle him to past profits.

*Extent of liability* — The period for which mesne profits can be awarded is clearly confined to the period during which the defendant was in possession<sup>19</sup> or to the period during which he was active in keeping the plaintiff out of possession.<sup>20</sup> Thus if the defendant is deprived of possession by virtue of an order of attachment under

13 (31) AIR 1931 Cal 605 (606)

14 (27) AIR 1927 Nag 9 (10) (Decree for posse

18 (36) AIR 1936 Mad 587 (593) I L R (1937) Mad 66

19 (31) AIR 1931 Cal 663 (664)

(19) AIR 1919 Cal 167 (167)

(67) 8 Suth W R 450 (450)

(68) 10 Suth W R 486 (487)

(13) 21 Ind Cas 590 (592) ■ Nag L R 145 (As

11 (17) AIR 1917 All 479 (480, 481) 32 All GL

(24) AIR 1924 Mad 81 (83) 46 Mad 815

(18) AIR 1918 Mad 178 (180) (AIR 1917 All 479, Relied on)

17 (32) AIR 1932 P C 89 (91) 59 Ind App 147 7 Luck 61 (P C)

without dispossession not enough)  
(69) 1 N W P H C R 273 (274)

action

Section 146 of the Code of Criminal Procedure<sup>21</sup> or is dispossessed by another trespasser<sup>22</sup> he cannot be held liable for the period during which he had no possession. A transferee from the defendant *pendente lite* is liable for mesne profits<sup>3</sup> but his liability starts only from the time he entered into possession<sup>24</sup>. Where a preliminary decree gives the plaintiff mesne profits before suit but does not specify the exact date from which the mesne profits are to be assessed the decree entitles the plaintiff to mesne profits before suit for such period as the law entitles him to sue for three years before the suit<sup>25</sup>.

**Principles relating to assessment** — Mesne profits observed Lord Hobhouse in delivering the judgment of the Board in *Grish Chunder v Shoshi Shikreswar* [1 L R 27 Calcutta 951 (1967) P O] are in the nature of damages which the Court may mould according to the justice of the case<sup>26</sup>. The assessment of mesne profits is therefore a matter for the exercise of judicial discretion in each case<sup>27</sup>. The question to be decided is the amount of profits which the wrongdoer while in possession received or which without wilful default he might have received<sup>28</sup>. The test is as pointed out

- 21 { 24 } AIR 1924 Cal 1010 (1012) 51 Cal 853  
[See also { 24 } AIR 1924 Mad 24 (225) (Suit for mesne profits by party defeated in § 145 proceedings—Need not vacate Magistrate's order)]  
22 { 97 } 24 Cal 418 (416)  
{ 28 } AIR 1928 Nag 103 (105) 18 Nag L R 195  
{ 69 } 11 Suth W R 444 (444) (Third party attach

- average)  
{ 23 } AIR 1923 Bom 87 (89 89) (No evidence to show receipt of profits — No decree can be passed)  
{ 69 } 1<sup>st</sup> Suth W R 104 (105) (Case of landlord dispossessing ryot)  
{ 71 } 15 Suth W R 428 (428) (Do)  
{ 03 } 30 Cal 536 (538) (Do)  
{ 23 } AIR 1923 Bom 893 (398) (Tenant holding over)  
{ 14 } AIR 1914 All 1 (2) (Do)  
{ 98 } AIR 1928 S ad 173 (174) (Held tenant liable for mesne profits)  
{ 91 } 18 Cal 540 (544) (PC) (Mesne profits relating to alluvial land — Court can presume cultivation)  
{ 89 } 16 Cal 40 (60 61) 15 Ind App 195 (PC) (Minor liable for mesne profits)  
(1864) 1 Suth W R M so 20 (20)  
{ 71 } 16 Suth W R 294 (294)  
(1865) 2 Suth W R Misc 50 (50) (Award limited to the amount claimed in plaint)

- with executor)  
23 { 11 } 11 Ind Cas 939 (939 940) 39 Cal 220  
24 { 21 } AIR 1921 Pat 102 (102) 6 Pat L Jour 166  
25 { 88 } AIR 1938 Cal 668 (566)  
26 { 88 } 40 Pun L R 448 (445)  
[See also { 88 } AIR 1938 All 8 (10 11) 1 L R (1938) All 71 (Mesne profits as undeposited damages—A claim for mesne profits is not a claim in respect of a debt within § 7 (1) (b) U P Encumbered Estates Act 1934)  
{ 87 } AIR 1937 Pat 568 (571)]  
27 { 81 } AIR 1931 Mad 650 (651 652) 54 Mad 955 (E B)  
{ 67 } 8 Suth W R 447 (447)

- { 89 } 8 Cal 225 (227) (Do)  
{ 66 } 8 Suth W R 197 (199) (PC) (Court cannot give mesne profits more than claimed although a greater amount may be proved)  
{ 71 } 15 Suth W R 61 (62) (Do)  
{ 67 } 7 Suth W R 140 (141)  
{ 69 } 9 Suth W R 217 (218)  
{ 71 } 16 Suth W R 307 (30)  
{ 34 } AIR 1934 All 465 (469)  
[See (1837) 2 Moo Ind App 72 (60 81 6) (PC) (For actual mode of calculation)]  
[But see { 70 } 14 Suth W R 8 (34)]

- a. ruled)  
{ 93 } AIR 19 3 Nag 55 (56) (Court bound to enquire)  
{ 11 } 1 W I L Jour 965 (969) (The plaintiff is not a defendant in one of the suits)  
{ 75 } 3 Suth W R 111 (11) (To be decided upon evidence)  
{ 31 } 7 C I I R 59 (1) (And not by striking

- { 11 } 11 I L Cas 401 (405) (Cal)  
{ 84 } 10 Cal 85 (91) 11 Ind App 67 (17)  
{ 1 } AIR 1921 Cal 363 (365)

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Note 5

by their Lordships of the Judicial Committee, not what the plaintiff has lost by his exclusion but what the defendant has or *might* reasonably have made by his wrongful possession<sup>29</sup> What the plaintiff might have made, or the character of possession before trespass, can only be relevant as evidence of what the defendant might with ordinary diligence have received<sup>30</sup> A trespasser cannot say that he kept the land waste and that therefore he is not liable for mesne profits<sup>31</sup>

The principles by which the Courts should be guided in awarding and assessing mesne profits are that the possession which has been wrongfully retained should not be a source of profit to the wrongful possessor, and that the person wrongfully kept out of possession is put in the same position financially as if right had been done<sup>32</sup>

Where the trespasser is in actual possession, the mesne profits should be awarded on the basis of the *actual* profits received or which might have been received with ordinary diligence less the deductions referred to in the undermentioned case<sup>33</sup> Where, however, the trespasser is not in actual possession, but has himself leased the property to third persons, he will be liable only to the extent of the rent which he *actually* received from his lessee, unless it can be shown that he might, with ordinary diligence, have

- (69) 11 Suth W R 461 (461)
- (72) 17 Suth W R 257 (258)
- (68) 10 Suth W R 463 (463)
- (99) 3 Cal W N 749 (749)
- (69) 11 Suth W R 538 (538)
- (69) 12 Suth W R 52 (54)
- (71) 7 Beng L R 175 (178)
- (75) 24 Suth W R 271 (272)
- (72) 17 Suth W R 849 (848)
- (71) 16 Suth W R 21 (22)
- (70) 13 Suth W R 87 (87, 88)
- (95) 8 C P L R 58 (60)
- (1862) 1862 Beng L R Sup Vol 1004n
- (74) 22 Suth W R 126 (129)
- (67) 8 Suth W R 101 (102)
- (73) 19 Suth W R 125 (126)
- (66) 3 Suth W R Misc 85 (85)
- 30. (30) AIR 1930 F C 82 (83) 9 Pat 621 57

Principle is correct )  
(89) 40 Pan L II 443 (445) (But the application of this general rule to a particular case will

- value )
- (09) 85 Cal 1000 (1000)
- 31. (16) AIR 1916 Mad 828 (830)
- 32. (17) AIR 1917 Pat 421 (422)
- 33. (26) AIR 1926 Cal 847 (847)
- (34) AIR 1934 Cal 503 (505)
- (02) 6 Cal W N 732 (734)
- (67) 4 Cal 566 (569)
- (28) AIR 1923 Cal 474 (475)
- (23) AIR 1923 Nag 64 (64)
- (09) 13 Oudh Cvs 154 (155, 156)

received more rent<sup>31</sup> And *prima facie* it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land and that the true owner wrongfully dispossessed has been a loser by that amount<sup>32</sup> But the lessee himself will, it is conceived, be also liable, as a person in wrongful possession, to the extent of the *actual profit* realised by him<sup>33</sup>

#### Illustration

B trespasses upon the land belonging to A and subsequently lets it out to C for a rental of Rs. 300 per annum. C gets a gross profit of Rs. 700 and the expenses of cultivation amount to Rs. 150. A sues B and C for possession and mesne profits. B will be liable to pay A Rs. 300 the rent which he received from C, and C will be liable for Rs. 250 the net profit realised by him after deducting the expenses of cultivation and after deducting the rent paid to B. But B and C cannot be made liable jointly and severally, for the total of the profits realised by both of them together<sup>37</sup>

Where two or more persons are in wrongful possession of the plaintiff's land, a decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiff out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution, or the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff's favour<sup>35</sup>

**Deductions** — In awarding mesne profits it is proper that the following deductions should be made from the gross profits of the defendant in possession<sup>39</sup>

34 (19) AIR 1929 P C 300 (808) 56 Ind App 290 57 Cal 1 (PC)

(34) AIR 1934 Cal 503 (504) (Decree against Secretary of State and his tenants — As against Secretary of State basis is that of rent actually received by him)

(26) AIR 1926 Cal 1233 (1234 1935)

(26) AIR 1926 Cal 860 (861)

(27) AIR 1927 Rang 116 (117)

(68) 9 Suth W R 445 (447)

(1862) 1862 Deng L R Sup Vol 1004n (1004n)

(91) 18 Cal 93 (107) 17 Ind App 90 (PC)

(191) 18 Cal 93 (107) 17 Ind App 90 (PC)

(191) 18 Cal 93 (107) 17 Ind App 90 (PC)

(191) 18 Cal 93 (107) 17 Ind App 90 (PC)

(191) 18 Cal 93 (107) 17 Ind App 90 (PC)

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(191) 18 Cal 93 (107) 17 Ind App 90 (PC)

on this point)

(20) AIR 1920 Pat 747 (748)

(81) 9 Cal L Rep 1 (5 G)

(10) 6 Ind Cas 69 (79 73) 37 Cal 559 (Effect of release of some of the joint tortfeasors considered)

(10) 11 Ind Cas 707 (707) (Cal) (No combination between the landlord and the tenant holder in disposing of the plaintiff established—No joint liability)

(1665) 9 Suth W R Misc 51 (57) (The liability under the decree in this case was joint and several — However, it was held that the claim must be limited to the particular lands with which particular defendants were shown to have been connected)

(66) 11 Suth W R 113 (114 115)

(66) 11 Suth W R 230 (230)

[See also (70) 14 Suth W R 76 (77)]

(70) 14 Suth W R 175 (176 177)

(72) 17 Suth W R 149 (149) (Not only the zamindar but also the *ujdar* who took *izara* of the suit land pending litigation is liable for mesne profits)

The following cases are no longer good law

(69) 12 Suth W R 354 (355)

(60) 6 Cal L Rep 357 (359)

[See also (72) 17 Suth W R 149 (149) (Zamindar liable with his *ujdar*)]

38 (39) AIR 1932 Cal 600 (617) 3 Cal 303

(33) AIR 1933 Cal 554 (554)

(73) 13 Suth W R 119 (119)

(73) 13 Suth W R 119 (119)

(73) 13 Suth W R 119 (119)

(73) 13 Suth W R 119 (119)

(73) 13 Suth W R 119 (119)

(73) 13 Suth W R 119 (119)

(73) 13 Suth W R 119 (119)

(73) 13 Suth W R 119 (119)

O. 20 R. 12

Note 5

37. (29) AIR 1929 P C 300 (303) 57 Cal 1 56 Ind App 290 (PC) (It was 6 AIR 1927 Cal 122)



## O. 20 R. 12

## Note 5

(1) Public charges such as Government rent, revenue or cesses which are made for the preservation of the estate<sup>40</sup>

(2) The cost of cultivation<sup>41</sup>

It was held in certain decisions<sup>42</sup> that the expenses of collecting rents and profits cannot be deducted unless the defendant entered upon the property under a *bona fide* claim of right. This view, however, has been held by the Calcutta High Court in a recent case<sup>43</sup> not to be good law after the decision of the Privy Council in *Secretary of State for India v Saroj Kumar Acharyya*<sup>44</sup>. So, it has been held by the Calcutta High Court<sup>45</sup> that even where the dispossession is wanton and malicious, in calculating the amount of mesne profits, collection charges are to be deducted from the gross realization. The Allahabad High Court<sup>46</sup> has held that it is only where there has been a gross and contemptuous trespass that no deduction should be allowed for collection charges, but that where the defendant is a tenant holding over after the expiry of the term of his lease under the mistaken impression that he was entitled to a renewal of the lease, he is entitled to claim a deduction on account of collection charges. A deduction of 10 per cent, it has been held, can be allowed as collection charges where there is no specific evidence on the point<sup>47</sup>. But where the defendant has elected to let in evidence as to the actual charges of collection and the result of such evidence shows that the collection charges were less than 10 per cent, the defendant is not entitled to a deduction of 10 per cent<sup>48</sup>.

It has been held that in the case of endowed lands, the judgment debtor is entitled to a deduction of the expenses incurred by him in carrying on the worship of

40 (94) 21 Cal 142 (148) 20 Ind App 160 (PC) (Government revenue)

(34) AIR 1934 Cal 503 (505)

(11) 12 Ind Cas 885 (886) (Mad)

(02) 24 All 376 (380) (Tortious and malicious trespass—Expenses of collection of rents incurred by trespasser not allowed—1 All 518 Followed)

(01) 23 All 252 (255 256 259) (Ordinary trespasser—Trespasser is entitled to charges of collection—1 All 518 distinguished)

(01) 23 All 252 (255 256 259)

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(71) 13 Suth W R 203 (203) (Expenses allowed at 10 per cent)

1 Hay 377

(29) AIR 1929 Oudh 55 (56)

(24) AIR 1924 Nag 427 (428) 20 Nag L R 112

(68) 7 Suth W R 78 (78, 79)

1 Hay 277 (Defendant cannot take credit for rent uncollected)

(02) 21 All 376 (380)

(01) 23 All 252 (256 259)

(68) 9 Suth W R 457 (458) (Suranjames allowed)

(09) 2 Ind Cas 464 (465) (All) (Trespasser *bona fide*)

(98) 20 All 203 (209) (Expenses incurred in sub

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(68) 9 Suth W R 369 (370) (Principle accepted though percentage reduced)

[See also (21) AIR 1921 Cal 699 (707)

(08) 7 Cal L Jour 197 (200)]

43 (38) AIR 1933 Cal 563 (563)

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(dissenting)

(59) 10 All 13 (15) (Possession tortious)

(1900) 22 All 262 (265 266) (Possession not *bona fide*)

(67) 7 Suth W R 230 (231)

(67) 9 Suth W R 473 (474) (Allowance should be made for expenditure of capital for extraordinary profits)

46. (37) AIR 1937 All 309 (333)

47. (35) AIR 1935 P C 49 (52) 65 Ind App 53

62 Cal 499 (1 C)

(37) AIR 1937 All 323 (333)

(38) AIR 1933 Cal 563 (563)

48 (33) AIR 1933 P C 189 (142) 32 Sind L R 492

(P C)

the idols<sup>40</sup> Under Section 2, clause 12 *ante*, mesne profits will not include profits due to the improvements made by the person in wrongful possession<sup>50</sup> See also the under-mentioned case<sup>51</sup>

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Notes 5-6

*Onus of proof* — It is for the plaintiff who comes into Court with a claim for mesne profits to establish first his right to immediate possession<sup>52</sup> The *onus* of proving the amount of profits actually received is on the person receiving them, but the burden of proving the profits that the person in occupation might with ordinary diligence have received therefrom, is on the person claiming them<sup>53</sup> If the plaintiff lets in *prima facie* evidence to show that the profits were somewhere about the sum he alleges, the burden of proving that they were less, shifts to the defendant<sup>54</sup>

**6. Interest forming part of mesne profits.** — There was no definition of 'mesne profits' in the Code of 1859 The definition in the Code of 1877 did not include interest on mesne profits as part of mesne profits But the Code of 1882 as well as the present Code includes interest as part of mesne profits<sup>1</sup> But this does not mean that the Court is obliged, in every case, to award interest<sup>2</sup> It may refuse interest having regard to the circumstances of the case<sup>3</sup> The reason is that mesne profits are in the nature of damages which the Court may mould according to the justice of the case<sup>4</sup> Under the old Code, where mesne profits were left to be ascertained in *execution*, the executing Court could grant interest even though the decree was silent in respect thereof<sup>5</sup> Under the present Code, however, the executing Court is not empowered to ascertain the mesne profits and cannot award any interest where both the *preliminary* and the *final* decrees are silent on the matter<sup>6</sup> The reason is that the duty of the

49 (72) 17 Suth W R 208 (200)

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in

51 consequence of a reversal of an execution sale, mesne profits are awarded to a tenant and against a landlord decree holder such mesne profits should not include the rent payable by the tenant to the landlord Such rent is liable to be deducted from the mesne profits)

52 (21) AIR 1921 Mad 42 (44 46) 44 Mad 987. (74) 21 Suth W R 276 (276, 277)

53. (25) AIR 1925 Mad 145 (146) 47 Mad 800

(83) AIR 1933 Mad 825 (825) 57 Mad 49

(25) AIR 1925 Mad 297 (297)

(72) 18 Suth W R 251 (251) (Actual receipts to be proved by the person in wrongful possession)

(185) 9 Suth W R 25 (25) (Do)

(24) AIR 1918 Mad 387 (389)

(35) AIR 1935 P C 49 (50) 62 Ind App 53 62

Cil 499 (1 C)

54 (21) AIR 1924 Nag 117 (118) 20 Nag LR 52

(74) 1 Suth W R 269 (270)

(82) Cil 413 (351)

[See also (70) 2 N. W. P. H. R 217 (270) (damages in papers filed by plaintiff *prima facie* evidence of the profits of the estate)]

Note 6

1 (35) AIR 1934 P C 159 (142) 32 Sind L R 492 (1 C)

had been kept out of their money by conduct of defendants it is only fair that defendants should pay a reasonable rate of interest upon the sum awarded)

(31) AIR 1931 Mad 513 (520) (Interest may be disallowed on special grounds)

(16) AIR 1916 Mad 635 (896) (Power to order interest on mesne profits beyond three years is discretionary)

(21) AIR 1921 Pat 430 (432) (Rate of interest on mesne profits)

4. (1900) 27 Cal 91 (967) 27 Ind App 110 (P C)

5. (1900) 27 Cal 951 (967) 27 Ind App 110 (P C).

(12) 17 Ind Cas 915 (916) (All)

(03) 25 All 275 (276)

(14) 18 Cil W N 76n

(09) 2 In L Cas 464 (463) (All)

[See (21) AIR 1921 Cal 999 (700)]

[See also (07) 6 Cal L Jour 462 (470, 471)]

6. (31) AIR 1931 Mad 550 (559) 54 Mad 953

(11) (Overruling AIR 1927 Mad 954)

(1900) 22 All 262 (263)

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Notes 6-7

executing Court is simply to carry out the decree and not to *add* to it or *vary* it in any way. But when the *preliminary* decree is silent as to interest the Court can award interest in the *final* decree.

If mesne profits are payable month to month or at intervals of other periods, then interest also should be calculated according to such periods.<sup>7</sup> The rate of interest usually awarded by the Court is six per cent.<sup>8</sup> In the undermentioned decision<sup>9</sup> the Calcutta High Court made a distinction between the period before the delivery of possession of the property to the plaintiff and the period after such delivery and held that while in respect of the former period a higher rate of interest should be paid in respect of the latter period it was enough if the usual court rate allowed on money decrees was paid. But this view has been criticised by the Privy Council<sup>10</sup> which has held that there is no reason for making any such distinction and that in the absence

a statutory provision or a special contract there is no ground for awarding interest on mesne profits at a higher rate up to the date of delivery of possession and at a lower rate subsequently. As to the period for which the interest should be calculated see the undermentioned cases.<sup>11</sup> Where under a redemption decree accounts are directed to be taken as to the mesne profits payable by the defendant and it is also directed that the plaintiff should pay interest on the mortgage money from the date on which it fell due to the date on which it was deposited in Court it is proper that the plaintiff should be charged with counter interest on the amount thus due as interest from him.<sup>12</sup>

**7. Value of mesne profits, if affects jurisdiction** — See Note 5 to Section 6 and the undermentioned case.<sup>1</sup>

- 499 (P C) (In absence of special circumstances 6 per cent is fair rate of interest)  
(37) AIR 1937 All 898 (833)  
(30) AIR 1936 All 549 (558)  
9 (08) 7 Cal L Jour 197 (201)  
10 (37) AIR 1937 P C 148 (146) 64 Ind App 940 16 Pat 882 81 Sind L R 800 (P C)  
[See also (38) AIR 1938 Cal 568 (568) (The above Privy Council view followed)]  
11 (24) AIR 1924 All 801 (807) 46 All 849 (Preliminary decree awarding mesne profits — But amount ascertained subsequently — Interest to be calculated from the date of the preliminary decree)  
(80) G Cal L Rep 357 (300) (Case under the 1877 Code — Interest may be allowed from commencement of suit)  
(69) 11 South W R 95 (25) (Under the Code of 1877)  
(79) 8 Cal L Rep 517 (519) (Interest can be calculated upon the rental at the end of each year)  
(03) 80 Cal 506 (507) (Twelve per cent awarded)  
(19) 14 Ind Cas 396 (398) (Mad) (3½ per cent held proper)  
(78) 8 Cal 654 (661) (Interest Act no bar)  
(21) AIR 1921 Loh 234 (235) (12 per cent awarded)  
(37) AIR 1937 P C 148 (146) 16 Pat 359 64 Ind App 240 81 Sind L R 800 (P C) (Rate of interest depends on variety of circumstances but in absence of special circumstances 6 per cent is fair rate)  
(35) AIR 1939 Cal 563 (564) (Do)  
(35) AIR 1935 PC 49 (57) 67 Ind App 53 67 Cal  
— Interest at six per cent to be calculated upon each year's mesne profits up to date of decree — Interest on consolidated sum from date of ascertainment)  
(24) AIR 1924 Pat 761 (768) 4 Pat 57 (Interest up to date of realisation of mesne profits can be allowed)  
12 (39) AIR 1938 P C 180 (147) 32 Sind L R 492 (P C)  
**Note 7**  
1 (37) AIR 1937 Cal 761 (762) 1 L R (1937)  
2 Cal 176 (Person deliberately undervaluing mesne profits accruing before institution of suit)

**B. Court-fees.**—Under Section 11 of the Court-fees Act (VII of 1870), where the amount of *past mesne profits* (i. e., profits before the date of the suit) decreed or ascertained is in excess of the amount claimed in the plaint, execution of the decree will not be allowed unless the deficient court-fee is paid<sup>1</sup>. But the Court has no jurisdiction to levy court-fee on the *application* to ascertain the profits after the preliminary decree<sup>2</sup>. The fee can be levied only after ascertainment and before execution. Nor can the Court refuse to execute the decree for *possession* because the court-fee due in respect of mesne profits is not paid<sup>3</sup>.

No court-fee is payable on *future mesne profits* (i. e., profits after the institution of the suit) under Section 11 of the Court-fees Act<sup>4</sup>. In Madras, however, that Section has been amended by Madras Act V of 1922 by which such profits are chargeable with court-fee and the decree will not be executed until such fee is paid<sup>5</sup>.

Where a court-fee is payable on mesne profits, it is to be calculated *ad valorem* on the amount claimed or decreed<sup>6</sup>.

**9. Right to apply for ascertainment of future mesne profits, when arises.**—The right to apply for the ascertainment of future mesne profits arises on the happening of any one of the three events mentioned in clause (c) and not on the date of the preliminary decree itself<sup>1</sup>. Where a decree for possession is made conditional on the payment of a certain sum of money, the decree-holder will not be entitled to mesne profits until such payment is made<sup>2</sup>.

*Decree silent as to future mesne profits*—Where the right to future mesne profits is *negated* in the preliminary decree, the Court has *no jurisdiction* to award the same in a *final* decree<sup>3</sup>. Similarly, where the decree is *silent* as to the mesne profits it cannot be awarded in execution<sup>4</sup>. But where the decree simply says, "the

—He cannot claim greater amount exceeding pecuniary jurisdiction of the Court)

#### Note 8

1. ('15) AIR 1915 Cal 696 (693)  
( '33) AIR 1933 Pat 81 (83) 12 Pat 183  
( '97) 21 Cal 173 (176)

Pat 183  
( '33) AIR 1933 Pat 231 (235) . 12 Pat 694 ]

#### Note 11

1. ('24) AIR 1924 Pat 781 (782) 4 Pat 57  
( '24) AIR 1924 Pat 781 (782) 4 Pat 57

4. ('01) 15 Bom 416 (418)  
( '14) AIR 1914 Cal 859 (859)  
( '10) 5 Ind Cas 880 (880) (Mad) (Case before Madras Act V of 1922)  
( '93) 21 Mad 371 (372) (Do)  
[See however ( '07) 30 Mad 82 (34) (Where court fee was directed to be paid on subsequent rent awarded—Case before Madras Act V of 1922)  
( '31) 129 Ind Cas 662 (663, 664) (Pat).  
( '20) AIR 1920 Low Bur 94 (95, 96) 10 Low Bur Rul 276 ]  
5. [See ( '37) AIR 1937 Mad 46 (48) I L R

2.  
3.  
[See ( '31) 1931 Mad WN 846 (847) (Preliminary

- 4  
( '75) 24 Suth W R 193 (195) . 2 Ind App 219 (PC).  
( '70) 13 Suth W R 11 (13)  
( '74) 22 Suth W R 160 (161)  
( '70) 19 Suth W R 154 (155).  
( '71) 15 Suth W R 232 (233)  
( '51) 7 All 197 (199)  
( '01) 6 Cal W N 672 (674)

- 1000 ]  
6. ( '31) AIR 1931 All 539 (539)  
( '23) AIR 1923 N 119 (191) 43 M 1 2-0  
( '20) AIR 1920 Pat 522 (522)

O. 20 R. 12  
Notes 6-7

executing Court is simply to carry out the decree and not to add to it or vary it in any way. But when the preliminary decree is silent as to interest, the Court can award interest in the final decree.

If mesne profits are payable month to month or at intervals of other periods, then interest also should be calculated according to such periods.<sup>7</sup> The rate of interest usually awarded by the Court is six per cent.<sup>8</sup> In the undermentioned decision,<sup>9</sup> the Calcutta High Court made a distinction between the period before the delivery of possession of the property to the plaintiff and the period after such delivery and held that while in respect of the former period a higher rate of interest should be paid, in respect of the latter period it was enough if the usual court rate allowed on money decrees was paid. But this view has been criticised by the Privy Council<sup>10</sup> which has held that there is no reason for making any such distinction and that in the absence

a statutory provision or a special contract there is no ground for awarding interest on mesne profits at a higher rate up to the date of delivery of possession and at a lower rate subsequently. As to the period for which the interest should be calculated, see the undermentioned cases.<sup>11</sup> Where under a redemption decree accounts are directed to be taken as to the mesne profits payable by the defendant and it is also directed that the plaintiff should pay interest on the mortgage money from the date on which it fell due to the date on which it was deposited in Court, it is proper that the plaintiff should be charged with counter interest on the amount thus due as interest from him.<sup>12</sup>

**7. Value of mesne profits, if affects jurisdiction.**—See Note 5 to Section 6 and the undermentioned case.<sup>1</sup>

*See also the following cases under the old Code holding that executing Court cannot allow in*

499 (P C) (In absence of special circumstances 6 per cent is fair rate of interest)

are  
earned or might have been earned by the wrong  
doer yearly interest on the profits must be  
calculated yearly and year by year)

8 (22) AIR 1922 All 117 (118) 44 All 579

(21) AIR 1921 Cal 699 (707) (Bona fides of ten-

decree)

(80) 6 Cal L Rep 357 (360) (Case under the 1877  
Code — Interest may be allowed from com-  
mencement of suit)

(68) 11 South W R 25 (25) (Under the Code of

in the discretion of Court Twelve per cent  
allowed)

(79) 8 Cal L Rep 517 (519) (Interest can be cal-  
culated upon the rental at the end of each year)

(93) 30 Cal 506 (507) (Twelve per cent awarded)

(19) 14 Ind Cas 396 (395) (Mad) (3½ per cent held  
proper)

(78) 8 Cal 654 (661) (Interest Act no bar)

(21) AIR 1921 Lah 234 (235) (12 per cent award  
ed)

(37) AIR 1937 P C 143 (146) 16 Pat 352 III Ind  
App 240 31 Sind L R 300 (P C) (Rate of in-  
terest depends on variety of circumstances but  
in absence of special circumstance, 6 per cent is  
fair rate)

(5-) AIR 1933 Cal 563 (56-) (Do)

(35) AIR 1935 PC 49 (52) 62 Ind App 62 Cal

—Interest at six per cent to be calculated upon  
each year's mesne profits up to date of decree —  
Interest on consolidated sum from date of  
ascertainment)

(21) AIR 1924 Pat 761 (763) 4 Pat 57 (Interest  
up to date of realisation of mesne profits can be  
allowed)

III (38) AIR 1935 P C 189 (142) 32 Sind L R  
492 (P C)

**Note 7**

1 (37) AIR 1937 Cal 761 (762) 1 L R (1937)

2 Cal 176 (Person deliberately undervaluing  
mesne profits accruing before institution of suit)

suit for such profits will not be barred, even though the plaintiff omitted to apply for a final decree.<sup>2</sup> See also the undermentioned cases<sup>3</sup> and Note 125 to Section 11 and Note 24 to Order 2 Rule 2. O. 20 R. 13  
Notes 13-15

**14. Order after preliminary decree determining period and mode of accounting, if a decree.** — An order passed in supplemental proceedings after the preliminary decree with regard to the mode of accounting and the period for which the defendant is liable for mesne profits amounts, according to the High Court of Calcutta,<sup>1</sup> to another preliminary decree, but according to the High Court of Allahabad,<sup>2</sup> only to an interlocutory order in a pending suit. For a fuller discussion, see Note 10 to Section 2, clause (2).

**15. Appeal.** — Under the old Code the ascertainment of mesne profits was done in execution and the order relating thereto was appealable as having the force of a decree under Section 244 (Section 47). Under the present Code, the ascertainment is made in the *suit itself* and the result of it should be embodied in a *final decree* which is appealable as such.<sup>1</sup>

When the decree of the trial Court dismissing a suit for possession and mesne profits is reversed in appeal, the Appellate Court should not remand the case for enquiring into the mesne profits but should pass a preliminary decree for possession directing an enquiry into mesne profits under this rule.<sup>2</sup> *Vide also* the amendment made to this rule by the High Court of Madras.

### R. 13. [S. 213.] (1) Where a suit is for an account of any property and for its due administration<sup>2</sup> under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary

O. 20 R. 13

Decree in administration suit.

(16) AIR 1916 Cal 678 (674) (This rule contemplates relation between only plaintiff and defendant.)

mesne profits in execution — Application dismissed.]

a second suit for future mesne profits was not barred, see the following cases.

(187) 7 Suth W R 364 (365)

(81) 8 Cal 178 (190). ■ Ind App 197 (PC)

(84) 7 All 170 (178, 174)

future mesne profits—Fresh suit for such mesne profits not barred)

Note 14

1. (24) AIR 1924 Cal 160 (162)

Note 15

1. (24) AIR 1924 Bom 286 (235). ■ 52 Bom 360

It is not a petition praying ascertainment of the profits for default — Subsequent fresh petition not barred as *res judicata*)

(170) 2 N W P H O R 176 (177) (Decree silent as to mesne profits—Decree holder applying for

**O. 20 R. 13** decree, ordering such accounts and inquiries to be taken and made,  
**Notes 1-2** and giving such other directions as it thinks fit

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts<sup>8</sup> and liabilities, the same rules shall be observed as to the respective rights of secured<sup>9</sup> and unsecured creditors and as to debts and liabilities provable,<sup>10</sup> and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code

[1877, S 213]

### Synopsis

- |  |   |
|--|---|
| 1 Analogous law                                  | ■ Estate insufficient to pay all the debts  |
| 2 Administration suits                           | — Sub rule (2)                              |
| 3 Hindu Law                                      | 9 Rights of secured creditors See Note 8    |
| 4 Mahomedan Law                                  | 10 Provable debts and liabilities under the |
| 5 Who may file an administration suit            | Insolvency Act                              |
| 5a Against whom administration suit can be filed | 11 Barred debt                              |
| ■ Plaintiff in administration suits              | 12 Court fees                               |
| 7 Decree in administration suits                 | 13 Appeal                                   |

### Other Topics (miscellaneous)

- |  |   |
|--|---|
| Costs out of the estate See Note 7             | Priority for individual creditors in execution      |
| Inapplicability to suits against administrator | See Note 7  |
| General See Note 8                             | Secured creditor whether affected See Notes 7 and 8 |
| Jurisdiction See Note 2                        | Suits by creditors See Note 5                       |
| Principles of distribution See Note 10         | Suits by executors See Note 5                       |

**1. Analogous law.** — This rule corresponds to Section 34 and Part I Schedule I of the Administration of Estates Act 1925 (15 Geo. V, Ch 23) The main difference between Part I Schedule I and this rule consists in the addition of the words 'and as to the priorities of debts and liabilities after the words 'contingent liabilities respectively' See Note 8 *infra*

**2 Administration suits** — 'Administration' means the management of the estate of a deceased person who has left no executor<sup>1</sup> It consists in—

(1) Payment of the funeral expenses of the deceased

### Order 20 Rule 13 — Note 2

1 (3) AIR 1915 Pesh 63 (G) (Where a debtor asks and her son to take up the administration of his estate for liquidation of his liabilities)

and a composition deed is drawn up a decree passed in accordance with this deed is not an administration decree)

- (ii) Collection, realisation and preservation of assets
- (iii) Payment of debts and legacies
- (iv) Acts in respect of adverse claims to assets
- (v) Dealings with creditors and legatees
- (vi) Distribution finally among the heirs and next of kin<sup>2</sup>

The object of an administration suit is to have the estate administered under a decree of Court. In such a suit the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled and a decree is made for the benefit of creditors and other persons entitled to the property<sup>3</sup>.

Thus, the suit is, in essence, one for an account and application of the estate of the deceased, for the satisfaction of the dues of all the creditors<sup>4</sup>. It cannot be dismissed at the preliminary stage except where the plaint discloses no cause of action or the suit is premature<sup>5</sup>.

An administration suit is not a suit relating to immovable property and, therefore, the Court is not incompetent to administer properties or to deal with questions of title in respect of properties situate outside its jurisdiction<sup>6</sup>. Again, the jurisdiction of the Court, as to such a suit, does not depend upon the fact whether the deceased is one to whose estate the Succession Act applies<sup>7</sup>.

Though sub section (1) does not expressly prohibit the filing of an administration suit in respect of the property of a living person, it has been held by the High Court of Bombay that such a suit is not maintainable<sup>8</sup>.

Before the Court takes upon itself the administration of the property, the preliminary decree for administration should be passed<sup>9</sup>. The Court may also make an order for grant of maintenance *pendente lite* but this power has to be exercised with caution<sup>10</sup>. Where a preliminary decree has been passed under this rule, the Court can stay proceedings taken by another decree holder and direct him to come in and prove his claim in the administration suit<sup>11</sup>. It has been held that a creditor who has neglected to come in under the administration decree cannot subsequently sue the creditors who have proved their debts and received dividends, for a re distribution of the assets and for a *pro rata* refund by such creditors<sup>12</sup>.

**3. Hindu Law.**—An administration suit is filed only in respect of the estate of the deceased and therefore if the property of a Hindu passes by *survivorship*, there is no estate of the deceased left for administration and a suit for administration is not maintainable<sup>1</sup>.

**4. Mahomedan Law.**—Under the Mahomedan law, the funeral expenses of the deceased should be defrayed first from out of the assets, then his debts and then

parties from defendants alleged to be in wrongful possession of them cannot be held to be an



**O. 20 R. 13** decree, ordering such accounts and inquiries to be taken and made,  
**Notes 1-2** and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts<sup>8</sup> and liabilities, the same rules shall be observed as to the respective rights of secured<sup>9</sup> and unsecured creditors and as to debts and liabilities provable,<sup>10</sup> and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

[1877, S. 213.]

### Synopsis

1. Analogous law.
2. Administration suits
- 3 Hindu Law.
- 4 Mahomedan Law.
5. Who may file an administration suit
- 5a Against whom administration suit can be filed
6. Plaintiff in administration suits.
- 7 Decree in administration suits.

- 8 Estate insufficient to pay all the debts  
— Sub-rule (2)
9. Rights of secured creditors. See Note 8
10. Provable debts and liabilities under the Insolvency Act.
11. Barred debt.
12. Court fees.
13. Appeal.

### Other Topics (miscellaneous)

Costs out of the estate : See Note 7.

Inapplicability to suits against Administrator

General : See Note 8

Jurisdiction : See Note 2

Principles of distribution : See Note 10

Priority for individual creditors in execution  
See Note 7

Secured creditor, whether affected : See Notes 7 and 8

Suits by creditors : See Note 5

Suits by executors : See Note 5

**1. Analogous law.** — This rule corresponds to Section 34 and Part I, Schedule I of the Administration of Estates Act, 1925, (15 Geo. V, Ch 23) The main difference between Part I, Schedule I and this rule consists in the addition of the words "and as to the priorities of debts and liabilities" after the words "contingent liabilities respectively" See Note 8 *infra*.

**2. Administration suits.** — "Administration" means the management of the estate of a deceased person who has left no executor.<sup>1</sup> It consists in —

(1) Payment of the funeral expenses of the deceased

### Order 20 Rule 13 — Note 2

1. (35) AIR 1935 Pesh 63 (64) (Where a debtor asks another person to take up the administration of his estate for liquidation of his liabilities

and a composition deed is drawn up a decree passed in accordance with this deed is not an administration decree)

**7. Decree in administration suits.** — In drawing up decrees in administration suits the forms prescribed in the Code should be followed as far as possible<sup>1</sup> For forms of preliminary decree, see Schedule I, Appendix D, Forms Nos 17 and 19, *infra*, and for forms of final decrees, see Forms Nos 18 and 20, *infra*. In a suit by a creditor for administration, it cannot be held that the other creditors are represented by the plaintiff in the sense that they are, in effect, *parties* to the suit<sup>2</sup>. But a decree for the administration of the estate of a deceased person is a decree in favour of all creditors and persons entitled to the effects of the deceased, and therefore a creditor who has attached the property of the deceased is not entitled to any priority in respect of his claims and will only rank among other creditors<sup>3</sup>. But the pendency of an administration suit will not debar a secured creditor from enforcing his security.<sup>4</sup> After the passing of the preliminary decree it is not proper for the Court to sanction a compromise to which all parties to the suit are not parties,<sup>5</sup> or to discharge the receiver appointed by the Court and direct him to make over the estate to the plaintiff.<sup>6</sup> So also, a supplementary decree cannot be passed after the preliminary decree has been passed, the only other decree that can be passed in the case after the preliminary decree being the final decree.<sup>7</sup>

Although a Court in pursuance of a decree in an administration suit is competent to direct one of the parties to the suit to restore or hand over to the administrator or receiver assets belonging to the estate which are in the possession of such party, it is not open to the Court in an administration suit to direct a debtor to pay a debt (which is disputed by the alleged debtor) to the administrator or the receiver.<sup>8</sup>

The Code makes no provision as to when a final decree in an administration suit should be passed or as to the contents of such decree, this must depend upon the circumstances in each case.<sup>9</sup>

**8. Estate insufficient to pay all the debts**—Sub-rule (2). — Where the estate of the deceased, in respect of which administration by Court is sought, is *insufficient* to pay all the debts of the deceased in full, sub rule (2) will apply. Under that sub rule, the law of insolvency in respect of the following heads should be observed in the administration of such estates —

(i) as to the respective rights of secured and unsecured creditors (see Sections 28 and 47 of the Provincial Insolvency Act, 1920, and Section 48 and clauses 9 to 17 of Schedule II of the Presidency Towns Insolvency Act, 1909),

(ii) as to the debts and liabilities of the estate provable (see Sections 45 and 46 of the Provincial Insolvency Act, 1920, and Sections 46 and 48 of the Presidency Towns Insolvency Act, 1909), and

(iii) as to the valuation of annuities and future and contingent liabilities (see

#### Note 7

1. (05) 32 Cal 561 (566)

(See (36) AIR 1936 Lah 879 (882) (The forms are merely to be used as a guide in framing decrees they can be varied and adopted according to the circumstances in each case))

[See also (25) AIR 1925 P 261 (262) (P C) (Change in form of preliminary decree was

4. (81) 7 Cal 733 (735)

5. (05) 32 Cal 561 (565-566)

6. (01) 5 Cal W N 417 (419)

7. (38) AIR 1933 Rang 372 (374)

8. (36) AIR 1936 Lah 865 (863)

9. 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Notes 4-6

the legacies The residue is to be thereafter distributed amongst the heirs of the deceased<sup>1</sup> A suit by the heirs or the creditors or the legatees of a deceased Mahomedan for the enforcement of their claims against the estate of the deceased becomes essentially a suit for *administration*<sup>2</sup> though in such cases partition of the estate may be an incident thereof<sup>3</sup> and even the heirs of the deceased who are not parties to such a suit are bound by the proceedings and cannot claim anything but what remains after the debts of the deceased have been paid<sup>4</sup>

**5. Who may file an administration suit** — A suit for administration of the estate may be instituted by any person *interested in the estate* Thus the following persons may maintain a suit for administration —

- (i) Any person entitled to a share in the deceased's estate such as next of kin<sup>1</sup>
- (ii) A legatee or an annuitant<sup>2</sup>
- (iii) A creditor of the deceased But the creditor should sue on behalf of himself and on behalf of all the creditors<sup>3</sup>
- (iv) An executor or administrator where there are disputes between the heirs or the legatees and where there is a doubt as to the manner in which he should administer the estate<sup>4</sup>
- (v) The legal personal representative of the deceased<sup>5</sup>

An order for administration will not be made in a suit therefor, unless the plaintiff proves his claim or establishes his right to bring the suit<sup>6</sup> But it is not obligatory on the Court to pass a decree for administration if the defendant before decree satisfies the plaintiff's claim It may dismiss the suit<sup>7</sup>

**5a Against whom administration suit can be filed** — A suit for administration is maintainable against persons who were in possession of the property during the lifetime of the deceased as agents or managers and who continued to be in possession after his death<sup>1</sup> In an administration suit where a legatee sues the executor for payment of a legacy and for administration of the estate of the deceased the executor, if there is one is the only necessary party and not the other legatees<sup>2</sup> The next of kin and the intermeddler with the estate of the deceased are proper parties to an administration suit<sup>3</sup>

**6 Plaint in administration suits** — As to the form of plaint in such suits see Schedule I Appendix A Forms Nos 41 to 44

#### Note 4

- 1 (82) 8 Cal 20 (24)
- 2 (15) AIR 1915 Cal 655 (657) (Mahomedan widow can have her claim to dower settled only by administration suit)
- (97) 1 Cal W N 836 (837) (Heirs opposing probate may maintain suit for administration against administrator *pendente lite*)
- (87) 11 Cal 370 (374) (Creditor's suit—Treated as administration suit)
- (79) 4 Cal 142 (159) (FB) (Do)
- (75) 24 Suth W R 3 (4) (Do)
- 3 (28) AIR 1908 Mad 760 (769 763)
- 4 (94) 21 Cal 311 (317 318)

#### Note 5

- 1 (28) AIR 1908 Mad 760 (762)
- 2 (1877) 7 Ch D 68 (59) Wollastan v Wollastan

- 3 (75) 15 Beng L R 296 (301)
- (84) 10 Cal 713 (734)

vested interest in property)

- 4 (09) 11 Ind Cas 164 (165) 33 Bom 499
- 5 (30) AIR 1932 P O 146 (151) (PC)
- 6 (1887) 86 Ch D 269 (276 277) Battany v Wallford
- 7 (14) AIR 1914 Mad 646 (647)

#### Note 5a

- 1 (30) AIR 1932 Lah 328 (330)
- 2 (32) AIR 1932 Cal 337 (338) 59 Cal 77
- 3 (33) AIR 1933 Mad 74 (79) 56 Mad 273

**R. 14.** [S 214] (1) Where the Court decrees a claim to pre-emption<sup>2</sup> in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall —

Decree in pre-emption  
suit

- (a) specify a day on or before which the purchase money shall be so paid,<sup>6</sup> and
- (b) direct that on payment into Court<sup>9</sup> of such purchase money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued<sup>8</sup> from the date of such payment, but that, if the purchase-money and the costs if any are not so paid, the suit shall be dismissed with costs

(2) Where the Court has adjudicated upon rival claims to pre-emption,<sup>15</sup> the decree shall direct, —

- (a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and
- (b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions

[1877, S 214]

### Synopsis

1 Legislative changes

2 Pre-emption

3 Pre-emption under Mahomedan law

4 Pre-emption by custom

5 Pre-emption by contract

6 Shall specify a day before which purchase-money shall be paid

7 Extension of time

8 Plaintiff's title when accrues

9 Payment into Court

10 Tender of money, if sufficient.

11 On or before the day referred to \* See Note

12 Right to rents and profits

13 Vendor's title in pre-emption suits.

14 Set-off of costs against purchase money

15 Rival pre-emptors — Sub rule (2)

16 Appeal

O. 20 R. 14  
Notes 1-2

## Other Topics (miscellaneous)

Conditional decrees under this rule See Note 16  
Effect of non payment — If the decree should state See Note 7  
Inapplicability where vendee not entitled to immediate possession See Note 8

Payment of costs under this rule See Note 9  
Payment of money and rights thereto Note 9  
Value for jurisdiction See Note 2

## 1. Legislative changes. —

1 The words "whose title thereto shall be deemed to have accrued from the date of such payment" are new See Note 8, *infra*

## 2 Sub-rule (2) is new

2. **Pre-emption.**—The right of pre-emption is the right of a person to purchase property before opportunity to purchase it is offered to others<sup>1</sup> Such a right may, however, be defeated by waiver or acquiescence on the part of the claimant<sup>2</sup>

The doctrine of pre-emption does not apply to *execution sales*, apparently because the would-be pre-emptor can, in such a case, as well have bid at the auction<sup>3</sup>

The right of pre-emption arises only on a *sale* of immovable property.<sup>4</sup>

Where a plaintiff having a right to pre-empt joins with himself, in a suit for pre-emption, a *stranger*, he forfeits his right to pre-empt,<sup>5</sup> but not so where the other persons joined are members of the plaintiff's family<sup>6</sup> See also the undermentioned cases<sup>7</sup>

## Order 20 Rule 14 — Note 2

1. The Concise Oxford Dictionary  
2. (08) 85 Cal 402 (411) 35 Ind App 60 (PC)  
(Delay in asserting right to pre-emption construed as waiver)

(89) 11 All 164 (174) (Acquiescence in mortgage by conditional sale is not relinquishment of right of pre-emption upon conditional sale becoming absolute)

*Merely fact that negotiations were made with vendee without resorting to suit does not amount to waiver*

(94) 16 All 800 (802)

(97) 19 All 834 (836)

3. (05) 27 All 670 (677) (Private sale by receiver is not a compulsory sale and right of pre-emption exists)

(83) AIR 1932 Nag 44 (46) 28 Nag L R 11  
(Sale in execution in presence of a compromise decree—No right of pre-emption)

(71) 15 Suth W R 455 (466)

4. (92) 14 All 333 (335) (Gift—No right of pre-emption)

(88) 15 Cal 184 (186) (Perpetual lease—No right

(83) AIR 1933 Lah 491 (493) 14 Lah 421.

(01) 23 All 129 (130) (Guardian of minor is competent to exercise or refuse to exercise on behalf of the minor a right of pre-emption)

(04) 26 All 549 (553) (In suit for pre-emption vendee is not a necessary party)

(11) 9 Ind Cas 414 (414) (Oudh) (Jurisdiction of Court is to be decided by the valuation set forth in the plaint)

(87) 9 All 471 (473) (Price alleged in deed of sale not true contract price — Vendor and vendee concealing real price — Court should ascertain the market price at the time of the sale)

(97) 19 All 148 (152) (Sale to two, one of whom alone is liable to be pre-empted—Interest separable—Pre-emption only of his interest allowable)

(93) 20 All 100 (102) (Land having been sold to stranger, subsequently re-sold by the stranger before suit to a co-sharer having equal rights with those seeking pre-emption—No right of pre-emption)

(99) 21 All 374 (379) (Right to pre-empt must subsist both at the time of the sale and at the time of the institution of suit)

(93) 21 All 441 (444, 445) (Right to pre-empt lost during pendency of suit — Suit to be dismissed)

(96) 18 All 382 (384) (Claimant for pre-emption under *wajab al arza* does not forfeit his right by

**3. Pre-emption under Mahomedan law** — The Mahomedan law is the only system of law which provides substantive rules relating to pre-emption<sup>1</sup> In the Madras Presidency, the right of pre-emption under the Mahomedan law is not recognised on the ground of its being opposed to public policy which favours the free and unrestricted transfer of property<sup>2</sup>

The undermentioned are some of the cases bearing upon the Mahomedan law of pre-emption<sup>3</sup> See also the Punjab Pre-emption Act (I of 1913) Section 11 the Agra Pre-emption Act, 1922, and the Oudh Laws Act 1876

**4. Pre-emption by custom.** — A right of pre-emption is recognised by custom among Hindus in Behar,<sup>4</sup> Gujarat<sup>5</sup> and the United Provinces<sup>6</sup> See also the under-mentioned cases<sup>4</sup>

pre-emption conveyed by one transfer—See also (1884) 6 All 423 (426 427)  
(89) 11 All 109 (117) (Claimant disqualified to sue as to part cannot claim the remainder)

**Note 3**

1 (89) 5 All 110 (118 117)  
(88) 5 All 180 (182)  
2 (70) 6 Mad II O R 26 (81)  
3 (96) 20 All 88 (82) (Sunnis—Plaintiff dying before suit—Right does not survive to his heirs—See however 12 Ind Cas 720 (720) (Bom)—Heirs and representatives of executors or

3 [See for instance (90) 13 All 284 (284 288)]

4 *One coparcener has no right of pre-emption against another*  
(66) 6 Suth W R 250 (252)  
(79) 4 Cal 831 (834 835) (FB)  
(87) 14 Cal 761 (766)

*Persons not entitled to pre-empt*

(98) 20 All 419 (420) (Wajub ul arz — Co-sharers and owners of separate plots of muafi land — Musafidars held not entitled to pre-empt)  
(01) 23 All 427 (428) (Hissedar of superior class not entitled to pre-emption upon sale to his descendant of inferior class)  
(91) 16 All 412 (414)  
(95) 17 All 447 (450) (Vendor who is not a co-sharer)

Transaction complete and right of pre-emption arose)

(06) 28 All 127 (129) (Owner of the dominant tenement has in respect of a sale of the servient

(84) 6 All 17 (19) (Maintenance holder)

*Classes of persons entitled to pre-empt*

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(87) 9 All 480 (483) (Recorded co-sharer to be preferred to person claiming to be co-sharer by virtue of benami purchase)

*Miscellaneous*

(1900) 22 All 1 (11 22, 32) (FB) (Perfect partition extinguishes co-sharer's right of pre-emption)

(14) AIR 1914 All 75 (75 76) 36 All 450 (Claim can be based in the alternative on contract custom or Mahomedan law)

(70) 3 N W P H G R 222 (223) (Claims to pre-emption based on contract as well as custom may be united in one suit)

(07) 23 All 590 (592) (Generally custom to be presumed to be co-extensive with Mahomedan law)

(01) 23 All 30 (33) (Fuzuli meaning of)

(90) 12 All 231 (234) (Custom ordinarily co-extensive with Mahomedan law)

**Note 4**

1 (1900) 22 All 102 (104 105)

(90) 12 All 229 (231 234) (Shia law — Property owned by more than two sharers — No right of pre-emption)  
(1900) 22 All 102 (104 105) (Mahomedan of the Shia sect cannot maintain claim for pre-emption based on the ground of vicinage under the Mahomedan law when both the vendor and vendee are Sunnis)

## O. 20 R. 14 Notes 1-2

### Other Topics (miscellaneous)

Conditional decrees under this rule See Note 16  
Effect of non payment — If the decree should state See Note 7  
Inapplicability where vendee not entitled to immediate possession See Note 8

Payment of costs under this rule See Note 1  
Payment of money and rights thereto Note 9  
Value for jurisdiction See Note 2

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1 The words "whose title thereto shall be deemed to have accrued from date of such payment" are new See Note 8, *infra*

2 Sub rule (2) is new

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The right of pre-emption arises only on a sale of immovable property<sup>3</sup>

Where a plaintiff having a right to pre-empt joins with himself, in a suit for pre-emption a *stranger*, he forfeits his right to pre-empt,<sup>4</sup> but not so where the other persons joined are members of the plaintiff's family<sup>5</sup> See also the undermentioned cases<sup>7</sup>

#### Order 20 Rule 14 — Note 2

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- 2 (08) 85 Cal 402 (411) 35 Ind App 60 (PC)  
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- Vero fact that negotiations were made with vendee without resorting to suit does not amount to waiver*  
(94) 18 All 800 (302)  
(97) 19 All 334 (336)
- 3 (05) 27 All 670 (677) (Private sale by receiver is not a compulsory sale and right of pre-emption exists)
- (32) AIR 1932 Nag 44 (45) 98 Nag L R 11  
(Sale in execution in presence of a compromise decree—No right of pre-emption)
- (71) 15 Suth W R 455 (456)
- 4 (192) 14 All 333 (335) (Gift—No right of pre-emption)
- (88) 15 Cal 164 (166) (Perpetual lease—No right of pre-emption)
- (03) 32 Cal 988 (991) (Sham sale—No right of pre-emption)

- (83) AIR 1933 Lah 491 (493) 14 Lah 491
- (01) 23 All 129 (180) (Guardian of minor competent to exercise or refuse to exercise behalf of the minor a right of pre-emption)
- (04) 26 All 549 (553) (In suit for pre-emption vendor is not a necessary party)
- (11) 9 Ind Cas 414 (414) (Oudh) (Jurisdiction: Court is to be decided by the valuation set forth in the plaint)
- (87) 9 All 471 (473) (Price alleged in deed of sale not true contract price — Vendor and vendee concealing real price — Court should ascertain the market price at the time of the sale)
- (97) 19 All 148 (152) (Sale to two one of whom is a minor)

- (09) 21 All 374 (379) (Right to pre-empt must subsist both at the time of the sale and at the time of the institution of suit)
- (99) 21 All 441 (444 445) (Right to pre-empt lost during pendency of suit — Suit to be dismissed)
- (96) 18 All 382 (384) (Claimant for pre-emption under *waqf ul arif* does not forfeit his right to pre-empt if he does not file a suit for pre-emption)

6 (87) 4 All 259 (260)

(97) 19 All 311 (311)

7. (85) 7 All 107 (111) (Decree for pre-emption — Property transferred by decree holder — He can thereafter execute the decree)

must include whole of the property subject

may, if it thinks fit, enlarge the time<sup>4</sup> Where the appeal is dismissed or the decree of the lower Court is varied and the appellate decree is silent about the extension of time, there is a conflict of opinion as to whether the time fixed by the original decree is to be calculated from the date of the appellate decree See Note 9 to Section 148 *ante* and the undermentioned case<sup>5</sup> Where, however, the Appellate Court increases the sum to be paid by the plaintiff in a pre-emption suit and he deposits the excess amount ordered *within a reasonable time after the appellate decree*, the payment is a valid one<sup>6</sup>

*Effect of failure to deposit within the time allowed* — On the plaintiff's default in paying the purchase money within the time allowed, the suit should be dismissed,<sup>7</sup> though the decree does not contain a specific provision to that effect<sup>8</sup> But where the plaintiff has appealed against the *very condition* in the decree that he should pay the purchase money within a certain period, the Appellate Court should not dismiss the suit simply on the ground of non-payment within the time so fixed<sup>9</sup>

Where a suit for pre-emption by a son in his own individual capacity is dismissed owing to his failure to pay the purchase money within the time allowed, a fresh suit by his father, for pre-emption, in assertion of his own individual right is not barred<sup>10</sup>

**8. Plaintiff's title, when accrues** — The pre-emptor's title to the property accrues from the date of the payment of the purchase money into Court and not from the date of the sale or of the decree<sup>1</sup> A registered instrument is not necessary for passing the title<sup>2</sup> The words "whose title thereto shall be deemed to have accrued from the date of such payment" have been newly inserted in this rule to make this clear and to supersede the opinion expressed by the Madras High Court in the undermentioned case<sup>3</sup> that a registered instrument is necessary for passing title to the pre-empted property<sup>4</sup> It has been held that where, at the time of the deposit in

(80) AIR 1930 Nag 107 (103) (Plaintiff failing to make payment within period fixed by Court — His right of pre-emption is lost—Mere fact that plaintiff files appeal and executes security bond does not extend time)

4 (80) 2 All 744 (745)

(69) 8 Age 254 (255)

(23) AIR 1928 All 516 (517) 45 All 456

(96) 18 All 228 (226)

(80) AIR 1930 Nag 140 (141) (Plaintiff can appeal though he has not paid the money within the time fixed—Appellate Court can also extend time)

be so the moment the due date passes without payment After that it becomes a decree in the defendant's favour)

8 (03) 1903 Pun Re No 53, p 205

(98) 1898 Pun Re No 47, p 160

(87) 14 All 579 (531)

(88) 1888 All W N 4 (5)

9 (12) 17 Ind Cas 668 (868) (All)

10 (85) 1885 Pun Re No 1 p 1

#### Note 8

1. (30) AIR 1930 Lah 273 (277) 11 Lah 123

(FB) (Overruling 1908 Pun Re No 25)

(33) AIR 1933 Lah 791 (792)

(29) AIR 1929 All 953 (954) 51 All 998 (Title

does not date from decree)

(95) 1895 All W N 13 (14)

(25) AIR 1925 Lah 202 (203) 11 Lah 480 (Title does not date from sale)

(23) AIR 1923 Lah 529 (530) (The Punjab Pre-emption Act does not in any way modify the

1. "

(FB) )

2 (22) AIR 1929 All 237 (239)

3 (01) 11 Ind 449 (463)

4. See Notes on Clauses by Select Committee



**O. 20 R. 14**  
**Notes 5-7**

**5 Pre-emption by contract** — Pre-emption can be claimed on the basis of a contract between the person claiming to pre-empt and the vendor, if the vendee has notice of such contract<sup>1</sup>. (See Transfer of Property Act Section 40)

Thus a right of pre-emption in respect of a property may be conferred on a mortgagee thereof<sup>2</sup>. The price in such cases may or may not be fixed beforehand<sup>3</sup>. It has been held that the right cannot be enforced against an execution purchaser of the equity of redemption<sup>4</sup>.

**■ Shall specify a day before which purchase-money shall be paid** — It is necessary under this rule that the decree should *specify a day* before which the purchase money shall be paid<sup>1</sup>. It is not a compliance with the rule to say that the money should be paid within a certain period the *date* by which the amount should be paid should be specified<sup>2</sup>.

Where the vendee has paid off encumbrances on the property the amount should be included in the purchase money unless he has paid off the encumbrance in bad faith or improvidently<sup>3</sup>.

**7. Extension of time** — The general principles embodied in O. 20 R. 3 apply to pre-emption decrees under this rule and hence Section 148 does not enable the Court to enlarge the period fixed by the decree for paying the purchase money<sup>1</sup>. But where the last day allowed to the plaintiff to deposit the purchase money is a holiday the money may be deposited on the next court day on general principles of law<sup>2</sup>.

may if it thinks fit enlarge the Court after its usual working hours is not valid" the lower Court is varied the day referred to" — See Note 7 above

time there is a conflict of **and profits** — The rights of a pre emptor are different is to be calculated from the purchaser Under a pre emption decree the right to possess *ante* and the underment, the consequential right to mesne profits accrue to the the sum to be paid by the date when he pays the amount of the purchase money finally amount ordered *within* Till then the original purchaser retains possession and is valid one<sup>6</sup>

**d profits**<sup>1</sup> As to whether the vendee is entitled to the crops on

**Effect of failure** date of payment see Note 8 above

default in paying the **title in pre-emption suits** — A pre emptor is not entitled in dismissed<sup>7</sup> though the put the vendor to proof of his title to the property which he where the plaintiff the principle of pre emption is substitution A pre emptor is should pay the purchase money to take the title which the vendee was ready to take<sup>1</sup>

not dismiss the suit/

**of costs against purchase-money** — The rule does not provide Where a pre emptor is instead of being awarded against the pre emptor were awarded dismissed owing to a decree Under the doctrine of equitable set off he is entitled to fresh suit by his failure in depositing the purchase money<sup>1</sup> It has been held that when not barred<sup>1</sup> the purchase money to be deposited within a specified time but does

**8 Plaintiff** is awarded to the defendant to be deposited the plaintiff is not accrues from the date of the sale although he deducts from the purchase money the costs the date of the sale

passing the title **pre-emptors—Sub-rule (2)** — Sub rule (2) is new and prescribes from the decree to be passed where there are rival pre emptors Under the old Code clear are decided such cases on general principles suited to the emergencies of each case<sup>1</sup> Under the new rule enables rival claimants to pre emption to join as plaintiffs in a suit for pre emption and to obtain in that suit a decision not only as to their right to pre (89) AIR 1930 also as to their rival claims<sup>2</sup> But where the plaintiffs do not ask the Court make pay<sup>1</sup>

- (88) 1898 Pun Re No 70 page 183  
(1900) 3 Oudh Cas 323 (394)  
(12) 15 Ind Cas 337 (337 338) 34 All 596  
(11) 10 Ind Cas 454 (455) (All)  
(06) 8 All L Jour 804 (806 807) 28 All 676  
(84) 6 All 351 (357)  
(39) AIR 1939 All 228 (229) ILR (1939) All 261  
(37) AIR 1937 All 756 (757)  
2 (39) AIR 1939 All 999 (230) I L R (1939) All 261  
1897 All 756 )

**Note 15**

- <sup>1</sup> See also the following cases  
(84) 6 All 370 (373 375)  
(84) 11 All 455 (456)  
(88) 10 All 182 (187)  
(89) 11 All 164 (16 )  
(75) 1 All 291 (293)  
(99) 11 All 292 (296)  
(85) 7 All 720 (728)  
(85) 1895 All W N 11 9 (399)  
(92) 1892 Pun Re No 29 page 116  
(81) 1891 Pun Re No 20 page 37  
(81) 1891 Pun Re No 10 page 936  
(05) 9 All 463 (467)  
2 (29) AIR 1939 P C 53 (60) 5C Ind App 51 All 67 (P C)

276 (Payment into the treasury without informing the Court not a due compliance)]

**Note 12**

- 16) AIR 1916 P C 179 (181) 44 Cal 675 44 Ind App 80 (P C)  
(33) AIR 1933 All 91 (92) (Pre emptor's suit)

**Note 13**

- 1 (15) AIR 1915 All 154 (155) 37 All 529

**Note 14**

- 1 (20) AIR 1917 Lah 142 (143) 19 Lah 991  
(33) AIR 1933 All 113 (114)

O. 20 R. 14  
Notes 15-16

to adjudicate upon their respective rights *inter se*, a joint decree may be passed and if the amount is deposited in compliance with the decree, the defendant has no concern in the way in which the property is to be shared by the plaintiffs, but the mere fact that a joint decree is passed in favour of all has not the necessary result of passing title to all the joint decree-holders even if only one of them pays the amount. In order to determine in what proportion the joint plaintiffs are to share the property, the circumstances under which the payment was made must in each case be enquired into.<sup>3</sup>

**16. Appeal.** — A plaintiff, who has obtained a decree for pre-emption conditional on his paying a certain sum within a certain period, may appeal against the decree whether or not he has deposited the money in Court within the time limited.<sup>1</sup> A vendee does not forfeit his right of appeal against a pre-emption decree merely because he has withdrawn the money deposited by the plaintiff.<sup>2</sup> A plaintiff depositing purchase money in Court under a pre-emption decree is entitled to a refund of the amount on the reversal of the decree in appeal.<sup>3</sup> A decree with a condition that unless the purchase money is paid within the time fixed the suit shall stand dismissed, is a complete decree and a subsequent order dismissing the suit is not a decree against which an appeal can be preferred.<sup>4</sup> Further, an order passed on an application for payment of the pre-emption money in compliance with a decree under Rule 14 is not appealable under Section 47 of the Code as it is not an order relating to execution, discharge or satisfaction of a decree.<sup>5</sup>

O. 20 R. 15

**R. 15.** [S 215.] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

[1877, S. 215]

### Synopsis

- 1 Scope of the Rule
- 2 Preliminary decree directing the taking of accounts.
- 3 Mode of taking accounts
- 4 "Fixing the day on which the partnership shall stand dissolved."

- 5 Defendant's right to what is found due to him
- 6 Court-fee in partnership suits
- 7 Appeal
- 8 Letters Patent Appeal

**1. Scope of the Rule.** — This rule contemplates the passing of a preliminary decree in suits for dissolution of partnership so as to enable the Court to pass a final

3 (23) AIR 1929 All 953 (954) 51 All 998

Note 16

- 1 (1900) 1900 Pun Re No 97, page 379
- (96) 18 All 223 (226)
- (91) 16 All 126 (128)
- (91) 13 All 876 (378) (F B)
- (95) 1895 Pun Re No 67, page 933
- (90) 1890 Pun Re No 161, page 521
- [See also (12) 17 Ind Civ 668 (669) (All)]

2 (07) 1907 Pun Re No 16 page 74

3 (96) 18 All 262 (264).

1)

as

adjudication of the specific rights of the parties. The words "may pass = preliminary decree" show that the passing of such a decree is in the judicial discretion of the Court. While, on the one hand, it will be an improper exercise of the discretion to pass a preliminary decree where the shares of the parties in, and the fact and date of dissolution of, the partnership are admitted,<sup>1</sup> on the other hand, where such facts are not admitted, the Court *ought* to pass a preliminary decree defining and declaring the rights of the parties before giving a final adjudication in the suit.<sup>2</sup> In *Ramchunder Shaha v Manick Chunder Banikya*,<sup>3</sup> Pontifex, J., observed as follows:

"At the first hearing of the suit really what the Court had to determine was, whether there had been a partnership and what were its conditions: was it dissolved or ought it to be dissolved and who were the parties interested in the partnership and in what shares and upon determining these questions it ought, in the first instance to have directed that accounts should be taken as set forth in Form No 182 (now Form No 21, Appendix D) subject, of course to any such alterations as the nature of the case might require. It is only after taking these accounts and obtaining the report of the officer of the Court or, if there is no such officer when the Judge himself has arrived at a decision on the accounts that a final decree should be made according to Form No 183 of the Fourth Schedule of the Code (now Form No 22 of Appendix D)."

If, however, the Court has passed an order defining and declaring the said rights, the mere fact that no formal decree has been drawn up in those terms will be a mere irregularity not vitiating the trial.<sup>4</sup>

Under Section 265 of the Contract Act as it originally stood, a partner had to apply to the District Court to wind up the business of the firm to provide for the payments of its debts and to distribute the surplus according to the shares of the partners respectively, and there was a conflict of opinion as to whether a suit for such relief in the ordinary Court lay.<sup>5</sup> The Section was amended by the Contract Amendment Act (IV of 1886), and under that Section a suit for dissolution of partnership could be brought in the ordinary Courts like any other suit.<sup>6</sup> See now the Partnership Act (IX of 1932).

**2. Preliminary decree directing the taking of accounts.**—Besides making the declarations as to the rights of the parties referred to in Note 1 above, the Court should, in the preliminary decree, direct an account to be taken of the dealings and transactions of the partnership, of the credits, property and effects due and belonging to it, and should, if need be, appoint a receiver for realising the partnership property.<sup>1</sup>

As to the nature of the rights conferred by such a decree, see the undermentioned case.<sup>2</sup> Although it is desirable that the preliminary decree should state who is to be the accounting party, yet the Court can, even subsequently, decide the question.<sup>3</sup>

The ordinary form for the preliminary decree is given in Form No 21 in Appendix D. This form should ordinarily be followed unless there is any special reason for modifying it. The form is applicable also where the Court is asked to declare that

#### Order 20 Rule 15 — Note 1

- (84) 11 Bom 494 (496) (Do)
- (81) 7 Cal 157 (162) (Suit did not lie in ordinary Court)
- (81) 7 Cal 428 (433) (Do)
- 6. [See (18) AIR 1918 All 268 (269) 40 All 446 (A suit by a surviving partner against the representative of a deceased partner for partnership accounts)]

#### Note 2

- (83) 5 All 700 (503) (A suit lay in the ordinary Court)
- (83) 183 All W N 205 (205) (Do)
- (84) 8 Bom 272 (277) (Do)
- 1. (97) 20 Mad 313 (315, 316)
- 2. (29) AIR 1929 Mad 641 (647) 52 Mad 503 (I D)
- 3. (36) AIR 1936 Lah 78 (80) (It is open to the Court to give instructions at any time to facilitate and regularise the taking of accounts)

**O.20 R.15**  
**Notes 2-3**

a dissolution has taken place and an account is still required <sup>4</sup>

**3. Mode of taking accounts.**—The Court may itself take the accounts of the partnership or appoint a commissioner for the purpose. In the latter case the Court may give directions, if any are required, as to the mode of taking accounts. It may call upon either party to furnish a statement of particulars relating to the business and its transactions <sup>1</sup>. All the account books and other documents relating to the partnership and in the possession of either party should be produced <sup>2</sup>. Sufficient time should be given to the parties for the purpose and evidence should be taken if necessary <sup>3</sup>. A commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners <sup>4</sup>. In a suit for dissolution of partnership and the settlement of accounts, ordinarily the partnership business must be wound up so that all questions between the parties in respect of the partnership may be finally decided, and a procedure which leaves outstanding such questions or is calculated to give rise to fresh questions is not proper <sup>5</sup>.

As to the power of the Court to go into the accounts of firm anterior to a date on which there has been a settlement of accounts between the parties, see the undermentioned case <sup>6</sup>.

**4. "Fixing the day on which the partnership shall stand dissolved."**—The preliminary decree should fix a day on which the partnership should stand dissolved or be deemed to have been dissolved. The fixing of the day is a judicial act and should be done arbitrarily. Ordinarily, if a notice of dissolution has been given by one of the partners, the dissolution will be declared as and from that date <sup>1</sup>. Otherwise and in the absence of any other circumstance, the dissolution should be ordered to date from the plaint <sup>2</sup>. It can be ordered to date from the judgment only in exceptional cases <sup>3</sup>.

**5. Defendant's right to what is found due to him.**—If, on the taking of accounts, it is found that any balance is due to the defendant, the Court can pass a decree in his favour for the amount <sup>1</sup>.

**4** (38) AIR 1938 Lah 788 (759) I L R (1939) Lah 178

**Note 3**

**1** (81) 7 Cal 428 (433)

**2** (14) AIR 1914 P C 33 (33) (P C) (Accounts taken by a commissioner)

**3** to pass an *ex parte* final decree on the mere statements of the plaintiff)

**4** (1911) 1 P 1007 P — 91 (1007)

**6** (38) AIR 1938 Lah 788 (759) I L R (1939) Lah 178 (If it is necessary to examine the

acceptance of the existing accounts is correct)

**Note 4**

**1** (18) AIR 1918 Mad 261 (264)

**2** (18) AIR 1918 Mad 261 (264)

**3** (1881) 17 Ch D 529 (531) *Lyons v Tredwell* (Referred to in AIR 1918 Mad 264)

**Note 5**

proceed the proper course is to transpose the plaintiff to the position of defendant and make the defendant plaintiff)  
(But see (196) 3 All L Jour 233 (234) (Not accepted as good law)

**6. Court-fee in partnership suits.** — The plaint or memorandum of appeal in a partnership suit is chargeable with an *ad valorem* court fee, the valuation being fixed under Section 7, clause (iv) (f) of the Court fees Act.<sup>1</sup>

The defendant in such a suit is not bound either to value his claim or to pay any court fee. If, however, on the taking of accounts any amount is found due to him, he is bound to pay court fee thereon before a decree for the amount is passed in his favour.<sup>2</sup>

**7. Appeal.** — An appeal lies from a preliminary decree passed under this rule.<sup>1</sup> But mere directions given to the commissioner in the matter of taking accounts are not decrees and are not appealable.<sup>2</sup>

**8. Letters Patent Appeal.** — An order appointing the Official Receiver as the receiver in a partnership suit was held by the Rangoon High Court to be a "judgment" within the meaning of Clause 13 of the Letters Patent and as such appealable.<sup>1</sup> The same High Court has, however, held that orders by way of directions to the commissioner in the matter of taking accounts are not "judgments" within the meaning of the said Clause of the Letters Patent and hence not appealable.<sup>2</sup>

**R. 16. [S. 215A.]** In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary,

Decree in suit for account  
between principal and agent

in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

### Synopsis

- |   |   |
|---|---|
| 1. Scope of the Rule.   | 4. Valuation for court-fee and jurisdiction |
| 2. "Shall pass a preliminary decree."                                 | 5. Appeal                                   |
| 3. Suit by principal — Right of agent to the amount found due to him. | 6. Stay of proceedings                      |

### Other Topics (miscellaneous)

Final decree <i>ex parte</i> — Right of defendant to re-open accounts. See Note 2	Suit for delivery of account papers. See Note 2
In any other suit. See Note 1	'Where it is necessary'. See Note 2

#### Note 6

1. (10) C Ind Cas 832 (832) 32 All 517  
(33) AIR 1933 Mad 330 (331) 56 Mad 705 (34)

- (36) AIR 1936 Lah 453 (460)  
2. (11) 10 Ind Cas 250 (253) (Lab)  
(14) AIR 1914 Sind 137 (137) 8 Sind L R 122

#### Note 7

1. (9C) 23 Cal 406 (403) 412)  
(01) 1901 1 un Re No 13 p 47  
2. (25) AIR 1923 Sind 100 (100 101) 23 Sind L R 87

#### Note 8

1. (27) AIR 1927 Rang 139 (139) 5 Rang 99  
2. (25) AIR 1925 Rang 11 (15) 11 Rang 469

O. 20 R. 15  
Notes 6-8

O. 20 R. 16

O. 20 R. 16  
Notes 1-2

- 1 Scope of the Rule** — The rule applies to the following kinds of suits: —
- (1) suits for accounts between principal and agent<sup>1</sup>
  - (2) suits in which plaintiff has a right to a rendition of accounts from the defendant<sup>2</sup> and
  - (3) suits in which it is necessary that an account should be taken in order to ascertain the amount due to or from any party<sup>3</sup>

The purpose of a preliminary decree in such suits is merely to ascertain whether the defendant is liable to account to the plaintiff<sup>4</sup> and the preliminary judgment, therefore need not be exhaustive or specify all details<sup>5</sup>

**2 "Shall pass a preliminary decree"** — Where the plaintiff has established that the defendant was his agent<sup>1</sup> or that the defendant is otherwise liable to account to him<sup>2</sup> it is the duty of the Court to pass a preliminary decree directing an account to be taken of the transactions between the parties. But no such decree need be passed if the liability to account is not established<sup>3</sup> or if the necessity for accounts is not made out<sup>4</sup>

A preliminary decree in a suit contemplated by this rule finally declares the liability of the defendant for such sum as may be found due<sup>5</sup> but does not terminate the suit<sup>6</sup>

In a suit for accounts it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree<sup>7</sup>

The proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and not proceedings in execution<sup>8</sup>

For the procedure to be observed in taking accounts see the undermentioned cases<sup>9</sup>

**Order 20 Rule 16 — Note 1**

1 (21) AIR 1911 Sind 47 (43) 15 S and L R 16

to recover  
balance of *anwar* money retained in the hands  
of defendant for payment to creditors)

(87) AIR 1937 All 276 (278)

4 (26) AIR 1926 Nag 893 (896)

■ (81) AIR 1931 Cal 358 (359)

**Note 2**

1 (87) 14 Cal 147 (153 158) 13 Ind App 123

(P C)

Cal 97 & 98 1899

■

er is  
not liable to account but is liable for damages  
therefore no preliminary decree for account can  
be passed against him)

4 (25) AIR 1917, Cal 1009 (1074) 52 Cal 766

(16) AIR 1916 Cal 244 (215) (It is only where it  
is necessary in order to ascertain the amount of  
money due to or from any parties that an  
account should be taken; that the Court shall

before passing the final decree pass a preliminary decree directing such account to be taken as it thinks fit)

(30) AIR 1930 Mad 721 (722) 53 Mad 476 (If  
every suit for an account of pecuniary transactions  
it is not imperative for the Court to pass  
— It can  
— simple  
— involve

(28) AIR 1908 Nag 299 (300) (The mere fact  
that a preliminary decree was not passed under  
O 20 R 16 C P Code in a suit for accounts will  
not render the decree passed in the suit illegal if

5 (12) 13 Ind Cas 374 (375) (Cal) (Final decree  
passed *ex parte* — Defendant must be given an  
opportunity to be heard as to how much is due  
from him)

6 (31) AIR 1931 Lah 268 (269)

7 (36) AIR 1936 P O 825 (829)

8 (37) AIR 1937 P C 163 (164) 18 Lah 507

64 Ind App 191 31 Sind L R 367 (P C)

9 (99) 13 Cal 174 (178 to 181) 19 Ind App 83

(P C)

(81) 6 Cal 754 (757 758)

(81) 7 Cal 634 (636 637)

(87) 14 Cal 147 (153) 13 Ind App 123 (1 C)

O 20 R 16  
Notes 3-6**3 Suit by principal — Right of agent to the amount found due to him —**

If in a suit by the principal accounts between him and the agent are taken and nothing is found due to the principal but something is found due to the agent a decree can be passed in the defendant's favour for the amount on his paying the necessary court fee<sup>1</sup>

**4 Valuation for court-fee and jurisdiction —** Suits for accounts are governed

by the provisions of Section 7 clause (iv) (f) of the Court fees Act<sup>1</sup>. The plaintiff's valuation will be the value both for the purposes of the court fee and for the purpose of jurisdiction<sup>2</sup>. If a defendant appeals against the whole preliminary decree in such a suit he will be bound by the valuation given in the plaint<sup>3</sup>.

**5 Appeal —** An appeal lies from a preliminary decree in a suit for accounts<sup>1</sup>

Notwithstanding that a final decree has been passed in the case the final decree will be subject to the result of the appeal from the preliminary decree<sup>2</sup>. See Notes to Section 97 *ante*

**6 Stay of proceedings —** An Appellate Court in which an appeal from the

preliminary decree is pending can stay further proceedings under the preliminary decree (such as enquiry into accounts) pending the hearing of the appeal<sup>1</sup>.

**R. 17. [New] The Court may either by the decree directing** O 20 R 17Special directions as to  
accounts

an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or

vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised

**[R S C, O 33 R 3]**

(68) 10 Suth W R 279 (280) (Suit for delivery of account papers — Court should direct delivery of them)

(71) 15 Suth W R 260 (260 261)

(72) 17 Suth W R 403 (410)

(74) 22 Suth W R 191 (192)

(20) AIR 1926 Nag 393 (396) (Object on to particular item should be taken when question as to accounts is tried)

(19) 19 Ind Cas 901 (907) (Cal) (Unless fraud and undue influence are proved accounts cannot be reopened)

(1872) 9 Ch D 529 (532 533) *Williamson v Barbour*

(87) 11 Bo 88 (85) (*Williamson v Barbour*) (1872) 9 Ch D 529 R. ferret)

**Note 3**

1 (10) C I d Cas 162 (163) 32 All 5 5

(33) AIR 1933 Sind 247 (43 249)

(07) 34 Cal 89 (894 895)

(37) AIR 1937 All 276 (9 9)

[See (00) 3 All L Jour 33 (231) (Defendant should claim a set off. Otherwise Court cannot pass a decree in his favour)]

(33) AIR 1937 Lah 619 (r 0) (Do)]

**Note 4**

1 (03) 1903 Pun Re No 150 p 631 (Appeal)

**Note 5**

1 (21) AIR 1921 Sind 42 (44) 15 Sind L 116

2 (12) 16 Ind Cas 157 (1 9) 31 All 493

(13) 19 Ind Cas 630 (631) (Cal)

**Note 6**

1 (04) 31 Cal 2 (771) (FB)



O. 20 R. 17  
Notes 1-3

### Synopsis

- |                       |   |
|-----------------------|---|
| 1. Scope of the Rule. | 3. Omission to give directions in preliminary decree. |
| 2. Settled accounts   |   |

**1. Scope of the Rule.**—The rule is new and corresponds to O 33 R 3 of the Rules of the Supreme Court in England. It, however, enacts no new provision of law, but only recognises an already existing practice in the matter of taking accounts. It is in the discretion of the Court to give special directions or not under this rule<sup>1</sup>. Under the English practice the Court may treat the account books as *prima facie* evidence in partnership cases<sup>2</sup>. Similarly, account books kept by a trustee may be ordered to be taken as *prima facie* evidence against the *cestui que trust* if the latter has had access to these books<sup>3</sup>. In other cases special directions should be obtained from the Court,<sup>4</sup> and such directions will be given if the ordinary proof of accounts is not available owing to lapse of time or other causes,<sup>5</sup> or if the accounts are beyond the control of the accounting party<sup>6</sup>.

**2. Settled accounts.**—In proceedings by way of taking accounts a settled account may be set up or pleaded in the absence of any special directions in the matter, in the preliminary decree<sup>1</sup>.

**3. Omission to give directions in preliminary decree.**—Though the necessary directions in the matter of taking accounts are generally given in the preliminary decree, yet the omission of such directions in the decree will only amount to a mere irregularity.<sup>1</sup> In fact this rule contemplates such directions being given subsequently also.

Their Lordships of the Privy Council have held that in a decree directing accounts to be taken, it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree<sup>2</sup>.

O. 20 R. 18

Decree in suit for partition of property or separate possession of a share therein

**R. 18.** [New.] Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

Order 20 Rule 17 — Note 1

1. (21) AIR 1921 G 32 (42) 18 G 32 T D 16

Jams

6. (1941) 5 Decc 515 (517, 518), *Turner v Corney*  
Note 2

1. (1865) 28 Ch D 111 (116), *Holgate v Shuth*  
Note 3

1. (21) AIR 1921 Sind 42 (43) 15 Sind L R 15  
2. (36) AIR 1936 P C 325 (329) (PC)

(2) if and in so far as such decree relates to any other immovable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

### Synopsis

- |  |                                    |
|--|------------------------------------|
| 1. Scope of the Rule                   | 5 Preliminary decree               |
| 2. Jurisdiction of Court and Collector | 6 "Giving such further directions" |
| 3 Moveable property                    | 7 Final decree                     |
| 4 Joint Hindu family property          | 8 Stamp for final decree           |
|  | 9 Appeal                           |

### Other Topics (miscellaneous)

- |   |  |
|---|--|
| A second preliminary decree See Note 9                | Mesne profits See Note 6                                       |
| Decree for joint possession — Construction See Note 5 | Partition suits—Costs See Note 5                               |
| Execution of partition decree — Limitation See Note 7 | ' Shall declare the rights of the several parties ' See Note 4 |

**1. Scope of the Rule** — Sub rule (1) refers to partition decrees relating to an 'estate assessed to Government revenue' referred to in Section 54 of the Code, while sub rule (2) deals with partition decrees relating to any other immovable property or to moveable property. In the former case the rule does not contemplate the passing of a preliminary and of a final decree.<sup>1</sup> The Court has merely to pass a decree declaring the rights of the several parties interested in the property, the actual partition so as to affect the Government revenue being left to be made by the Collector.<sup>2</sup> In the latter case, i.e., a case coming under sub rule (2) the Court may pass a preliminary decree if the separation cannot be made conveniently without further inquiry see Note 5, *infra*. Where the decree does not contain any direction as required by sub rule (1) the decree is defective and unless the defect is rectified the parties cannot ask for the transmission of the proceedings to the Collector.<sup>3</sup>

Where in a suit for partition a decree has been passed under sub rule (1) an application to the Court by the parties for the transmission of the papers to the Collector is not one for execution.<sup>4</sup>

**2. Jurisdiction of Court and Collector.** — See Section 54, Note 7, *ante*. As has been seen in that Note where the Collector disregards the directions in the decree, the Court has the power to interfere and set right his action.<sup>1</sup>

**3 Moveable property.** — Where in a suit for partition of moveable property the plaintiff files a list of properties, and the defendant either denies that they are liable to partition or that they exist, it is incumbent on the Court, before passing

#### Order 20 Rule 18 — Note 1

- 1 (14) AIR 1914 Outh 337 (333)
- 2 (25) AIR 13 5 Lah 445 (440) 6 Lah 449
- 3 (14) AIR 1914 Outh 332 (333)
- 4 (35) AIR 1935 Cal 197 (197) (It is incumbent upon the plaintiffs to have decree corrected within the time allowed by law)
- 5 (33) AIR 1933 Bom 451 (455) 41 Bom LR 971

(973 974) (There is nothing in cases of this sort for the Court to execute—A king the Court to send the paper to the Collector is really asking the Judge to do a ministerial act)

#### Note 2

- 1 (37) AIR 193 Bom 173 (176) (Civil Court has jurisdiction to set aside in toto or modify partition effected by the Collector)

O. 20 R. 18  
Notes 3-5

a preliminary decree, to determine the following points<sup>1</sup>—

- (1) whether such properties exist, and if so in whose possession,
- (2) whether they are partitionable and
- (3) what is their value

**4. Joint Hindu family property.** — See the undermentioned cases<sup>1</sup>

**5. Preliminary decree.** — In cases coming under sub rule (2), the Court may pass a preliminary decree. It is not obligatory to do so in every case. For instance, it is not necessary to pass a preliminary decree if the shares can be ascertained without difficulty in execution<sup>1</sup>. But where a partition cannot be conveniently made without further enquiry, a preliminary decree may be passed declaring the rights of the several parties interested in the property leaving the actual partition to be made later on<sup>2</sup>. It has been held that it would be premature to decide in the preliminary decree whether certain property in the defendant's possession about which partition is claimed is available for partition or not and that the question should be left to be decided at the enquiry subsequent to the preliminary decree<sup>3</sup>. After a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share is to apply for a final decree and not to bring a fresh suit for that purpose<sup>4</sup>. There is no limitation for such an application inasmuch as the rule does not contemplate any such application being made by the party, and it is the duty of the Court to pass the final decree after the necessary enquiries<sup>5</sup>. In fact the Court cannot, after a preliminary decree has been passed in a partition suit, dismiss it for default in depositing the fee for a commissioner to make a final partition: all that the Court can do in such a case is to adjourn the proceedings *sine die*<sup>6</sup>.

Any party to the suit whose interest it is that further proceedings be taken, may move the Court to pass a final decree, but ordinarily it is the plaintiff who moves<sup>7</sup>.

Under the old Code it was not necessary to pass first a preliminary decree and then a final decree in a partition suit<sup>8</sup>. It was, however, usual to pass an interlocutory order declaring the rights of the several parties interested in the property and then a decree. See the undermentioned cases<sup>9</sup>. As to whether there can be more than one

#### Note 3

- 1 (19) AIR 1919 Oudh 208 (210)  
[See also (75) 7 N W P H C R 75 (77)]

#### Note 4

- 1 (15) AIR 1915 Mad 1065 (1065) (Preliminary decree for partition effects severance in status)  
(20) 23 Bom 184 (187) (Suit for partition by purchaser—Court need not determine shares of other coparceners)  
(29) 23 Bom 188 (190) (Suit for partition by member of joint Hindu family—Others can have their respective shares determined and allotted

#### Note 5

possession cannot be construed as a preliminary decree for partition)

- 3 (24) AIR 1925 Pat 433 (433)  
5 Luck 280  
5 Luck 280

(32) AIR 1932 Mad 519 (522)

7. (24) AIR 1924 P C 193 (196) 4 Pat 61 51  
Ind App 321 (PC)

<sup>1</sup> The period of the suit if the defendants have been receiving interest during such period]

preliminary decree in a case, see the discussion under Section 2 (2), Note 10, *ante*. As to the maintainability of an appeal against a preliminary decree after the final decree has been passed, see Section 97 Note 5, *ante*.

O. 20 R. 18  
Notes 5-6

6. "Giving such further directions." — These words include also directions for inquiry as to future mesne profits or interest, and it is in the *preliminary decree* that such directions should be given. Where such decree is silent as to future mesne profits or interest, can the final decree award the same or direct an inquiry in respect of the same? As regards *mesne profits* it has been held that the final decree cannot award it or direct an enquiry in respect of it. The reason is that Rule 12 and this rule should be read together and inasmuch as, under Rule 12, the final decree can only provide for mesne profits where an inquiry into the same has been directed by the preliminary decree, the same principle will also apply to cases coming under this rule.<sup>1</sup> But it has been held by the Madras High Court in a recent decision<sup>2</sup> that a Court can pass a final decree for mesne profits in a partition suit although there has been no preliminary decree in respect of such profits. It has also been held by the Chief Court of Oudh<sup>3</sup> that where a preliminary decree passed on compromise between the parties in a suit for partition omits to make any mention of mesne profits still it is open to the Court to direct an enquiry into mesne profits where it finds that the intention of both the parties is that mesne profits should be paid to each other. In any case where the final decree directs such an enquiry there is no want of jurisdiction and the executing Court cannot go behind it.<sup>4</sup> As to the maintainability of a separate suit for mesne profits where the decree in the partition suit is silent on the point, see Section 11 Note 125 and the undermentioned cases.<sup>5</sup>

As regards *interest* where the preliminary decree in a partition suit directs accounts to be taken but is silent as to interest, it has been held by the Bombay High Court<sup>5</sup> that it is competent to the Court to award by its final decree interest in a proper case. The learned Judges base their decisions on certain English cases according to which a Court has power on further directions to order payment of interest on a sum found due from a defendant although the decree declaring the liability contains no direction for payment of interest or the statement of claim does not ask for it. It was also pointed out that the case of taking an account under the present rule is similar to the case of taking an account in an administration suit under O 20 R 13 and that, if the forms of preliminary and final decrees in administration suits (Appendix D, Forms 17 and 18) are looked at, it will be clear that the Legislature does recognize that even where the preliminary decree does not contain any direction as to interest, yet, in the final decree interest may be awarded.

(81) 7 Cal 318 (320) (Do)  
(95) 18 Mad 73 (87) (Do)

23

5 (37) AIR 1932 Com 299 (224) 50 Com 992  
(35) AIR 1935 Pat 60 (57) (Suit by purchaser from copartener for partition and separate possession of share purchased—Question of net profits must be determined in the partition suit itself and not by a separate suit)

6 (25) AIR 19-5 Dom 40G(409 409) 10 Dom 282.

O.20 R.18  
Notes 7-9

**7. Final decree** — Where a preliminary decree for partition has been passed under this rule, the decree cannot be made effective without a final decree<sup>1</sup> Where subsequent to the preliminary decree, one of the co sharers dies and the other parties become entitled to increased shares, the final decree may award them the increased shares<sup>2</sup> In working out preliminary decrees for partition, the Court may, instead of making an actual division of all the property, give one coparcener a charge over the share of another for any difference in favour of the former<sup>3</sup> A decree for partition is a joint decree in favour of all the shareholders and therefore execution proceedings taken by one of them are sufficient to keep the decree alive in favour of all<sup>4</sup> It has been held by the Patna High Court<sup>5</sup> that where, along with the preliminary decree in a partition suit the Court passes an executable order for costs in favour of the plaintiff it is open to the latter to apply to have such order incorporated in the final decree although limitation for the execution of such order independently may have expired It has been held that after a preliminary decree has been passed it is always open to the parties before the final decree, upon proper procedure to bring in further property for partition<sup>6</sup> See also the undermentioned case<sup>7</sup>

**8 Stamp for final decree** — A final decree for partition is an instrument of partition within Section 2 (15) of the Stamp Act, and is chargeable with stamp duty under Schedule I Article 45 of that Act<sup>1</sup>

See also the undermentioned cases<sup>2</sup>

**9 Appeal** — Under the present Code a preliminary decree in a partition suit is appealable under Section 96 and if not appealed against, cannot be questioned in the appeal from the final decree [vide Sections 2 (2), 96 and 97] Under the old Code there was only one decree in a partition suit though the decree might be preceded by an interlocutory order declaring the rights of the several parties interested in the property As to the appealability of such order and other connected questions under the old Code see the undermentioned cases<sup>1</sup> which are not of any practical

#### Note 7

1  
2  
3

See also the undermentioned cases

See also the undermentioned cases

4

[See also (32) AIR 1932 Cal 869 (870)]

5 (38) AIR 1938 Pat 188 (189)

6 (35) AIR 1935 P C 12 (1<sup>o</sup> 13) (P C)

7 (17) AIR 1917 Nag 118 (119)

#### Note 8

1 (05) 3<sup>o</sup> Cal 488 (488 491)

(32) AIR 1932 Lah 249 (250) (Final decree in partition suit not stamped with general stamp—

Decree not having been drawn up on stamp paper was held not to be a decree upon which

[See (32) AIR 1932 Rang 120 (122) (Preliminary decree declaring the extent of shares without actually dividing—It does require to be stamped under S 2 (15) Stamp Act)]

2 (32) AIR 1932 Mad 722 (723) 55 Mad 9 5 (In a suit for partition a defendant co-sharer can ask for a decree for his share without paying court fee The Crown is only entitled to the

—Defendant need not pay court fee to have his share separately allotted to him)

#### Note 9

1 (97) 91 Cal 725 (735 736 738 739) (In appeal against final decree appellants can take objection to such order)

(95) 18 Mad 73 (87) (Interlocutory order declaring

(It is the duty of the Court to decide the proportion of stamp payable by each person who desires his share separated)

importance now. An order on an application for the appointment of a commissioner to work out the shares in a decree for partition is not appealable.<sup>2</sup>

O 20 R. 18  
Note 9

## R. 19. [S 216] (1) Where the defendant has been allowed

O.20 R.19

Decree when set off is allowed

a set off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party

## (2) Any decree passed in a suit in which a set off is claimed

Appeal from decree relating to set off

shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise

[1877, S. 216; 1859, S. 195]

### Local Amendment

#### ALLAHABAD

In sub rule (1), *substitute* a comma for the full stop at the end and *add* the following

'but no decree shall be passed against the plaintiff unless the claim to set off was within limitation on the date on which the written statement was presented

### Synopsis

- |  |   |
|--|---|
| 1 'Where defendant has been allowed a set off' | 3 Decree for defendant claiming set off                   |
| 2 Appeal from decree relating to set off       | 4 Applicability of Rule to equitable set off—Sub rule (3) |

1 "Where defendant has been allowed a set-off"—The rule applies only where the defendant has been allowed a 'set off' against the plaintiff's claim and not in any other case. Thus the rule does not apply to a case where in determining the defendant's liability for mesne profits deductions are made for costs or expenses of cultivation.<sup>1</sup>

2 Appeal from decree relating to set-off — Under the second paragraph of Section 216 of the old Code corresponding to sub rule (3) of the present rule the *forum* of appeal in relation to the defendant's claim of set off depended upon the sum claimed by him and not upon the valuation of the suit made by the plaintiff.<sup>1</sup> This has been amended under the present rule so as to give effect to the view that appeals from

of a second preliminary decree.)

Order 20 Rule 19 — Note 1

1 (76) 75 Sath W R o 5 (75)

Note 2

1 (05) 37 Cal GJ (65J)

(85) 10 All 557 (591 592)

O. 20 R. 19  
Notes 2-4

decrees relating to set off should lie to the Courts to which appeals in respect of the original claim of the plaintiff would lie<sup>2</sup>

A preliminary order disposing of a claim of set off made by the defendant is not a decree and is not appealable by itself but can be attacked in an appeal from the decree<sup>3</sup>

**3. Decree for defendant claiming set-off.** — Where the amount due to the defendant by the plaintiff is found to exceed that due to the plaintiff by the defendant, the Court may not only dismiss the suit, but may pass a decree in favour of the defendant against the plaintiff<sup>1</sup>

The question has arisen as to whether a decree may be passed in favour of the defendant in a suit for accounts, where, on taking accounts, it is found that the balance is in defendant's favour. In such a case, it was observed by Phillips, J., in the undermentioned Madras case<sup>2</sup> that there is really no 'set off' pleaded to which the present rule may apply. The High Courts of Allahabad<sup>3</sup> and Calcutta<sup>4</sup> have, on the other hand, held that a decree may be passed in favour of the defendant in such a case under O. 20 Rr 15 and 16. In one of the Calcutta cases<sup>5</sup> it was even said that it was a case of equitable set off and that Rule 19 itself might apply.

**4. Applicability of Rule to equitable set-off—Sub-rule (3).**—Order 8 Rule 6 provides only for a legal set off being allowed. But the present rule applies also to equitable set off and provides for a decree being passed giving effect to such set off<sup>1</sup>. As to the distinction between the two types of claims, see Notes under Order 8 Rule 6. See also the undermentioned cases<sup>2</sup>

O. 20 R. 20

Certified copies of  
judgment and decree to  
be furnished

**R. 20. [S. 217.]** Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

[1877, S. 217 ; 1859, S. 198.]

**1. Certified copies of judgment and decree to be furnished.** — An application for copies under this rule is to be made to the Court which has decided the case and such an application must be deemed to be a proceeding before the Court, although

■ Notes on Clauses

3. (17) AIR 1917 Lah 261 (265) 1917 Pun Ra No 62

■ Note 3

1. (5) 32 Cal 654 (659)  
(34) AIR 1934 All 543 (545) 56 All 912 (Court must pass a decree in favour of defendant on his

■ Note 4

1. (5) 27 All 145 (147)  
(93) 15 All 9 (11)  
(96) 1896 Bom P J 728 (728)  
(17) AIR 1917 Mad 258 (259) 39 Mad 939  
2

■ set off )

3. (10) 6 Ind Cas 162 (163) 32 All 525  
(24) AIR 1924 All 854 (854, 855) 46 All 858  
(Suit for partnership accounts—Distinguishing All L Jour 233)

4. (31) AIR 1931 Cal 358 (358, 359)  
(07) 34 Cal 692 (895, 896)

5. (31) AIR 1931 Cal 358 (359)

(86) AIR 1936 Cal 277 (279) (Set off may be purely defensive or may be by way of counter-claim)

claim )

the Court may have delegated its functions in the matter to some other officer. Hence, an offence committed in connection with such an application comes within the purview of Sections 195 and 476 of the Criminal Procedure Code.<sup>1</sup> See also the undermentioned cases.<sup>2</sup>

O. 20 R. 20  
Note 1

### Local Amendments

#### ALLAHABAD

Add the following

"21 (1) Every decree and order as defined in Section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly, what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

O. 20 R. 21  
(Allahabad)

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(5) When the Judge signs the decree, he shall make an autograph note stating the date on which the decree was signed."

#### RANGOON

Add the following

"21 As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records Establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey

O. 20 R. 21  
(Rangoon)

Certificate to be issued to I and Records Department when interests in land are affected

Order 20 Rule 20 — Note 1  
1. (28) AIR 1924 Lah 759 (7C1, 762) Small Cause Courts)  
2. (1944) 1 Bom LR 10 (100) (Articles 111 (7-1) 2 Cal LR 1 553 (554) (Rt of string to obtain copies)  
(70) 7 Bom LR 10 (130) (131) (Rule applicato (73) 230 Sath WR 10, (100)



O 20 R 21  
(Rangoon)

has been affected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub Registrar within whose sub district the land or any part thereof is situate

O 20 R 22  
(Rangoon)

Form of certificate

22 The certificate shall be in the prescribed form and shall be signed by the presiding officer of the Court

## ORDER XXI.

### EXECUTION OF DECREES AND ORDERS

#### PAYMENT UNDER DECREE

O 21 R. 1

Modes of paying money  
under decree

**R. 1.** [S 257 ] (1) All money payable under a decree shall be paid as follows, namely —

(a) into the Court whose duty it is to execute the decree, or

(b) out of Court to the decree holder, or

(c) otherwise as the Court which made the decree directs

(2) Where any payment is made under clause (a) of sub rule (1), notice of such payment shall be given to the decree-holder

[ 1877, S 257; 1859, S 206 ]

#### Local Amendments

##### CALCUTTA

(1) For clause (a) of sub rule (1) substitute the following clause

(a) By deposit in or by postal money order sent to the Court whose duty it is to execute the decree or

(2) In sub rule (2)

(i) Read the number 2 as 2 (a)

(ii) After the words the decree holder add the words or the person in whose favour the order is made

(iii) Add the following as clause (b)

(b) the cost of giving such notice shall be borne by the person making payment who shall have the option of having the notice served either by a process server of the Court or by a registered post. No such notice shall issue until the said cost shall have been paid

##### LAHORE

Add the following

*Explanation* — The judgment debtor may, if he so desires pay the decretal amount or any part thereof into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose

## NAGPUR

O. 21 R. 1  
Notes 1-3(1) In sub-rule (1), *after* the words "a decree" *insert* the words "or an order,"(2) *For* clause (a) of sub-rule (1), *substitute* the following clause

"(a) by deposit in, or by postal money order to, the Court whose duty it is to execute the decree or order, or",

(3) In clause (c) of sub-rule (1), *after* the word "decree" *insert* the words "or order,"(4). To sub rule (2), *add* the following proviso

"Provided that when the payment is made by money order, the notice may be given by registered post by the judgment-debtor direct to the decree-holder "

## PATNA

*For* Rule 1 *substitute* the following

"1 (1) All money payable under a decree or order shall be paid as follows, namely

(a) by deposit in or by special postal money order to the Court whose duty it is to execute the decree or order, or

(b) out of Court to the decree holder, or

(c) otherwise as the Court which makes the decree or order shall direct

(2) Where a judgment debtor makes any payment under clause (a) of sub-rule (1), he may give notice thereof to the decree-holder —

(a) either through the Court, on payment of the fees laid down in the rules framed by the High Court under clause (1) of Section 20 of the Court fees Act, 1870 (Act 7 of 1870), or

(b) notwithstanding anything contained in Order 48 Rule 2, by registered post direct

Where interest is payable under the decree or order, such notice shall, if duly proved, operate as a bar to the accrual of such interest, upon the amount so paid, after the date of receipt of such notice by the decree holder "

*Synopsis*

1. Legislative changes.

2. Retrospective operation of the Rules of this Order See Note 3 to the Preamble

3. Scope and applicability of the Rule.

4. Payment into Court.

5 Who should make payment.

6 Effect of payment.

7. Decree directing payment to decree-holder.

8 Payment out of Court to decree-holder.

9. Notice of payment.

*Other Topics (miscellaneous)*Court closed on last day for payment — Procedure See Note 4  
Inexecutable decrees, applicability of rule See Note 3

Liability for interest See Notes 3 and 8

' Money payable under a decree ' See Note 1

Tender by debtor to be unconditional See Note 1

1. Legislative changes. — Clause (2) of the rule is new

2. Retrospective operation of the Rules of this Order. — See Note 3 to the Preamble

3. Scope and applicability of the Rule. — The judgment debtor is bound to pay the decretal debt in one of the modes specified in the rule<sup>1</sup> He cannot be relieved

Order 21 Rule 1 — Note 3

1. (33) AIR 1933 Mad 523 (524) (Judgment debtor cannot be required to pay the money to a

third party who has got an unregistered assignment of the decree merely because he happens to know of it)

O 21 R 1  
Notes 3-5

from such liability on the ground that the decree holder is dead \*

The rule does not apply to decrees that are *inexecutable* as where a compromise decree provides that on default in payment the decree holder shall have the right to file a *suit*<sup>3</sup> Nor does the rule apply to money payable under an *order* though such orders are *executable* under the provisions of Section 36 like decrees. Thus where a party is ordered to pay the costs of the day to the opposite side he cannot deposit the costs in Court under this rule<sup>4</sup>. Under Section 11 of the Charitable and Religious Trusts Act (XIV of 1930) the provisions of the Code relating to execution of decrees are applicable to execution of orders under that Act.

**4 Payment into Court** — Where a payment under a decree has to be made *only into Court* as in the case of pre-emption decrees under O 20 R 14 and the Court is closed on the last day for making such payment the maxim *lex non cogit ad impossibilia*<sup>1</sup> will apply and the payment can be made on the day the Court re-opens<sup>2</sup>. It has been held by all the High Courts except the High Court of Allahabad that the same rule will apply even where the decree amount may be paid to the *decree holder* or *into Court* inasmuch as the judgment debtor is entitled to choose the method of payment<sup>3</sup>. The High Court of Allahabad<sup>4</sup> is of the opinion that in such cases the judgment debtor cannot get the time for payment extended by choosing to pay the amount only in Court.

An arbitrator is not an officer of the Court and a payment to him is not a payment into Court<sup>5</sup>. Where a receiver appointed in an administration suit was not authorized to receive certain payments to be made by X but the latter made the payments to the receiver who misappropriated them it was held by the Privy Council that X was not discharged from liability by reason of such payments<sup>6</sup>.

The words *all money payable under a decree* do not mean the entire amount payable under the decree. Therefore even if a portion of the decretal amount is paid into Court it will be a valid payment and the decree holder can take out execution only for the balance<sup>7</sup>.

**5 Who should make payment** — A payment into Court under this rule can be made only by the judgment debtor, his agent or his representative. A payment made by a *stranger* will not have the effect of satisfying the decree unless the decree holder consents thereto<sup>1</sup>. But a payment made by the mortgagee of a party liable to pay is effective though he is not a party to the suit<sup>2</sup>. In execution of a decree for money

2 (10) 5 Ind Cas 63 (64) (Cal) (Liable for interest on the whole of the amount due)

3 (20) AIR 1919 All 207 (207) 51 All 527  
[See however (35) AIR 1935 Pat 305 (393) 14 Pat 488 (Payment need not be due under executable decree—Payment made under preliminary decree is within this rule)]

4 (83) 12 Mad 190 (191)

**Note 4**

1 The law does not compel a man to do that which he cannot possibly perform

2 (81) 3 All 850 (851)

(81) 1884 All W N 217 (217)

(25) AIR 1915 All 687 (687)

(50) 5 Cal 906 (909) (Payment under 53 of Decretal Act VIII of 1869 had to be made in Court)

[See also (29) AIR 1919 All 207 (207) 51 All 527]

2 (29) 1 Bom L R 644 (644)

(10) 7 Ind Cas 937 (937) 35 Bom 80  
(06) 10 Cal W N 535 (539)

also decree and any other decree)

(35) AIR 1935 Lah 369 (370)

[See also (38) AIR 1938 Mad 573 (574)]

4 (29) AIR 1919 All 207 (207) 51 All 527

(38) AIR 1938 All 199 (200) 1 L R (1938) All 337

5 (24) AIR 19 4 Rang 263 (264) 3 Rang 147

6 (32) AIR 1932 PC 191 (193) 59 Ind App 311

7 Luck 389 (PC)

7 (33) AIR 1933 Pat 69 (90) 11 Pat 796

**Note 5**

1 (17) AIR 1917 Mad 739 (741)

2 (24) AIR 19 4 PC 183 (185) 51 Ind App 236

48 Bom 404 (1 C)

obtained by *A* against *B*, a receiver was appointed to collect certain amounts due to *B* by *C*. *C* paid the amount into the hands of the receiver who absconded and did not pay the money into Court. It was held that the payment by *C* to the receiver did not discharge the judgment debtor from liability under the decree<sup>3</sup>.

**6 Effect of payment.**—A payment into Court towards a decree debt operates as a discharge of the decree debt to that extent<sup>1</sup> and where interest has been awarded on the decree amount, it will cease to run on the sum deposited<sup>2</sup>. But if, after having made the payment, the judgment debtor prevents the sum reaching the hands of the decree holder, he will be liable for interest until the money becomes available to the decree holder<sup>3</sup>.

If money is paid into Court under process of execution and the decree holder or his agent is present, the Court should cause it to be paid to him immediately<sup>4</sup>.

**7. Decree directing payment to decree-holder.**—Even where the decree directs the payment to be made to the decree holder, payment into Court is a valid compliance with the decree<sup>1</sup> unless perhaps the Court directs that payment should not be made otherwise than by payment to the decree holder<sup>2</sup>.

**8. Payment out of Court to decree-holder.**—A payment made to the decree holder out of Court also discharges the decree<sup>1</sup>. But the decree holder is not bound to accept a sum in part satisfaction of his decree and the refusal to receive it will not deprive him of his right to interest<sup>2</sup>. Where a payment out of Court is made through post before a certain fixed date but does not reach the decree holder within that date, the payment is not effective<sup>3</sup>.

The language of the rule is only permissive and does not prohibit a payment to an agent or representative of the decree holder, and hence a payment out of Court may be made to the decree holder's agent or representative or in the case of members of a Hindu joint family, to the manager of the family<sup>4</sup>.

The term 'decree holder' in clause (b) of this rule used in the singular includes the plural also<sup>5</sup>. Where therefore, the decree is in favour of two or more persons jointly, a payment out of Court, in order to be binding on all, must be made to all the joint decree holders<sup>6</sup>. See also Notes to Order 21 Rule 15.

**9. Notice of payment.**—The question of notice of payment into Court to the decree holder is material only where the decree awards interest. Where no interest has been awarded by the decree and the decretal amount is paid into Court it operates as a discharge of the decree, even if no notice is given to the decree holder<sup>1</sup>. But if the decree awards interest, then the decree holder is entitled to interest till the date of

3 (97) 20 Mad 224 (296) (Per Shephard, J.)

#### Note 6

- 1 (97) 20 Mad 224 (296)
- (73) 20 Suth W R 131 (131)
- 2 (18) AIR 1918 All 934 (234 235) 40 All 125
- (33) AIR 1933 Loh 126 (16)
- 3 (23) AIR 1929 Nag 277 (298)
- (78) Cal I R p 183 (184)
- 4 (70) 5 Mad H C R App 2 (2)

#### Note 7

• • • • •

19 Nag

#### Note 8

- 1 (87) 9 All 9 (10)
- (71) 1871 Pan Re No 29
- 2 (67) 7 Suth W R 20 (20)
- 3 (18) AIR 1918 All 403 (401 405)
- 4 (11) Ill Ind Cas 503 (503) (Mad)
- (30) AIR 1930 All 659 (660) (Attaching decree holder is a representative of the decree holder and a payment can be made to him out of Court)
- 5 (34) AIR 1931 Mad 930 (31) 57 Mad 696
- 6 (31) AIR 1 31 Mad 130 (33) 57 Mad 636
- (17) AIR 1911 Mad 130 (33)
- (30) AIR 1 30 Cal 4 (3)

#### Note 9

- 1 (24) AIR 1924 Lat 115 (119) 21 Lat 751

**O. 21 R. 1**  
**Note 0**

notice.<sup>2</sup> Notice of such payment must be in writing and be served on the decree holder in the way prescribed for the service of summons.<sup>3</sup> Even if the judgment-debtor fails to give notice of the fact of payment, it is the duty of the Court to inform the decree-holder about it when he next applies for execution of the decree.<sup>4</sup>

Clause (2) of this rule does not apply to redemption decrees. They are governed by O. 34 R. 8, which does not require any such notice to be given.<sup>5</sup>

**O. 21 R. 2**

**R. 2. [S. 258.] (1)** Where any money payable under a

**Payment out of Court to decree-holder.** decree<sup>3</sup> of any kind<sup>4</sup> is paid out of Court,<sup>5</sup> or the decree is otherwise adjusted<sup>6</sup> in whole or in part<sup>7</sup> to the satisfaction of the decree-holder, the decree-holder shall certify<sup>12</sup> such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same<sup>19</sup> accordingly.

(2) The judgment-debtor also may inform the Court<sup>15</sup> of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized<sup>21</sup> by any Court executing the decree.<sup>22</sup>

[1877, S. 258; 1859, S. 206.]

**Local Amendments**

**MADRAS**

*Substitute the following for the existing sub rule (2)*

"Any party to the suit or his legal representatives or any person who has become surety for the decree debt also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice, the decree holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

**PATNA**

*In sub-rule (2) for the words "and if after service of such notice," substitute*

' and where certification has been made by an endorsement of such payment or adjustment by the decree holder or by any person authorized by him in that behalf upon the process issued by the Court the Court shall issue such notice of its own motion. If after service of the notice

### Synopsis

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>1 Legislative changes</li> <li>2 Scope and applicability of the Rule</li> <li>3 Money payable under a decree</li> <li>4 'Decree of any kind</li> <li>5 'Is paid out of Court'</li> <li>6 'Or the decree is otherwise adjusted'</li> <li>7 Adjustment in part</li> <li>8 Oral adjustments</li> <li>9 When and with whom payment or adjustment should be made</li> <li>10 Payment to one of several joint decree holders See Notes to Order 21 Rule 15</li> <li>11 Adjustment by guardian of minor party</li> <li>12 The decree holder shall certify</li> <li>13 Effect of certifying without payment or adjustment being made</li> <li>14 Certification by one of several joint decree holders See Notes to Order 21 Rule 15</li> <li>15 The judgment debtor may also inform Court and apply</li> <li>16 Judgment debtor meaning of</li> <li>17 Certification form of</li> </ul> | <ul style="list-style-type: none"> <li>18 Limitation for certification</li> <li>19 'Shall record the same</li> <li>20 Notice</li> <li>21 Uncertified payment or adjustment not to be recognized by Court executing the decree</li> <li>22 'Court executing the decree'</li> <li>23 Court acting under Order 21 Rule 16</li> <li>23a Court dealing with application under O 21 Rr 90 95 97 and 98</li> <li>24 Suit by judgment debtor based upon an uncertified payment or adjustment</li> <li>25 Suit by decree holder based on an uncertified payment or adjustment</li> <li>26 Effect of fraud</li> <li>27 Effect on limitation</li> <li>28 Operation as estoppel</li> <li>29 Remedies of the judgment debtor</li> <li>30 Suit for damages</li> <li>31 Restitution of uncertified payment on reversal of decree in appeal</li> <li>32 Criminal proceedings</li> <li>33 Appeal and revision</li> </ul> |
|--|---|

### Other Topics (miscellaneous)

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>A-signee of the decree—Whether comes within the rule See Note 9</li> <li>Certificate—In which Court to be filed See Note 15</li> <li>Compromise—Whether and when sufficient adjustment See Note 6</li> </ul> | <ul style="list-style-type: none"> <li>Judgment debtor pleading agreement with assignee of decree See Note 2</li> <li>Rule whether confined to parties only See Note 2</li> <li>Show cause See Note 20</li> <li>Such payment or adjustment See Note 29</li> </ul> |
|---|---|

#### 1 Legislative changes —

1 In sub rule (1) after the words payable under a decree the words of any kind have been added See Note 4 *infra*

2 The words as a payment or adjustment of the decree which occurred in the old Code in sub rule (3) after the word recognized have been omitted See Note 27 *infra*

3 The words or if any payment is made in pursuance of an agreement of the nature mentioned in Section 207A after the words to the satisfaction of the decree holder have been omitted. Section 257A of the old Code has also been omitted. It ran as follows

Every agreement to give time for the satisfaction of a judgment debt shall be void unless it is made for consideration and with the sanction of the Court which issued the decree and such Court deems the consideration to be under the circumstances reasonable

Every agreement for the satisfaction of a judgment debt which provides for the payment directly or indirectly of any sum in excess of the sum due or to accrue due under the decree shall be void unless it is made with the like sanction

O 21 R 2  
Notes 1-2

Any sum paid in contravention of the provisions of the Section shall be applied to the satisfaction of the judgment debt and the surplus if any, shall be recoverable by the judgment debtor

The omission of Section 257A from the present Code renders the under mentioned decisions<sup>1</sup> now merely of academic interest. The effect of the omission is that the legality of such arrangements between parties after decree must be tested like other agreements<sup>2</sup>

**2 Scope and applicability of the Rule** — The object of this rule is to ensure that the Court executing the decree shall not be troubled with any disputes between the parties with regard to any payment or adjustment unless the same has been duly certified or recorded<sup>1</sup> Sub rule (1) contemplates a certification by the *decree holder* and a record by the Court of the payment or adjustment sub rule (2) contemplates an application by the *judgment debtor*. In this case *notice* is to be given to the decree holder and the Court should give a *judicial decision* whether the payment or adjustment should be recorded as certified<sup>2</sup> Lastly sub rule (3) imposes a bar upon the Court executing the decree and prevents it from recognising any payment or adjustment which has not been certified or recorded as certified as required by the rule<sup>3</sup>

**Order 21 Rule 2 — Note 1**

1 In the following cases the agreement was held to be valid as being contrary to S 257A

- (09) 9 Ind Cas 901 (1991) (Mad)
- (81) 8 All 585 (589)
- (84) 6 All 623 (625)
- (95) 1895 All W N 149 (150)
- (85) 9 Bom 176 (179)
- (88) 12 Bom 499 (501)
- (88) 13 Bom 54 (55)
- (88) 20 Bom 693 (700 701)
- (03) 7 Bom 96 (100)
- (04) 9 Bom 62 (65)
- (04) 28 Bom 810 (813 814)
- (04) 28 Bom 833 (836)
- (14) AIR 1914 Bom 181 (180) 33 Bom 219
- (01) 3 Cal 917 (9 0)
- (50) 1880 Pun Ro No 48 page 101
- (91) 1 Mad L Jour 390 (333 334)
- (03) 96 Mad 19 (26 27)
- (19) AIR 1919 Mad 1198 (1120)

In the following cases it was held that an agreement made with the sanction of Court under

(85) 10 Bom 499 (501)

(89) 1889 Bom F J 877

[See also (90) 12 All 571 (575) (Sanction could be given only by Court which passed the decree)]

See also the following cases

- (03) 25 All 817 (320 321)
- (92) 16 Bom 618 (605)
- (89) 14 Bom 890 (89) (Section related only to debts enforceable in execution)
- (89) 16 Cal 504 (507)
- (01) 6 Cal W N 27 (30)
- (85) 11 Cal 671 (672)
- (03) 1908 Pun Ro No 90 page 151 (FB)
- (94) 17 Mad 392 (393)
- (93) 6 C P L R 133 (135)
- (01) 4 Oudh Cas 284 (285)
- (85) AIR 1935 Bom 257 (258)
- 2 (14) AIR 1914 Cal 697 (698)
- (11) 13 Ind Cas 701 (205) (Mad)
- (25) AIR 1975 Oudh 361 (365) 98 Oudh Cas 250

**Note 2**

1 (20) AIR 1922 Bom 320 (330 331) 46 Bom 296

2 (09) AIR 1909 P C 19 (2 03) 50 Ind App 30 31 Luck 684 (P C)

Section 257A applies only as between parties to the decree

- (83) 6 Mad 101 (102)
- (83) 13 Bom 671 (6 2)
- (99) 23 Bom 507 (508)

- (25) AIR 1925 Bom 309 (303) 49 Bom 518 (111)
- (2) AIR 19 Bom 350 (350 331) 46 Bom 220
- (84) 13 Bom 171 (1 6)

**O.21 R.2**  
**Note 2**

Section 71 of the Dekkhan Agriculturists' Relief Act (Bombay) expressly excludes the application of sub rule (3) of this rule to payments out of Court made in

- (70) AIR 1920 Cal 289 (290)  
(19) AIR 1919 Cal 121 (172)  
(12) 14 Ind Cas 839 (842) (Cal)  
(10) 11 Ind Cas 43 (44) (Cal)  
(98) 20 Cal 111 (35) (36)  
(99) 25 Cal 86 (89)  
(1805) 4 Suth W R Misc 11 (11)  
(78) 20 Suth W R 150 (150)  
(67) 8 Suth W R 318 (370)  
(67) 7 Suth W R 134 (184)  
(68) 9 Suth W R 802 (802)  
(71) 15 Suth W R (O C) 5 (r)  
(25) AIR 1925 Lah 566 (567)  
(78) 1878 Pun Re No 26 page 118  
(32) AIR 1932 Mad 250 (252) {Uncertified payment by judgment debtor to decree-holder after latter's adjudication as insolvent cannot be recognized as against receiver}  
(17) AIR 1917 Mad 605 (606, 607)  
(11) 12 Ind Cas 562 (568) 36 Mad 357  
(07) 17 Mad L Jour 527 (528)  
(06) 29 Mad 312 (318)  
(81) 3 Mad 118 (114)  
(21) AIR 1921 Pat 135 (137 138) 6 Pat L Jour 31  
(18) AIR 1918 Pat 778 (278)  
(31) AIR 1931 Rang 148 (149) 11 Rang 101 {The Court has no power to stay the confirmation of the sale of the judgment-debtor's properties on the basis of such an adjustment}  
(25) AIR 1925 Rang 313 (310)  
(14) 22 Ind Cas 968 (973) 1 Upp Bur Rul 191  
(11) 11 Ind Cas 780 (781) (Low Bur)  
(36) AIR 1936 Pat 253 (254)  
(36) AIR 1936 Lah 642 (643)  
(21) AIR 1927 Mad 911 (915) 50 Mad 897  
(35) 39 Cal W R 961 (966)  
{See also (70) 1890 All W N 68 (69)  
(61) 7 Suth W R 510 (510)}  
{But see (74) 7 Mad H C R 337 (391) (Case under Code of 1859)  
(66) 4 Bom H C R A C 120 (124)}  
(4) (9C) 19 Mad 230 (232 233)  
(31) AIR 1931 Mad 399 (400) 54 Mad 184  
(23) AIR 1923 Mad 230 (231)  
(11) 12 Ind Cas 637 (661 662) 11 Mad 650 {Per Sundara Iyer J}  
(27) AIR 1927 Cal 634 (696) {Agreement by judgment debtor with the proposed assignee can be pleaded in an application for execution by the assignee}  
(68) 1898 Pun Re No 187 page 370  
{See also (83) 5 All 269 (271)  
(27) AIR 1927 Mad 676 (677)  
(38) AIR 1938 Nag 265 (265) (Money paid previous to decree—O 21 II 2 does not apply)}  
{See however (34) AIR 1937 Cal 31 (36) {A  
up by B as bar to execution in absence of certification under this rule}}  
(11) 11 Mad 230 (232)  
(23) AIR 1923 All 71 (71) 45 All 304  
(38) AIR 1936 Mad 34 (37) 54 Mad 153 (FD)  
(O 23 R 3 applies to such a case)



O. 21 R. 2  
Note 2

proceedings under the Act<sup>9</sup> As to whether this rule applies to proceedings under the Bengal Tenancy Act, see the undermentioned cases<sup>9</sup> Sub rule (3) of this rule has been repealed, so far as the Punjab is concerned, by Section 36 of the Punjab Relief of Indebtedness Act, VII of 1934<sup>10</sup> Section 80 of the Agra Tenancy Act (III of 1926) deals with certification under this rule

This rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment debtor and the decree holder and when no other interests have come into being When once a sale in execution has been effected, a third party's interest intervenes which cannot be disregarded Therefore, after a sale is duly held the Court cannot refuse to confirm the sale on the ground that the decree holder and the judgment debtor say that the decree has been satisfied out of Court, and the only method by which the sale can be set aside is by the procedure prescribed in O 21 R 89<sup>11</sup> But, it has been held that where the adjustment has been made *before* the sale and an application for recording the adjustment is made after the sale the adjustment may be recorded and the sale may be set aside<sup>12</sup>

The principle that an adjustment cannot be recorded under this rule to the detriment of a third party was applied in the undermentioned case<sup>13</sup> in which it was held that an adjustment cannot be recorded under this rule when such recording will defeat the rights of the Government to court fees under O 33 R 10 See also the undermentioned decision<sup>14</sup> After a decree has been satisfied and the decree holder has certified such satisfaction, there is no subsisting decree and a sale held in ignorance of the satisfaction is void and liable to be set aside<sup>15</sup> But if the satisfaction is not certified, the sale is not vitiated and cannot be impeached<sup>16</sup>

This rule applies only to the adjustment of a *decree or order*. Hence it does not apply to the adjustment of a *claim* for restitution under Section 144 before such claim is allowed by the Court<sup>17</sup>

The executing Court is not precluded from recognizing a compromise entered into between the parties after the decree though such a compromise does not amount to an *adjustment* of the decree<sup>18</sup>

For cases under Section 206 of the Code of 1859 corresponding to this rule, see the undermentioned cases<sup>19</sup>

■ (21) AIR 1921 Bom 142 (142, 143) 45 Bom (The Court, as a general rule, will not for the 1128

(39) AIR 1939 Bom 253 (256) (Section applies only to payments and not to adjustments)

9. (1865) 3 Suth W R Act 7 (7 8) (Not applicable)

(68) 9 Suth W R 372 (373) (Do)

(74) 22 Suth W R 204 (204) (Applicable)

III (38) AIR 1935 Lah 607 (603) (The Act is retrospective)

(38) AIR 1933 Lah 126 (127) ILR (1933) Lah

of the parties)

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barred by this rule—Remedy is by way of suit

(37) AIR 1932 Lah 238 (239)

(28) AIR 1928 Pat 40 (43, 44) (But if decree-

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**3. "Money payable under a decree."**—A mortgage decree is a decree for the payment of money within the meaning of this rule even though it contains a further direction for the sale of the mortgaged properties on default of payment. The adjustment of such a decree out of Court must be certified under this rule<sup>1</sup>. But where a mortgagee decree holder is in possession of the mortgaged properties under the original contract of mortgage or by virtue of the terms of the decree, income received by the mortgagee from the mortgaged property is not "money payable under a decree" and does not therefore require to be certified<sup>2</sup>. Where, in a suit for possession by A against B, his tenant who set up a right to hold the land under a *mirasi* tenure, the Court declared in favour of B and directed payment of rent as before, it was held that rents paid by B to A out of Court were not "moneys payable under the decree"<sup>3</sup>.

The words "money payable under a decree" do not mean any money which the party may pay if he chooses, but money which is recoverable by a party in execution against the party liable to pay it. Thus, where a decree merely provided that if one party paid within a certain time a certain sum of money to the other party, the latter was to reconvey certain property to the former and that if default was made in payment, the latter was to enjoy the property with absolute rights, it was held that it was not a decree under which payment of money could be compelled in execution, and that this rule did not apply, so as to bar the Court from recognizing an uncertified adjustment out of Court<sup>4</sup>.

As to adjustments or payments made between the dates of preliminary and final decrees in mortgage suits, see Order 34 Rule 5, Note 14.

An award under the Arbitration Act when filed in Court is a decree for the purposes of Section 47 of the Code and this rule consequently applies to adjustments of such awards<sup>5</sup>.

**4. "Decree of any kind."**—Under the old Code, the High Court of Calcutta<sup>1</sup> and the Chief Court of Punjab<sup>2</sup> held that Section 258 of that Code applied to any kind of decree and not merely to money decrees. The High Court of Madras<sup>3</sup> on the contrary, held that Section 258 was applicable only to decrees under which money is payable and not to other kinds of decrees. Under the present Code, the High Courts of Bombay,<sup>4</sup> Calcutta,<sup>5</sup> Lahore<sup>6</sup> and Patna<sup>7</sup> have held that the addition of the words "of any kind" after the word "decree" in sub rule (1) makes it clear that the provisions of this rule are not confined to money decrees but apply to every kind of decree.

(1865) 2 Suth W R Misc 2 (2) ]

**Note 3**

1. (1865) 28 Mad 473 (476, 477, 478) (Over ruling 24 Mad 412)

mortgage requires to be certified )

2. (94) 18 Bom 690 (692)

4. (26) AIR 1926 Mad 749 (751) 49 Mad 716

5. (27) AIR 1927 Sind 66 (75)

(21) AIR 1921 Sind 182 (184) 16 Sind L R 215

(35) AIR 1935 Nag 250 (257) 81 Nag L R Sup 43 (FB)

**Note 4**

1. (81) 11 Cal 786 ("69) (Decree for possession)

(99) 3 Cal W N 187n

(72) 18 Suth W R 590 (521)

2. (66) 1906 Pun Re No 44 page 159 (Decree for foreclosure)

3. (99) 22 Mad 182 (184) (Decree for possession)

4. (27) AIR 1922 Bom 3-0 (3-0 3-1) 46 Bom

276 (Decree for partition)

5. (2-4) AIR 1925 Cal 715 (716 717) (Decree for partition—AIR 1922 Bom 3 0 Followed)

6. (36) AIR 1936 Lah 842 (843) (Decree for possession of house is within rule)

7. (35) AIR 1935 Pat 353 (353) 14 Pat 4-3

Page decrees are decrees for payment of money

Income received under a different contract of

O. 21 R. 2  
Note 2

proceedings under the Act<sup>9</sup> As to whether this rule applies to proceedings under the Bengal Tenancy Act, see the undermentioned cases<sup>9</sup> Sub rule (3) of this rule has been repealed so far as the Punjab is concerned by Section 36 of the Punjab Relief of Indebtedness Act, VII of 1934<sup>10</sup> Section 80 of the Agra Tenancy Act (III of 1926) deals with certification under this rule

This rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment debtor and the decree holder and when no other interests have come into being When once a sale in execution has been effected a third party's interest intervenes which cannot be disregarded Therefore after a sale is duly held the Court cannot refuse to confirm the sale on the ground that the decree holder and the judgment debtor say that the decree has been satisfied out of Court and the only method by which the sale can be set aside is by the procedure prescribed in O 21 R 89<sup>11</sup> But it has been held that where the adjustment has been made *before* the sale and an application for recording the adjustment is made after the sale the adjustment may be recorded and the sale may be set aside<sup>12</sup>

The principle that an adjustment cannot be recorded under this rule to the detriment of a third party was applied in the undermentioned case<sup>13</sup> in which it was held that an adjustment cannot be recorded under this rule when such recording will defeat the rights of the Government to court fees under O 33 R 10 See also the undermentioned decision<sup>14</sup> After a decree has been satisfied and the decree holder has certified such satisfaction there is no subsisting decree and a sale held in ignorance of the satisfaction is void and liable to be set aside<sup>15</sup> But if the satisfaction is not certified the sale is not vitiated and cannot be impeached<sup>16</sup>

This rule applies only to the adjustment of a *decree or order* Hence it does not apply to the adjustment of a *claim* for restitution under Section 144 before such claim is allowed by the Court<sup>17</sup>

The executing Court is not precluded from recognizing a compromise entered into between the parties after the decree though such a compromise does not amount to an *adjustment* of the decree<sup>18</sup>

For cases under Section 206 of the Code of 1809 corresponding to this rule see the undermentioned cases<sup>19</sup>

- 8 (21) AIR 1901 Bom 142 (142 143) 45 Bom (The Court as a general rule will not for the  
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(80) AIR 1939 Dom 955 (256) (Section applies  
only to payments and not to adjustments)  
9 (1865) 33 South W R Act 7 (7 8) (Not ap-  
plicable)  
(68) 33 South W R 372 (378) (Do)  
(74) 22 South W R 201 (204) (Applicable)  
10 (38) AIR 1935 Lah 602 (603) (The Act is  
for protection of the solicitor who in such an  
event can claim payment of the costs by either  
of the parties)

barred by this rule—Remedy is by way of suit

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suit, or the time when the decree becomes executable, is not an adjustment of the decree<sup>2</sup> Thus, an agreement between the parties to a decree by which arrangements are made to enable the decree-holder to collect moneys due to the judgment debtor and credit them towards his decree, and which provides for a temporary suspension of execution proceedings, is not such an adjustment of the decree as is contemplated by this rule<sup>3</sup> Similarly, where the parties agree that certain new or different rights not given by the decree should be included therein and be enforceable in execution, the arrangement is not an adjustment of the decree, but a variation of the decree Nor can such an arrangement be given effect to by enforcement in execution as it is a fundamental principle that the executing Court cannot go behind the decree This view has been laid down by the Privy Council in *Pradyumna Kumar Mulik v Kumar Dinendra Mulik*<sup>4</sup> The view taken in the undermentioned cases<sup>5</sup> that the arrangement

and a certain other sum by instalments in discharge of larger decretal amount—Property conveyed to decree holder—Agreement is adjustment )  
(35) AIR 1935 Bom 803 (805) (Oral agreement to accept part of decree amount in instalments in full satisfaction is an adjustment )

ment of the decree )  
(26) AIR 1926 Mad 184 (185) (Adjustment of

deed whereby the judgment debtor is released from liability )  
(11) 12 Ind Cas 169 (169) (Mad) (Agreement to discharge debt by services rendered )  
(25) AIR 1925 Rang 843 (319, 350) (Agreement not to execute decree in consideration of dis-

(80) 1899 Bom L J 93 (Adjustment by execution of mortgage )  
(26) AIR 1926 All 501 (503), 49 All 475 (Award of

consideration in adjustment )  
2. (10) AIR 1914 Mad 1081 (1084)  
(28) AIR 1928 Cal 5-7 (5-7)

(31) AIR 1931 Lah 608 (609)  
(27) AIR 1927 Mad 911 (918) 50 Mad 897  
(35) AIR 1935 All 364 (365) (Agreement by decree holder limiting methods of execution—Agreement though not an adjustment is binding on parties )  
(35) AIR 1935 Mad 429 (430) (Mortgage decree against A and B directing A's property to be sold first and then B's property—Compromise between decree holder and A that B's property to be sold first—B not party to it—Compromise is not adjustment )  
(See also (22) AIR 1922 Cal 311 (319) )  
(See however (26) AIR 1926 Oudh 885 (887)

from )  
(36) AIR 1936 Cal 518 (519) (Act of parties agreeing to vary decree is not adjustment—But

again in instalments and Court accepting it—Court can allow adjustment )

3. (80) 7 All 421 (431)  
4. (11) AIR 1937 P C 256 (259) 61 Ind App 302 ILR (1938) 1 Cal 66 31 Sind LR 637 (P C) (Third person paying off decretal amount, becoming as assignee of mortgagee and advancing fresh loan to mortgagor—Fresh deed by mortgagor covenant-

It comprised in first mortgage and also to treat

Sind LR 491  
(37) AIR 1937 Cal 222 (224) ]  
5. (37) AIR 1937 Cal 236 (237) (In this case

O. 21 R. 2  
Note 6

entered into between the parties can be enforced in execution is, it is submitted, not correct. It is not necessary that the judgment-debtor must have carried out all the terms of the arrangements made by him with the decree-holder, a *completed contract* by which he promises to do something at a future date can be accepted by the decree holder as a legal and immediate adjustment in satisfaction of his decree.<sup>6</sup> But an inchoate agreement, which if completed would bar the execution of the decree, cannot be pleaded as an adjustment within the meaning of this rule.<sup>7</sup> The reason is that an inchoate agreement is an agreement not yet concluded by the parties and therefore the judgment debtor cannot claim that the decree against him has been adjusted to the satisfaction of the decree-holder while the matter is still in the stage of negotiation. Similarly, where the decree holder has agreed to accept the *doing* of certain acts by the judgment debtor as satisfaction of the decree, the adjustment is not complete till such acts are done.<sup>8</sup>

There is no question of the "adjustment" of a decree when it is transferred to one of the judgment debtors.<sup>9</sup>

Where there is a dispute as to whether a decree has or has not been adjusted by a compromise, the executing Court will have to determine whether there was a compromise, whether the compromise amounted to an adjustment and what the effect of the adjustment is on the decree.<sup>10</sup>

The adjustment contemplated by this rule is one to the satisfaction of the decree holder. Hence, the *acceptance* of the decree holder is necessary for an

however the decision can be supported on the ground that the compromise and the order of the Court thereon amounted to an order for instalments under O. 20 R. 11.)

(27) 41 Cal W N 1183 (1184)

(29) AIR 1929 Cal 687 (689) 57 Cal 789

(30) AIR 1936 Sind 191 (195) 30 Sind L R 249

6. (27) AIR 1927 Lah 544 (545) (Adjustment need not be embodied in writing)

(30) AIR 1930 Lah 334 (335)

(33) AIR 1933 Mad 28 (30) 63 Mad L Jour 593 (603, 609, 610) 56 Mad 193

(35) AIR 1935 Lah 589 (590) (Adjustment to be complete must extinguish the decree even if it is to be performed at some future date—AIR 1933 Lah 732, Reversed)

(38) AIR 1938 Rang 202 (203) 1938 Rang L R 385 (FB)

(36) AIR 1936 Bom 277 (280) 60 Bom 729 (Actual payment not necessary for valid adjustment)

(35) 42 Cal W N 313 (314)

(37) AIR 1937 Nag 217 (220) 19 Nag L Jour 175 (178)

(37) AIR 1937 Cal 222 (224)

(36) AIR 1936 Pat 619 (620) - 15 Pat 330

(35) AIR 1935 Rang 353 (354) (Executory contract may form subject of adjustment)

[But see (20) AIR 1925 Mad 206 (207)]

(30) AIR 1930 Mad 410 (411) (Dissented from in AIR 1933 Mad 28)

(31) AIR 1931 Lah 603 (609)

(36) AIR 1936 Sind 191 (195) 30 Sind L R 249

(37) AIR 1937 Sind 229 (230) 31 Sind LR 491 J

7. (18) AIR 1918 Mad 896 (397)

(34) AIR 1934 Rang 190 (190)

(33) AIR 1933 Pesh 53 (55)

(33) AIR 1933 Mad 28 (32) 56 Mad 10.

(22) AIR 1922 All 18 (15) 44 All 258

(27) AIR 1927 Lah 544 (545)

(30) AIR 1930 Lah 231 (232)

(27) AIR 1927 Lah 537 (538)

(35) AIR 1935 Lah 817 (819) I L R (1935) Lah 40

[See (12) 16 Ind Cas 972 (978, 974) (Cil)]

8. (39) AIR 1938 Rang 202 (203) 1938 Rang L R 335 (FB)

(35) AIR 1935 Lah 973 (978) (Decree holder's name not in decree)

(35) AIR 1935 Mad 581 (582)

(35) 42 Cal W N 313 (314)

(36) AIR 1936 Rang 239 (290) (Decree holder agreeing that if judgment debtor transfers some land and pays certain amount he would regard decree as fully adjusted—Land not transferred there)

— . . . .

9. (38) AIR 1938 Oudh 106 (106)

10. (20) AIR 1920 Lah 334 (335)

adjustment under this rule<sup>11</sup> An arrangement which, although not consented to by the decree holder, is binding upon him by operation of law cannot be an adjustment under this rule<sup>12</sup>

O. 21 R. 2  
Notes 6-9

The question whether an executing Court can entertain an objection to the execution of the decree based on an arrangement between the parties prior to the decree has already been discussed in Section 47, Note 31, *ante* An adjustment of a decree pending an appeal from it is not a 'pre decree' arrangement but an 'adjustment' within the meaning of this rule<sup>13</sup>

See also Section 47 Note 41

**7. Adjustment in part.**—A decree may be adjusted in part and the judgment debtor is entitled to apply for a certificate of part satisfaction<sup>1</sup> Where there is a money decree against two or more defendants, an agreement discharging one or some only of the judgment debtors is an adjustment of the decree in part and should be certified<sup>2</sup>

Where a decree has been adjusted in part, it can be executed as to the remaining portion<sup>3</sup>

**8. Oral adjustments.**—It has been held by the High Courts of Allahabad, Bombay, Calcutta, Lahore and Patna and by the Judicial Commissioner's Courts of Nagpur and Sind that evidence to prove an oral adjustment subsequent to the decree is not inadmissible by reason of Section 92 of the Evidence Act<sup>4</sup> They proceed on the view that the words "as between the parties to any such instrument" in that Section suggest that the Section applies to *dispositive documents* between contracting parties and that a decree is not an 'instrument' between parties in the sense in which that expression is used in that Section But the High Court of Madras<sup>5</sup> has held that Section 92 of the Evidence Act is not confined in its operation to dispositive instruments but applies to decrees also and that therefore no evidence in proof of an oral agreement in adjustment of the decree is admissible

**9. When and with whom payment or adjustment should be made.**—The adjustment under this rule must be to the satisfaction of the *decree holder* and, therefore an adjustment to which the decree holder is not a party cannot be recorded by the executing Court<sup>1</sup> The term "decree holder" in this rule includes his assignee and

#### Note 11

1 (20) AIR 1929 AIR 59 (31)

(38) AIR 1933 Lah 806 (607) 14 Lah 673

(26) AIR 1926 Cal 643 (644)

(21) AIR 1927 Lah 544 (545) (Adjustments need

(37) AIR 1937 Cal 211 (219) 1 L R (1937) 1 Cal

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Scheme though made binding on him by law cannot amount to adjustment within the meaning of O. 21 R. 2)

(3) AIR 1936 Mad 491 (493)

#### Note 7

1 (50) 5 Cal 449 (449, 450)

(35) AIR 1933 Lah 3 (373)

2 (C) 31 M.L.J. 407 (407)

(15) AIR 1917 Pat 433 (434)

(33) AIR 1931 Pat 433 (434)

3 (33) AIR 1933 Pat 433 (434)

Mad 897

(30) AIR 1930 Mad 673 (673)

[See however (35) AIR 1933 Mad 491 (493)]

(Hes of judgment-debtor that decree has been adjusted by decree holder accepting certain amount that what is due under decree in full time is—what has been can be proved by oral evidence)

#### Note 9

1 (3) AIR 1933 Pat 411 (411) 13 Pat 317.

O 21 R 2  
Notes 9-12

the latter can certify a payment even before his transfer is recognized under O 21 R 16.<sup>3</sup> The judgment debtor also can apply to record a payment made by him to the transferee.<sup>4</sup> The reason is that it is the transfer and not the Court's recognition that passes the title to the decree. But the contrary view has been taken in the under-mentioned decisions<sup>5</sup> in which it has been held that until the transfer of the decree is recognized under O 21 R 16 the transferee is not a decree holder. Where an order recognizing the transfer of a decree is cancelled and before the order of cancellation is set aside in appeal the judgment debtor pays the decretal amount to the original decree holder the payment is binding on the transferee decree holder.<sup>6</sup>

A judgment creditor has a right to absolve his judgment debtor from liability at any time before other persons have acquired a right to realize the debt. Therefore after a decree has been certified in Court as having been satisfied it is not open to any creditor of the decree holder to attach the decree on the ground that the satisfaction was certified collusively in order to defraud his creditors.<sup>7</sup> There is also nothing in this rule to prevent the holder of a decree which is attached to enter satisfaction of his decree after the attachment if the payment or adjustment had been made before the attachment.<sup>8</sup> As to the validity of payments or adjustment made after attachment of the decree see Notes to Order 21 Rule 53.

**10 Payment to one of several joint decree-holders** — See Notes to O 21 Rule 15 *infra*

**11 Adjustment by guardian of minor party** — The provisions of O 32 R 7 apply to a compromise entered into even after a decree has been passed and an adjustment of a decree to which a minor is a party requires the sanction of the Court.<sup>1</sup> A payment or adjustment certified to the Court without the leave of the Court is not binding on a minor decree holder and cannot be recognized by the Court executing the decree.<sup>2</sup>

**12 "The decree-holder shall certify"** — It is the duty of the decree holder to report to the Court any payment or adjustment made out of Court.<sup>1</sup> It has been held that when once a Court is seized of an application to enter up satisfaction of a decree it is bound to make an enquiry and see whether the decree has been satisfied. The Court will not be justified in permitting the decree holder to withdraw his petition.<sup>2</sup>

<sup>2</sup> (12) 17 Ind Cas 617 (18) (Mad)

<sup>3</sup> (12) 14 Ind Cas 709 (13) (Mad)

<sup>4</sup> (35) AIR 1935 Nag 230 (234) 31 Nag L R Sup 111 (Adjustment made with transferee of decree before transfer is recognized under R 16 does not require certification under this rule and can be pleaded by judgment debtor in bar of execution by transferee although not certified under this rule)

(37) AIR 1937 Mad 605 (606) (Adjustment made with original decree holder before recognition of transfer under R 16 and certified by such decree holder can be set up against transferee when he applies for execution)

(71) 1871 Pun Re No 99

(09) 2 Ind Cas 523 (523 524) (Mad)

(01) 2 Mal L Jour 289 (290)

(19) AIR 1919 Mad 193 (199)

Note 11

1 (01) 26 Bom 109 (114)

(33) AIR 1933 Rang 186 (188)

(06) 29 Mad 809 (810)

(17) AIR 1917 Mad 409 (411)

(24) AIR 1924 Pat 185 (186)

[See also (36) AIR 1936 Mad 404 (405)]

2 (01) 26 Bom 109 (114)

(33) AIR 1933 Rang 186 (188)

(21) AIR 1921 Bom 142 (143) 45 Bom 1123

(25) AIR 1925 Mad 230 (232)

(23) AIR 1923 Pat 40 (44)

[See also (37) AIR 1937 Loh 397 (399)]

Note 12

1 (27) AIR 1927 Mad 947 (948)

As to the remedy of the judgment debtor in case the decree-holder does not certify the payment or adjustment, see Notes 30 and 32, *infra*

O. 21 R. 2  
Notes 12-14

### 13. Effect of certifying without payment or adjustment being made.—

Where a decree holder admits and certifies to the Court satisfaction of the decree, he cannot afterwards apply to execute the decree on the ground that he was induced to certify by means of fraud or coercion or that the certification was made under a mistake<sup>1</sup>

14. Certification by one of several joint decree-holders.—See Notes to Order 21 Rule 15

### 15. "The judgment-debtor may also inform Court . . . . and apply."—

Where a judgment debtor pays the amount due under the decree out of Court, he is not bound to wait till the decree holder fails to certify the payment<sup>1</sup> or till the decree is actually drawn up,<sup>2</sup> but may himself inform the Court of such payment and apply for its being recorded as certified. Where such application is resisted by the decree holder on the ground that no such payment or adjustment was made, the Court cannot straightway dismiss the application<sup>3</sup>. It is bound to investigate and decide any question upon which the parties may not be agreed, upon such materials as they may legally place before it<sup>4</sup>. The reason is that the words "to show cause" do not mean merely to *allege* cause, nor even to make out that there is room for argument, but both to *allege* cause and to prove it to the satisfaction of the Court<sup>5</sup>.

The dismissal for default of an application under sub rule (2) does not bar a fresh application by the judgment debtor for the same purpose, and he is entitled to have an adjudication on the merits subject, of course, to any objection that may be open to the decree holder<sup>6</sup>.

A certificate of payment or adjustment should be filed in the Court *which has to execute the decree*<sup>7</sup>. It has been held by the High Court of Calcutta in the undermentioned cases<sup>8</sup> that, where an agreement or adjustment has been brought to the notice of the Appellate Court by the judgment debtor when an appeal from the decree is pending before it and the same is not objected to by the decree holder, there

default—Subsequent application by judgment debtor after limitation should be treated as in continuation of the former application by decree-holder.]

(88) 1888 All W N 62 (53)  
(27) AIR 1927 Lah 544 (545)  
(22) AIR 1922 Pat 276 (277-278) 1 Pat 644

#### Note 13

1. (70) 1870 Pun Re No 1 (Fraud—Remedy is by suit)
- (34) AIR 1934 Nag 148 (144) 31 Nag L R 21 (Decree certified as fully satisfied through negligence of agent or pleader—Order cannot be reviewed)
- (71) 1871 Pun Re No 89 (Duress)
- (20) AIR 1920 Lah 73 (74) (Mistake)
- (17) AIR 1917 Low Bur 164 (165) (Mistake—Review is by review)
- (See also) (70) 1870 Pun Re No 65 p 171.]

#### Note 15

1. (10) 1870 All L Jour 94 (95) (He may himself pay the money)
2. (10) AIR 1910 Cal 1061 (1065)
3. (10) 1870 All L Jour 94 (95)
- (17) AIR 1917 All 403 (410 411)
4. (10) 1870 All W N 40 (40)
- (21) AIR 1921 All 73 (74)
- (19) AIR 1919 All 203 (204) 41 All 413

5. (85) 11 Cal 166 (168) (Evidence may be given either orally or by affidavit)

not enquire into a proceeding under this rule.)  
(22) AIR 1922 Pat 276 (277) 1 Pat 644  
(19) AIR 1919 Sind 92 (94) 13 Sind L R 120  
(Local reference in a plaint in another proceeding is not sufficient)  
(See also) AIR 1922 All 6 (67) (The fact attached—Information by the plaintiff and judgment debtor to the appellate Court that decree is satisfied is not sufficient)  
(8) (25) AIR 1925 Cal 27 (30)  
(12) 13 All 63 (67) (Cal)



O. 21 R. 2  
Notes 15-17

is a sufficient compliance with the provisions of sub rule (2) The High Court of Madras<sup>9</sup> has dissented from this view and has held that the filing of a certificate of satisfaction in the wrong Court and obtaining an order recording it cannot be treated as legally valid Where a decree has been transferred to another Court for execution, the transferee Court is the only Court which has the power to enquire into an application under this rule by the judgment debtor<sup>10</sup> A Collector to whom a decree is transferred for execution under Section 68 is not a 'Court' whose duty it is to execute the decree within the meaning of this rule<sup>11</sup>

**16. "Judgment-debtor," meaning of.** — The word "judgment debtor" in this rule includes persons claiming through him Thus, a transferee of the equity of redemption in the suit property from a judgment debtor in a mortgage decree is a 'judgment debtor' for the purposes of this rule<sup>1</sup> A surety for a judgment debtor can plead an uncertified payment or adjustment made by him (*the surety*) with the decree holder<sup>2</sup> The reason is that when a Court proceeds against a surety under Section 145 it does not purport to execute the decree but only enforces the bond in the manner provided for the execution of decrees and is not therefore a Court executing the decree within the meaning of sub rule (3)

But the surety cannot plead an uncertified satisfaction or adjustment by *the judgment debtor* inasmuch as the latter himself could not have pleaded it and the surety cannot be in any better position<sup>3</sup>

**17. Certification, form of. —**

*Certification by decree holder* — There is no particular form in which the decree holder is required to certify a payment or adjustment<sup>1</sup> The certification may be done orally,<sup>2</sup> or by statement made in a subsequent execution application<sup>3</sup> or in a statement in answer to the objections of the judgment debtor,<sup>4</sup> or in a petition filed by him<sup>5</sup> or by way of admissions<sup>6</sup> An intimation by him to the Court that the decree is satisfied is also a sufficient certification<sup>7</sup> Where a decree for sale was passed in favour

9 (18) 21 Ind Cas 639 (611) (Mad)

10 (87) AIR 1930 Bom 202 (203)

(94) 16 All 228 (231)

(85) AIR 1935 Bom 803 (804)

[See also (60) 5 Cal 449 (450)]

11 (80) AIR 1936 Bom 277 (279) 60 Bom 729  
(Application for entering satisfaction to be made to the Civil Court)

(37) AIR 1937 Nag 21\* (219) 19 Nag L Jour  
175 (177)

**Note 16**

1 (07) 80 Mad 537 (540)

(19) AIR 1919 Mad 353 (359) (Purchaser in execution of another money decree can apply to certify satisfaction of mortgage decree against the same property)

2 (76) AIR 19 (Sind 100 (106 107) 20 Sind  
L R 360

(1927) 12 Ind Cas 100 (101) (Sind)

decree holder)

2 (17) AIR 1917 Cal 466 (467)

(71) 1871 Pun Re No 32

(17) AIR 1917 Low Bur 164 (165)

3 (21) AIR 1924 Lah 676 (677)

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**Note 17**

[See (31) AIR 1934 All 531 (535) 56 All 971  
(Instalment decree — Mere placing of a cross mark after the instalment does not amount to certification)]

4 (88) 1888 All W N 11. (116)

5 (60) 12 Suth W R 353 (359)

6 (20) AIR 1920 Lah 73 (74)

(1927) 12 Ind Cas 100 (101) (Sind)

**Note 17**

1 (10) AIR 1916 Mad 795 (799)

(21) AIR 1924 Lah 676 (677)

(3) AIR 1937 Mad 511 (513 514) (It does not matter under what circumstances the payment is brought to the notice of the Court by the

by judgment debtor — If payment is made

7 (11) 12 Ind Cas 572 (574) 35 Bom 516

of a mortgagee in possession but the decree failed to provide for the taking of accounts of the profits that might thereafter be received by the mortgagee and the decree holder intimated to the Court in his application for sale that the net profits should go in reduction of the decree amount it was held by the High Court of Madras<sup>8</sup> that the application could be treated as an intention to certify adjustment of the decree and that an enquiry may be directed as to the amounts collected by him. The High Court of Bombay<sup>9</sup> has however held that a certificate of payment or adjustment without specifying the amount of the payment or without mentioning the terms of the adjustment is not a sufficient compliance with the rule. The certification must be of payment of money due under the decree. Hence an admission that certain sums of money were received coupled with a statement that they were received on account of interest not allowed by the decree itself but paid in consequence of a separate agreement entered into after the passing of the decree does not amount to a certification within the meaning of this rule<sup>10</sup>.

*Application by judgment debtor* — An application by the judgment debtor to certify a payment or adjustment cannot be said to comply with the rule where there is no prayer for the issue of a notice to the decree holder to show cause why the payment or adjustment should not be recorded as certified<sup>11</sup>.

According to the High Courts of Allahabad<sup>12</sup> Bombay<sup>13</sup> and Rangoon<sup>14</sup> where a judgment debtor contests an application for execution on the ground of payment or adjustment the statement of objection can be treated as an application under sub rule (2) provided it is made within 90 days of such payment or adjustment. The High Courts of Calcutta<sup>15</sup> and Madras<sup>16</sup> have on the other hand taken a contrary view and have held that to so treat the objection would be to ignore the express language of the rule. The Patna High Court held in the undermentioned decision<sup>17</sup> that an objection to execution can be treated as an application under sub rule (2). But in later decisions the same High Court has held that that sub rule only applies to cases where the judgment debtor applies for the recording of satisfaction before the starting of execution proceedings against him and not where he sets up the contention of payment or adjustment pending the execution proceedings<sup>18</sup>.

8 (16) AIR 1916 Mad 795 (799 800)

9 (1900) 2 Bom L R 901 (905)

10 (39) AIR 1987 All 581 (583 584)

(See however (29) AIR 1979 Mad 783 (788)

11 (18) AIR 1918 Cal 67 (68)

(29) AIR 1929 All G 4 (675) (Deposit of money by judgment debtor pending prior payment is not an application for certification of that payment)

(See (10) AIR 1970 Cal 899 (900) (Judgment

(39) AIR 1939 All 581 (583)

[But see (91) 1891 All W N 11 (11) (Cannot be treated so)]

13 (33) AIR 1935 Bom 303 (304)

14 (29) AIR 1928 Rang 62 (63) [Page 633]

(11) 11 Ind Cas 760 (781) (Low Bur) (Written

16 (12) 1 Ind Cas 5 (53) (Mad)

[But see (11) 10 Ind Cas 569 (563) 30 W L 95 (Objection dismissed in 1 Ind Cas 50)]

17 (30) AIR 1930 Pat 5 6 (59) (9 Pat 5 1)

18 (31) AIR 1934 Pat 904 (905) (The rule that a decree holder is to have a certificate of satisfaction entered in the decree register is not a condition precedent to the execution of the decree)

(O 21 Al 8 (10) (Thou 111:ot a k for rote it s fa 1ervd—Heli 11 t n may to ju l t )

12 (29) AIR 1 All (10)

(24) AIR 1 74 All 79 ( 5)

O. 21 R. 2  
Note 18

**18. Limitation for certification**—The period of limitation for an application by the judgment debtor under sub rule (2) is 90 days from the time when the payment or adjustment was made (see Article 174, Limitation Act) Where a judgment debtor alleges that the decree holder had fraudulently kept him from exercising his right to apply under sub rule (2) by promising that he would himself certify the payment or adjustment, the judgment debtor cannot claim an extension of time under Section 18 of the Limitation Act (IX of 1908)<sup>1</sup> The reason is that Section 18 does not deal with the exercise of the right to apply, but only to cases where a person has been fraudulently kept from the knowledge of his right. An order granting a time barred application to record satisfaction of a decree is, however, not a nullity, but is valid and binding unless set aside in appeal or other appropriate proceedings<sup>2</sup>

There is no express Article of the Limitation Act applicable to certification by the decree holder. Such certification is not an application within the meaning of Article 181 of the Limitation Act and therefore can be made at any time<sup>3</sup> See also Note 27, *infra*. In *Shri Prakash Singh v Allahabad Bank*,<sup>4</sup> it was held by their Lordships of the Privy Council that even if the document by which the decree holder certifies is styled as an application, and is in the form of a petition, it cannot alter the real nature of the procedure and convert what is really no more than a certificate, into an application within the meaning of Article 181.

It has been held by the High Courts of Calcutta, Madras and Rangoon and the Chief Court of Oudh following the decision of the Privy Council in *Shri Prakash Singh*'s case, that a certification by the decree holder is not an application to the Court to take some step in aid of execution, within the meaning of Article 182, clause 5 of the Limitation Act<sup>5</sup> The High Court of Allahabad,<sup>6</sup> on the other hand, held that it is a

(30) AIR 1936 Pat 253 (254) (Sub rule (3) of R. 2, O. 21 clearly contemplates a certification before the objection is taken to the execution on the basis of an adjustment or payment in satisfaction of the decree)

(20) AIR 1929 Mad 811 (811)  
(18) AIR 1918 Mad 670 (621) 41 Mad 251  
(19) 17 Ind Cas 617 (618) (Mad)  
(27) AIR 1927 Oudh 7 (11) 1 Luck 475 (affirmed)

#### Note 18

1 (1) AIR 1915 Cal 78 (73)  
(11) 13 Ind Cas 63 (66) (Cal)  
(28) AIR 1913 Rang 103 (106) 11 Low Bur  
Rul 863

(39) AIR 1930 All 581 (584)  
(30) AIR 1935 Mad 972 (923)  
[But see (29) AIR 1929 Cal 30 (31 32) (No longer law in view of AIR 1929 P C 19)]  
4 (29) AIR 1919 P C 19 (23) 50 Ind App 30  
3 Luck 684 (P C)

(19) AIR 1919 Cal 181 (182) (Certification made after a decree is barred by limitation does not save time)  
(15) AIR 1915 Cal 235 (237)  
(21) AIR 1924 Lah 676 (677)  
(16) AIR 1916 Mad 905 (959)

Act)  
(36) AIR 1936 Mad 116 (119) 50 Cal 424  
[But see (25) AIR 1925 Rang 26 (27) 2 Rang 333  
(19) AIR 1919 Low Bur 117 (118) 10 Low Bur  
Rul 81]  
6 (11) 9 Ind Cas 1023 (1024) (11)

step in aid of execution provided the payment or adjustment was actually made. But in a recent decision<sup>1</sup> the High Court of Allahabad also has followed the view of the above mentioned High Courts and held that the prior decisions of that Court are no longer good law in view of the decision of the Privy Council in *Shri Prakash Singh & case*.

Although there is thus no period of limitation for a certification by the decree holder under this rule when once it is brought to the notice of the executing Court that a certain alleged payment or adjustment has not been certified or recorded under this rule the Court must refuse to recognize such payment or adjustment and the defect cannot be cured by the decree holder subsequently certifying the payment or adjustment.<sup>2</sup>

19. "Shall record the same."—Where a decree holder certifies a payment or adjustment, the Court is *bound* to record it in accordance with his statement. It has no power to proceed to satisfy itself before recording the satisfaction that such statement is true.<sup>3</sup> But the judgment debtor will be entitled to show when an application for execution is made that no such payment or adjustment was made or that if it was made, it did not operate to extend the period of limitation for execution.<sup>4</sup>

Where the payment or adjustment is pleaded by the judgment debtor under sub rule (2), the Court is *not bound* to record the same as certified without requiring proof of it merely because the decree holder does not appear to show cause why it should not be recorded as certified.<sup>5</sup> After a payment or adjustment is recorded, it is not necessary that a fresh or amended decree should be drawn up.<sup>6</sup>

Sub rule (3) which provides that an uncertified payment or adjustment shall not be recognized by any Court executing the decree does not require that the payment or adjustment must be both certified *and* recorded. Thus where a certificate by the decree holder was not recorded by the Court as provided in this rule the judgment debtor does not lose his protection merely because the Court fails to perform the duty cast upon it to make the record.<sup>7</sup>

- { 10 } 5 Ind Cas 295 (296) 37 All 257  
{ 01 } 26 All 19 (20)  
{ 90 } 19 All 899 (407 403) (F B)  
{ 84 } 9 All 9 (10)

creditor )  
( 33 ) AIR 1938 Lah 60 (70) (The question

( Court suspicious that amount certified by decree holder was less than what was actually paid — Court can hold enquiry after notice to judgment-debtor )

2 ( 18 ) AIR 1918 Oudh 400 (407) 1 Oudh Cas 161

3 ( 25 ) AIR 1923 Rang 155 (156) 6 Rang 218 (Court should be satisfied that it is true)

4 ( 75 ) AIR 1919 Oudh 136 (137) (The Court has no jurisdiction to make such an amendment of the decree)

( 25 ) AIR 1925 Nag 49 (49) 90 Nag L II 122

5 ( 1 ) AIR 1915 Cal 744 ( 45 )

( 2 ) AIR 1923 Mad 155 (155 1 6) (The decree holder is not entitled to withdraw application and try him to his advantage at a later time if recorded nor can the Court set it aside)

( 5 ) AIR 1915 Mad 230 ( 31 )

( 1 ) AIR 1915 Mad 1 3 (1)

( 19 ) AIR 1919 La 50 ( 191 ) (Court can take evidence to decide whether record is correct)

#### Note 19

- 1 ( 31 ) AIR 1931 Rang 839 (333)  
( 33 ) AIR 1933 Mad 573 (524) (Court cannot go to question whether satisfaction was intended)

**O.21 R.2**  
**Notes 19-22**

An order recording the adjustment of a decree, brought about by the fraud practised by one party upon another can be vacated under the inherent powers of the Court<sup>6</sup>. But the Court ought not to exercise such powers to vacate the order unless it is prejudicial to one of the parties<sup>7</sup>.

See also Note 2 *supra*

**20. Notice.**—Sub rule (1) does not contemplate the issue of a notice to the judgment debtor<sup>1</sup>. But when the judgment debtor applies under sub rule (2), the Court is bound to issue a notice to the decree holder to show cause why the payment or adjustment should not be recorded as certified<sup>2</sup>. An order allowing a certification without notice to the decree holder is bad in law<sup>3</sup> and an application will lie to set aside such an *ex parte* order<sup>4</sup>.

**21. Uncertified payment or adjustment not to be recognized by Court executing the decree.**—The prohibition in sub rule (3) against the recognition of an uncertified payment or adjustment is limited to a "Court executing the decree" and will not extend to a Court, which is not executing the decree, when dealing with such a matter<sup>1</sup>. The object of the prohibition is to compel the judgment debtor to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree, if he desires that it should be recognized by the executing Court as against the decree holder executing the decree<sup>2</sup>.

Where the liability of the judgment debtor under a decree is only a *conditional* one as for instance where a decree provides that the decree holder is to execute the decree only in the event of the judgment debtor failing to comply with a particular condition, it will be open to the latter to prove, where execution is taken out, that the condition has been complied with, sub rule (3) has no application to such a case<sup>3</sup>.

**22. "Court executing the decree."**—The third clause of Section 258 of the Code of 1877 as well as Section 206 of the Code of 1859 provided that a payment or adjustment made out of Court shall not be recognized by "any Court executing the decree" unless it had been certified or recorded as certified<sup>1</sup>. Section 258 was amended in 1879 by Section 36 of Act XII of 1879 by omitting the words "executing the decree" after "any Court" and the Section as amended was re-enacted in the Code of 1882. This gave rise to a conflict of opinion as to the effect of the amendment. The High

(35) AIR 1933 All 116 (118)

(37) AIR 1937 Rang 507 (507)

6 (15) AIR 1915 Mad 281 (282)

7 (20) AIR 1920 Pat 750 (751) 5 Pat L.Jour 399

**Note 20**

1 (15) AIR 1918 Oudh 460 (461) 21 Oudh Cas 161

(19) AIR 1919 Pat 186 (137) 4 Pat L.Jour 159

2 (23) AIR 1923 Nag 20 (90)

3 (30) AIR 1930 Lah 118 (114)

4 (30) AIR 1930 Lah 113 (114)

(27-01) 2 Upp Bur Rul 254

**Note 21**

1 (22) AIR 1922 Pat 186 (187)

For other cases see Notes 22, 24, 25 and 26

2 (20) 17 All 42 (45)

3 (26) AIR 1926 Lah 611 (612)

1000 719 1000 719 1000 719

— — —

to execute—Contention that the instalments had been duly paid and that decree holder was not entitled to execute—Executing Court can not recognize such payments unless certified or recorded.]

**Note 22**

1. (79) 4 Bom 295 (297)

(82) 5 Mad 397 (400) (1 B)

(83) 6 Mad 41 (42 43)

(63) 10 Suth W R 354 (355) (Under S 206 of the Code of 1859)

[See also (74) 22 Suth W R 270 (271) (Do)]

Courts of Allahabad,<sup>2</sup> Calcutta<sup>3</sup> and Madras<sup>4</sup> and the Chief Court of the Punjab<sup>5</sup> held that the amendment had not the effect of altering the law as it stood before the amendment and that an uncertified payment or adjustment could be recognized by a Court other than a Court executing the decree. A contrary view was taken by the High Court of Bombay.<sup>6</sup> Owing to this conflict of opinion the Section was again amended by Section 27 of the Amending Act VII of 1888 which again restricted the prohibition to the Court executing the decree thus restoring the law to the state in which it was prior to the amendment of 1879.<sup>7</sup> The rule is now in the same form.

O. 21 R. 2  
Notes 22-23a

**22 Court acting under O 21 R 16** — Can a judgment debtor, who is debarred under this rule from pleading an adjustment of the decree with the decree holder for failure to have it certified, nevertheless plead the same when opposing an application by the assignee of the decree under O 21 R 16? The High Court of Bombay<sup>1</sup> held that he can. The High Court of Madras also held the same view in the undermentioned decisions.<sup>2</sup> These cases proceed on the view that when an application is made under O 21 R 16 by a transferee decree holder, it is heard by the Court as a Court which passed the decree and not as a Court which is *executing the decree*. The said Madras decisions have however, now been overruled by a Full Bench decision<sup>3</sup> according to which the judgment debtor cannot plead such an uncertified adjustment and evade the operation of this rule. This view is based on the ground that an application under O 21 R 16 is an application for execution and therefore the Court which passed the decree when dealing with such an application does not cease to be an executing Court as well. The High Courts of Allahabad<sup>4</sup> Calcutta<sup>5</sup> and Rangoon<sup>6</sup> and the Judicial Commissioners Courts of Nagpur<sup>7</sup> and Sind<sup>8</sup> have taken the same view. See also the undermentioned decision.<sup>9</sup>

**23a Court dealing with application under O 21 Rules 90, 95, 97 and 98.** — It has been held by the High Courts of Lahore and Patna that an application to set aside a sale under O 21 R 90 is not a proceeding in execution of a decree, and an

2 (81) 11 All 533 (535)

(81) 8 All 588 (540)

3 (84) 10 Cal 354 (356 357)

(84) 14 Cal 876 (879)

(83) 11 Cal 799 (790)

4 (80) 8 Mad 2 (233) (1 B)

(89) 12 Mad 61 (60 C3)

[But see (89) 11 Mad 469 (472) (Not followed in 12 Mad 61)]

5 (84) 1884 Lun Re No 63 page 930 (1B)  
[Overruling 1881 Pun Re No 4 and 1883 Pun Re No 11]

6 (87) 11 Bom G (12 34 35) (1B) { Such payment by instalment means payment or adjustment of the decree as such G Bom 146 Overruled }

(81) 10 Lw 155 (165)  
7 (91) 13 All 333 (317)

(1) 11 Lw 61 (60)

(1) 11 Lw 69 (67)

(1) 11 Lw 111 (101)

(93) O L J 111

### Note 23

3

(33) AIR 1933 Mad 157 (157) 56 Mad 316 (Following AIR 1932 Mad 132)

[See also (15) AIR 1915 Mad 1133 (1140)]

4 (84) AIR 1931 All 209 (210) 26 All 674

(31) AIR 1931 All 445 (447)

5 (37) AIR 1937 Cal 31 (34)

6 (30) AIR 1936 Rangoon 218 (215)

7 (91) 4 C P L R 132 (133)

8 (34) AIR 1934 Sind 205 (60)

9 (37) AIR 1937 Mad 511 (513) (Decree holder receiving part payment before it is certified or recorded transferring decree to another by document which says that the part payment has been made and purports to transfer the

**O. 21 R. 2** adjustment or compromise of the matter in dispute cannot be certified under the provisions of O 21 R 2 but must be recorded only under the provisions of O 23 R 3<sup>1</sup>  
**Notes 23a-26** On the same principle it has been held by the High Court of Bombay that a proceeding under O 21 Rules 95, 97 and 98 is not one in execution and the Court dealing with such an application is not an executing Court and is therefore not debarred from recognizing an uncertified adjustment of the decree<sup>2</sup>

**24. Suit by judgment-debtor based upon an uncertified payment or adjustment.** — It is only a Court *executing the decree* that is debarred from recognising an uncertified payment or adjustment. A suit based upon such payment or adjustment is not barred

#### Illustrations

1 B was a surety for D on a bond for Rs 50 passed by D to G. G obtained a decree against B on this bond and B fully satisfied the decree by paying G Rs 38. The payment was made out of Court and was not certified to the Court. B now sued D to recover the money so paid by him to G. It was held that sub rule (3) did not bar the suit and that the payment might be proved<sup>1</sup>

2 M obtained a decree against G for possession of a *jote* and mesne profits. Subsequently G adjusted the decree by paying the amount of mesne profits to M and purchasing the *jote* from him by a registered conveyance. After M's death his heirs executed the decree and obtained possession. G's plea of uncertified adjustment having been overruled, G now sued M's heirs for possession of the *jote*. It was held that though the adjustment was not certified, the suit based upon it was maintainable<sup>2</sup>

See also the undermentioned decision<sup>3</sup>

**25. Suit by decree-holder based on uncertified payment or adjustment.**  
 — Where a judgment debtor executed a bond in favour of the decree holder in adjustment of the decree against him, it was held that, in a suit by the decree holder upon the bond, the uncertified adjustment can be proved<sup>1</sup>. The reason is that the adjustment of a decree out of Court, if not certified to the Court under this rule, is ineffectual only so far as the *execution of the decree* is concerned. Similarly, where the plaintiff brought a suit under O 21 R 63 to establish his right to certain attached property on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment debtor, it was held that it was unnecessary that such transfer should be certified under the provisions of this rule<sup>2</sup>

**26. Effect of fraud.** — A obtains a decree against B. B satisfies the decree by a payment or adjustment made out of Court, but such payment or adjustment is not certified to the Court in time. A then applies for execution of the decree fraudulently omitting to state in his application the payment or adjustment as required by O 21,

right to execute in respect of the balance—  
 Assignee cannot in spite of the terms of the

— Suit for specific performance is maintainable.)  
**Note 25**

- 1. ('85) 7 All 121 (129 180)
- ('92) 16 Bom 580 (572)
- (01) 15 Bom 419 (421)
- (01) 25 Bom 253 (262)

(82) 1882 Pun Re No 182 p 537  
 (1900) 10 Mad L Jour 213 (214) (Bond assigned by judgment debtor to decree holder in adjustment—Suit on bond maintainable though adjustment not certified)

#### Note 24

- 1. ('88) 12 Bom 235 (237)
- ('20) AIR 1920 Nag 265 (263)
- 2. ('93) 25 Cal 718 (722, 724)
- 3. ('35) 157 Ind Cas 26 (28) (Rang) (Agreement to adjust decree though not certified is a contract)

- 144 L J 11
- 2. (01) 18 All 339 (342)

L Jour  
 FM  
 in 26

Rule 11 (e) Is B entitled to claim an investigation of the question under Section 47 ? The answer is no. Although the question is one relating to the *satisfaction* of the decree within the meaning of Section 47, it is taken out of the purview of that Section by virtue of the *particular provision* contained in this rule specifically dealing with such questions<sup>1</sup>.

O 21 R 2  
Notes 26-27

**27 Effect on limitation** — It has been already mentioned in Note 22 *ante* that Section 258 of the old Code provided that an uncertified payment or adjustment shall not be recognized by any Court executing the decree as a *payment or adjustment* of the decree. Consequently it was held that such a payment could however be relied upon by a decree holder for the purpose of extending the period of limitation for execution under Section 20 of the Limitation Act<sup>1</sup>. The words as a payment or adjustment of the decree have now been omitted in the present rule with the result that the executing Court cannot recognise an uncertified payment or adjustment for *any purpose whatever*<sup>2</sup>.

Now suppose a decree holder makes an application for execution of his decree more than three years after the date of the decree or after the last starting point of limitation and mentions in the application a part payment made by the judgment debtor. Can the Court executing the decree recognize the payment and hold that by virtue of such payment the decree is not time barred? The High Courts of Madras<sup>3</sup>

#### Note 26

- 1 (19) AIR 1919 Lah 18 (14) 1919 Pun Re No 185  
(20) AIR 1926 Oudh 820 (890)  
(35) AIR 1985 Mad 257 (207)  
(28) AIR 1923 Rang 108 (100) 11 Low Bur Rul 863  
(25) AIR 1925 Bom 809 (809 810) 40 Bom 545 (FB)  
(28) AIR 1928 Cal 842 (848) 50 Cal 468  
(28) AIR 1928 Cal 527 (529 530)  
(17) AIR 1917 Cal 492 (425)  
(12) 18 Ind Cas 424 (475) (Cal)  
(12) 18 Ind Cas 68 (80) (Cal)  
(12) 18 Ind Cas 896 (827 898) (Cal)  
(92) 90 Cal 82 (36)  
(12) 18 Ind Cas 944 (945) (Cal)  
(10) 7 Ind Cas 55 (57 58) (Cal)  
(09) 4 Ind Cas 409 (404) (Cal)  
(26) AIR 1926 Mad 674 (675) 49 Mad 395  
(18) AIR 1918 Mad 644 (644) 40 Mad 789  
(06) 29 Mad 312 (318)  
(98) 21 Mad 409 (410)  
(11) 12 Ind Cas 562 (563) 36 Mad 857  
(07) 17 Mad L Jour 527 (598)  
(26) AIR 1926 Oudh 482 (483)  
(28) AIR 1928 Oudh 195 (198) 3 Luck 170 (FB)  
(20) AIR 1920 Pat 833 (835) 5 Pat L Jour 70  
(21) AIR 1921 Pat 135 (137 188) 6 Pat L Jour 337  
(97 01) 9 Upp Bur Rul 256  
(25) AIR 1925 11 nd 140 (142) 18 S nd L R 51  
(21) AIR 1921 S nd 10 (11) 15 S nd L R 77  
(10) AIR 1919 S nd 56 (56 57) 13 S nd L R 71  
(35) AIR 1935 Mad 257 (257) (Uncertified agreement not to sell property of judgment debtor—Agreement cannot be relied on to prove fraud in conducting sale)

*The following cases are submitted as not good law*

- (08) 12 Cal W N 485 (487)  
(19) AIR 1919 Cal 202 (203)  
(98) 21 Mad 356 (359) (Dissent from in 110 Mad 812)  
(26) AIR 1926 Mad 945 (945)  
(25) AIR 1925 Oudh 225 (226) 27 Oudh Cas 217 (Dissent from in AIR 1926 Oudh 482)  
(22) AIR 1922 Low Bur 81 (82)  
(16) AIR 1916 Bom 217 (218) 40 Bom 333 (Overruled in AIR 1925 Bom 309)  
(10) 7 Ind Cas 940 (943) 34 Bom 575 (Do)

#### Note 27

- 1 (04) 26 All 86 (38) (Overruling 12 All 569)  
(95) 17 All 42 (44 45)  
(13) 11 Ind Cas 731 (732) 35 All 179  
(09) 9 Ind Cas 594 (524) 31 All 590  
(85) 7 All 327 (330)  
(89) 4 All 316 (317)  
(79) 2 All 291 (293)  
(97) 21 Bom 199 (125)  
(87) 11 Bom 506 (518 514)  
(94) 21 Cal 649 (549)  
(71) 15 Suth W N 66 (67)  
(70) 4 Beng L R 130 (131) (F B)  
(69) 11 Suth W R 232 (933)  
(96) 19 Mad 162 (164)  
2 (19) 18 Ind Cas 424 (425) (Cal)  
(18) AIR 1918 Cal 977 (979) 45 Cal 630  
3 (18) AIR 1918 Mad 690 (691 699) 41 Mad 531  
(16) AIR 1916 Mad 958 (959)  
(85) AIR 1935 Mad 999 (993)



**O. 21 R 2**  
**Notes 27-28**

Calcutta<sup>4</sup> Bombay<sup>5</sup> Lahore<sup>6</sup> Patna<sup>7</sup> Rangoon<sup>8</sup> and Nagpur<sup>9</sup> and the Judicial Commissioner's Court of Sind<sup>10</sup> have held that it will amount to a sufficient certificate and the payment can therefore be recognized provided the payment is as a *matter of fact made* and provided also the application for execution is within three years of such payment (as otherwise Section 20 of the Limitation Act will not apply) The said decisions proceed on the view that nothing is prescribed in this rule as to the time within which or the manner in which the decree holder must certify a payment or adjustment See also Notes 17 and 18 *supra* The High Court of Allahabad on the other hand held the contrary view in a series of cases In one class of cases<sup>11</sup> it was held that this rule contemplates a formal proceeding consisting of two steps—

*first* an application by the decree holder informing the Court of the payment  
*and*

*secondly* a formal order of the Court recording the payment and therefore a statement as to payment in an execution application is not such a certificate as is contemplated by this rule and would not save limitation It was held in another class of cases<sup>12</sup> that where the decree will be time barred if the payment sought to be certified by the decree holder is ignored such a payment cannot be certified In a recent Full Bench ruling however<sup>13</sup> the same High Court has impliedly overruled these cases and fallen in line with the other Courts The Judicial Commissioner's Court of Oudh<sup>14</sup> has followed the earlier view of the High Court of Allahabad It is submitted that in view of the general trend of opinion the said decision cannot be accepted as correct

**28 Operation as estoppel** — It is not open to the executing Court to enquire into the fact of payment or adjustment of a decree which has not been certified or recorded within the period allowed by law on the ground that the decree holder is estopped from denying such payment or adjustment<sup>1</sup> The reason is that sub rule (3) enacts a special law for a special purpose and the general law of estoppel cannot be allowed to override the special law

4 (15) AIR 1915 Cal 235 (236)

{ 10) AIR 1919 Cal 181 (182) (As explained in AIR 1925 Cal 101<sup>10</sup>)

[But see (27) AIR 1929 Cal 200 (200)]

5 (21) AIR 1921 Bom 411 (412) 45 Bom 91

6 (21) AIR 1924 Lah 6 G (6<sup>c</sup>)

7 (19) AIR 1919 Pat 136 (137) 4 Pat L Jour 159

8 (30) AIR 1930 Rang 329 (331) 3 Rang 810

(25) AIR 1925 Rang 26 (27) 2 Rang 333

9 (36) AIR 1920 Nag 231 (252) 1 L R (1937) Nag 106

10 (31) AIR 1931 Sind 128 (30) 25 Sind L R 260

(20) AIR 1920 Sind 23 (24) 14 Sind L R 193

(12) AIR 1919 Sind 70 (75) 13 Sind L R 37

(18) AIR 1919 Sind 23 (24) 14 Sind L R 193

**Note 28**

1 (10) 7 Ind Cas 910 (911 912) 34 Bom 575  
 (Per Chandavarkar J)

(14) AIR 1914 Cal 253 (254)

(12) 13 Ind Cas 326 (327 328) (Cal)

**29 Remedies of the judgment-debtor** — Where a judgment debtor satisfies the decree by a payment or adjustment made out of Court which is not certified to the Court in time and the decree holder applies for execution of the decree in spite of the satisfaction what is the remedy of the judgment debtor in such a case? It is clear that the judgment debtor cannot maintain a suit for a declaration that the decree has been satisfied and is consequently incapable of execution<sup>1</sup> The reason is that such questions relate to the *satisfaction* of the decree a separate suit in respect of which is barred by Section 47 If the properties of the judgment debtor are sold in execution in such circumstances no separate suit will for the same reason lie to set aside the sale<sup>2</sup> As to whether a suit for damages will lie against the decree holder see Note 30 below

**30 Suit for damages** — Where a decree holder whose decree has been satisfied by payment out of Court fails to certify satisfaction to the Court and executes the decree and realises the money a second time the judgment debtor may sue him for the recovery of the money paid out of Court<sup>1</sup> Such a suit will not be barred by Section 47 for the question in the suit as observed by Turner C J in *Viraraghava v Subbakkha* I L R 5 Madras 397 relates not to the execution of a decree but to a contract which formed no subject of inquiry in the suit and could not form a subject of inquiry in execution of the decree

The cause of action for the suit is *failure of consideration* or breach of an express or implied promise or of a statutory duty to certify the payment

There is a difference of opinion as to when the cause of action for such a suit arises — whether it arises as soon as the application for execution is presented or only

(25) AIR 19 5 S nd 140 (142)	18 Sind L R 51	(99) 23 Bom 391 (396)
<b>Note 29</b>		(79) 4 Bom 235 (297)
1 (94) 91 Cal 437 (445 449 460) (FB)	—	(66) 4 Bom H C R A C 76 (77)
		(19) 13 Ind Cas 63 (66) (Cal)
		(11) 11 Ind Cas 1 (1 2) (Cal)
		(79) 3 Cal L Rep 414 (416)
		(74) 22 Suth W R 298 (298)
		(73) 20 Suth W R 150 (150)
		(70) 13 Suth W R 69 (73) (F B)
		(68) 8 Suth W R 210 (211)
		(67) 8 Suth W R 449 (449)
		(17) AIR 1917 Lah 90 (91)
		(77) 1877 Pun Re No 66 page 172
		(92) 1892 Pun Re No 9 page 281
		(18) AIR 1918 Mad 720 (721)
		(11) 10 Ind Cas 462 (462) (Mad) (Affirming 6 Ind Cas 267 on appeal)
		(85) 8 Mad 277 (283) (F B)
		(82) 5 Mad 397 (400) (F B) (Overruling 3 Mad H C R 188)
		(83) 6 Mad 41 (42 43)
		(04) 14 Mad L Jour 359 (369)
		(76) 1 Mad 203 (204)
		(97) 20 Mad 369 (370 371)
		(04) 17 O P L R 60 (61)
		(26) AIR 1926 Oudh 487 (483)
		(23) AIR 1923 Rang 88 (92) 11 Low Bur Rul 429
		(

**Note 30**

- 1 (03) 30 All 461 (460)  
 (81) 8 All 538 (540)  
 (09) 1 N W P H C R 93 (739)  
 (03) AIR 1923 Bo n 253 (253)

- (93 1900) 1893 1900 Low Bur Rul 621  
 (35) AIR 1935 Pat 65 (66) (Suit is maintainable irrespective of whether payment is pleaded or not in execution)

O 21 R 2  
Notes 30-32

after the amount is *actually recovered* in execution. The High Courts of Allahabad<sup>2</sup> and Patna<sup>3</sup> the Judicial Commissioner's Court of Nagpur<sup>4</sup> and the undermentioned decisions<sup>5</sup> of the High Court of Madras have held that the cause of action arises only when damage is actually sustained that is: when the money is recovered a second time. In the undermentioned cases<sup>6</sup> however the High Court of Madras has held that the cause of action arises when the decree holder fails to fulfil his duty and applies for execution and that an execution need not actually be levied and money realised a second time before the suit can be maintained. Where the decree holder has not applied for execution at all nor realised anything over and above the payments alleged to have been made by the judgment debtor towards the satisfaction of the decree the judgment debtor has no cause of action to sue the decree holder merely because the payment out of Court has not been certified.<sup>7</sup>

Where the decree holder transfers the decree after it is satisfied by an uncertified payment or adjustment and the assignee executes the decree he is not liable to repay the decretal amount realised in execution of the decree even though he has knowledge of the payment or adjustment.<sup>8</sup> The reason is that there is no privity of contract between the parties.

Where an application by the judgment debtor under sub rule (2) for recording a payment out of Court is dismissed by the executing Court on a consideration of the merits the judgment debtor cannot maintain a suit for recovery of the amount alleged to have been paid twice over for, such a suit will be barred on general principles of *res judicata*.<sup>9</sup>

**31 Restitution of uncertified payment on reversal of decree in appeal** — V obtained a decree against G for Rs 89. G appealed against the decree and pending appeal made a payment of Rs 60 to the decree holder which was not certified to the Court. The decree was reversed in appeal and G applied for refund of the amount he had paid. It was held that G was entitled to recover on the ground that the decree having been reversed the payment whether certified or not could only be regarded as made without consideration and entitling the defendant to have it restored.<sup>1</sup>

**32 Criminal proceedings** — Sub rule (3) has no application to a case where a Criminal Court is investigating a charge under Section 210 of the Penal Code of

1936 AIR 1936 200

the amount twice over or not.)  
(93) 21 Mad 409 (410) (The fact whether decree holder recovered money from the judgment debtor a second time is not clear from the judgment.)

7 (39) AIR 1939 All 495 (496) 1939 All L Jour 403 (404)

(30) AIR 1935 Mad 961 (964) (Actual filing of execut on and not failure to certify is cause of action.)

8 (19) AIR 1919 Mad 424 (426) 42 Val 1839

9 (12) 14 Ind Cr 751 (752) 1912 Pun Re No 91  
(95) 18 Mad 26 (27)

(03) 4 Ind Cr 818 (819) (Upp Bur)

#### Note 31

1 (87) 11 Bom 724 (727)

(39) AIR 1939 Mad 176 (176) (Payment to decree holder a plea not certified — Decree reversed in appeal — Application for restitution is maintainable.)

2 (33) AIR 1933 All 511 (512)

3 (39) AIR 1939 Pat 156 (157)

4 (23) AIR 1923 Nag 219 (220)

5 (10) 6 Ind Cr 267 (268) (Mad)

(06) 16 Mad L Jour 51 (55 56)

6 — — — — —

from the date of payment.—It is not clear from the report whether the judgment debtor paid

fraudulently executing a decree<sup>1</sup> The prohibition in sub rule (3) only means that the Court cannot consider the alleged adjustment in the *course of the execution of the decree in question* The sub rule does not prohibit the Court executing the decree from holding an enquiry under Section 476 of the Criminal Procedure Code into an alleged payment or adjustment with a view to file a complaint against the decree holder for an offence under Section 210 Penal Code<sup>2</sup> Any other interpretation would make Section 210 Penal Code a mere nullity and there could never be any prosecution for such an offence Where on the objection of the judgment debtor the Court dismisses an application for execution on the ground that the decree has been satisfied by a payment out of Court the decree holder is not guilty of an offence under Section 210 Penal Code because the decree has not been *caused to be executed*<sup>3</sup>

**33 Appeal and revision** — An order on an application by the judgment debtor under sub rule (2) recording or refusing to record as certified a payment or adjustment made out of Court is the determination of a question between the parties relating to the satisfaction of the decree within the meaning of Section 47 and hence is appealable as a decree<sup>1</sup> No appeal lies against an order refusing to set aside a dismissal of an application for default<sup>2</sup> or an order refusing to review an order rejecting an application under this rule<sup>3</sup>

Where a decree holder certifies a payment made out of Court but the Court in spite of it orders execution to proceed on the ground that the payment is not proved the Court fails to exercise a jurisdiction vested in it by law and the order is therefore revisable by the High Court under Section 115<sup>4</sup> A Judge declining to proceed with an application for execution on the ground of an uncertified payment or adjustment out of Court acts with material irregularity and his order is open to revision<sup>5</sup>

## COURTS EXECUTING DECREES

### R. 3. [New] Where immovable property forms one estate

21 R. 3

**Lands situate in more than one jurisdiction** or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure

### Synopsis

1 Sale of property situate in more than one jurisdiction

2 Change of territorial jurisdiction See Section 37

#### Note 32

1 (86) 10 Bom 288 (299) (Case under Amend

1 (94) 16 All 129 (129 130)

(87) 11 Bom 57 (58 59)

(93) 7 Cal W. N. 172 (174) (Even though there may be no pendency application for execution still Court may be said to be executing the decree)

O. 21 R. 3  
Notes 1-2

**1. Sale of property situate in more than one jurisdiction.** — As has been seen in Note 8 to Section 17, *ante*, it is a general principle of law that no Court can execute a decree in which the subject matter of the suit or of the application for execution is property situate *entirely* outside the local limits of its jurisdiction. This rule is an exception to that general rule.<sup>1</sup> Even before this provision was enacted in this Code, it was held by the Calcutta High Court<sup>2</sup> that where property attached in execution of a decree forms one estate and is situate within the territorial jurisdiction of two or more Courts, any one of such Courts has jurisdiction to sell the *entire* estate. See also Note 6 to Section 38 *ante*.

**2. Change of territorial jurisdiction.** — See Section 37

O. 21 R. 4

Transfer to Court of  
Small Causes

**R. 4.** [S 223, para. 5.] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras *or Bombay*, such Court may send to the Court of Small Causes in Calcutta, Madras *or Bombay*, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

[1877, S. 223, para. 5]

<sup>a</sup> Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Bombay or Rangoon"

### Synopsis

1. Scope of the Rule

2. "As if it had been passed by itself"

3. Decrees of foreign Court See Note 1  
4. Jurisdiction of Court of Small Causes to question validity of order of transfer.

**1. Scope of the Rule.** — This rule is not restricted in its application to decrees of British Indian Courts, it applies equally to decrees of such foreign Courts as come within Section 44.<sup>1</sup> See also Order 51 Rule 1, *infra*.

**2. "As if it had been passed by itself."** — The Court of Small Causes in Calcutta, Madras or Bombay, in executing a decree of another Court transferred to it under this rule, has the same powers as it possesses in regard to execution of its own

Order 21 Rule 3 — Note 1

(75) 23 Suth W R 171 (157)

1. (23) AIR 1923 Cal 619 (621)

2. (50) 12 Cal 307 (312)

(52) 8 Cal 703 (705)

(75) 19 Suth W R 431 (436)

1.

decrees<sup>1</sup> See also Section 42

**O. 21 R. 4**  
**Notes 2-4**

**3. Decrees of foreign Court.** — See Note 1 above

**4. Jurisdiction of Court of Small Causes to question validity of order of transfer.**—The Court of Small Causes to which a decree is sent for execution under this rule has no jurisdiction to question the correctness or validity of the order of transfer<sup>1</sup>

**R. 5. [S 223, para 6]** Where the Court to which a decree is to be sent for execution is situate

**O. 21 R. 5**

**Mode of transfer.**

within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

[1877, S 223.]

#### Local Amendments

##### ALLAHABAD

For the word 'district,' where it occurs *after* the words "same" and "different" read 'Province'

##### LAHORE

In the last sentence after the words "the District Court" and before the words "of the district" insert the words "or the Court of any Judge having jurisdiction in the place where the decree is to be executed to whom power to receive plaints has been delegated by the District Judge"

##### ODDH

For the word "district" where it occurs *after* the words "same" and "different" read "Province"

##### RANGOON

Add the following proviso

"Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as the Court which passed the decree, such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings"

### Synopsis

1 Scope of the Rule.

2. Power of Court to which decree is sent for execution. See Ss 51 and 42

3 Transfer of local jurisdiction. See Section 37

**1. Scope of the Rule.** — Where two Courts are in the *same district*, one Court may transmit a decree for execution to the other Court direct *without the*

#### Note 3

1. (197) 34 Cal 823 (827) (Trying a question of title in respect of tiled huts in execution)

#### Note 4

1. ( 36) 16 J Ind Cas 625 (626) (Cal) (It is the function of the transferring Court to decide whether the transfer can or cannot be made)

O. 21 R. 5  
Notes 1-3

*intervention of the District Court*<sup>1</sup>

But where the Court to which the decree is to be sent is situate in a *different* district, it should be sent to the *District Court* of the district in which the decree is to be executed. Where this procedure is not followed and the decree is sent direct to the Court subordinate to the District Court in another district, that Court cannot execute the decree<sup>2</sup>. It should not, however, dismiss the application, but should send the papers back to the Judge who sent them for adopting the correct procedure<sup>3</sup>. In the undermentioned cases<sup>4</sup> it was held that the failure to send the decree through the District Court is a mere irregularity which can be waived.

The High Court of Madras<sup>5</sup> has framed a rule — Rule 161A of the Civil Rules of Practice — under which the transferee Court is to return the papers to the transmitting Court, if no steps are taken by the decree holder within six months from the date of transfer. This rule is one of convenience made with the object of inducing decree holder to take early steps to execute the decree, and a violation thereof does not render the proceedings taken after six months *void ab initio*.

See also the undermentioned case<sup>6</sup> as to the practice in Sind Courts.

**2. Power of Court to which decree is sent for execution.** — See Sections 51 and 42, *ante*.

**3. Transfer of local jurisdiction.** — See Section 37, *ante*.

O. 21 R. 6

Procedure where Court desires that its own decree shall be executed by another Court

**R. 6. [S. 224.]** The Court sending a decree for execution shall send —

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

[1877, S. 224; 1859, S. 286.]

#### Order 21 Rule 5 — Note 1

1. (92) 15 Mad 345 (347).
- (36) AIR 1936 Cal 571 (579) (Decree transferred without express request by decree holder — Acquiescence by decree holder — Jurisdiction of transferee Court to execute not affected)
2. (95) 22 Cal 764 (766)
- (33) AIR 1933 Lah 839 (840, 841) (There is an inherent lack of jurisdiction to execute the decree—Even assuming such jurisdiction it can not send decree to another Subordinate Court for execution)
- (14) AIR 1914 Cal 786 (787).

- (19) AIR 1919 Pat 324 (324) 4 Pat L Jour 49 (It is open to the parties at any stage to question the jurisdiction of the Subordinate Judge to execute it)
3. (14) AIR 1914 Cal 786 (786)
4. (36) AIR 1936 Lah 765 (765).
- (37) AIR 1937 Lah 174 (176)
- (96) AIR 1936 Lah 891 (891)

plying for same until as he is a person not fit to be trusted with such papers)

## Local Amendments

O. 21 R. 6  
Note 1

## ALLAHABAD

Rule 6 shall be re numbered as 6 (1) and add the following sub rule (2)

"(2) Such copies and certificates may, at the request of the decree holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent

## N-W F P

Read Rule 6 as Rule 6 (1) and add the following sub rule (2)

"(2) Such copies and certificates may, at the request of the decree holder be handed over to him or to such person as he appoints in a sealed cover to be taken to the Court to which they are to be sent

## OUDH

To Rule 6, add the following as sub rule (2) and re number it as 6 (1)

(2) Such copies and certificates may, at the request of the decree holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent'

## PATNA

Insert the following words after the word "decree" in clause (a)

'and a copy of the suit register relating to the suit in which the decree was passed and a memorandum showing the costs allowed to the decree holder subsequent to the passing of the decree

## RANGOON

To Rule 6 add the following proviso

Provided that where a transfer is effected under the proviso to Rule 5 it shall not be necessary to send the above documents

*Synopsis*

- |  |                              |
|--|------------------------------|
| 1 Scope of the Rule                          | 4 Copy of any order          |
| 2 Certificate, effect of not sending         | 5 Small Cause Courts         |
| 3 Presumption as to compliance with the Rule | 5a Notice to judgment debtor |
|  | 6 Appeal                     |

1. Scope of the Rule. — The documents required to be transmitted by the Court sending the decree for execution to another Court are —

- (1) a copy of the decree,
- (2) a certificate as required by clause (b) and
- (3) a copy of any order for execution that may have been passed<sup>1</sup>

As to the form of certificate of non satisfaction, see Appendix E Form No 4

Where a Court, upon an application for transfer of the decree for execution to another Court, places a wrong construction on the decree and mentions in the certificate that a particular amount is due the statement is *ultra vires* and the judgment debtor need not have it amended by the transferor Court<sup>2</sup> In sending the certificate of non satisfaction, the Court which passed the decree is not called upon to consider whether the decree is still capable of execution, that is a question for determination by the transferee Court when a proper application for execution is presented to it<sup>3</sup>

When once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree holder to apply to the Court to which

Order 21 Rule 6 — Note 1

2 (25) AIR 1925 Pat 507 (800 810) 4 Pat 440

1. (69) 4 Mad II C R 831 (393)

3 (10) 8 Ind Cas 22 (25) (Cal)



O. 21 R 6  
Notes 1-5a

the decree is sent for execution<sup>4</sup> Where an application for execution has already been made to the Court which passed the decree, a fresh application for execution need not be made to the Court to which the decree is transferred for execution<sup>5</sup> See also the undermentioned case<sup>6</sup>

**2. Certificate, effect of not sending.** — The omission to send the certificate as required by clause (b) of this rule is a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred for execution to entertain the application for execution<sup>1</sup> Nor is it a ground for an application under O 21 R 90 to set aside a sale<sup>2</sup> Similarly it has been held that a mere mistake in the certificate of non satisfaction as to the number of the suit or the names of the judgment debtors will not affect the jurisdiction of the execution Court to proceed with the execution<sup>3</sup>

**3. Presumption as to compliance with the Rule.** — Where the validity of an attachment effected by the transferee Court is attacked on the ground that no copy of the decree was sent by the Court which passed the decree it lies upon the judgment debtor to prove that it was not transmitted, the maxim applicable being *omnia presumuntur rite esse acta* — all things are presumed to have been rightly and duly performed<sup>1</sup> Where a decree was passed by a Judge in the capacity of a Small Cause Judge and an application for execution of the decree was filed before the same Judge acting on the original side, it was held that even though there was no formal order of transfer, the provisions of this rule were sufficiently complied with<sup>2</sup>

**4. Copy of any order.** — The words 'copy of any order for the execution of the decree' in clause (c) mean a copy of any *subsisting* order and not a copy of an order for execution in the previous execution application<sup>1</sup>

**5. Small Cause Courts** — This rule applies to proceedings in the Small Cause Courts in the mofussil and if there is no sufficient property within the jurisdiction of the Small Cause Court to satisfy the decree it may be sent to another Court<sup>1</sup>

**5a. Notice to judgment-debtor** — Where the application for transmission of the decree for execution to another Court is made when the decree is already under execution in the Court which passed it, notice should be given to the judgment debtor and the transfer should not be ordered unless there is sufficient cause to order simultaneous execution<sup>1</sup> See also Note 17 to Section 39 *ante*

4 (10) 8 Ind Cas 852 (853) 35 Mad 588 (For rateable distribution)

[But see (29) AIR 1933 Mad 496 (497) (Obiter)]

5 (36) AIR 1936 Cal 267 (269)

6. (36) AIR 1936 Lah 369 (369) (Order transferring decree of High Court to another Court for execution may be signed by the Registrar and need not be signed by the Judge.)

## Note II

1 (31) AIR 1931 Cal 649 (649)

2 (97) 20 Mad 10 (12)

3 (39) AIR 1938 Pat 513 (514)

[See also (36) AIR 1936 Lah 765 (765) (Certificate wrongly addressed to the Subordinate Judge instead of to the District Judge — Defect cured in the circumstances of the case)]

(36) AIR 1936 Cal 571 (572) (Irregularity in manner of transfer does not prevent the transfer Court from having jurisdiction of the execution)

## Note 3

1 (72) 17 Suth W R 289 (291)

2 (27) AIR 1927 Cal 782 (783) (Appeal would lie from an order in execution)

(28) AIR 1928 Rang 15 (16) 5 Ring 613 (Transfer is not invalid)

## Note 4

1 (39) 13 Bom 371 (373)

## Note 5

1 (63) 9 Suth W R 175 (177)

## Note 5a

1 (39) AIR 1939 Bom 258 (260) 41 Bom LR 431 (433) (A mere order transmitting a decree for execution to another Court may be said to be a purely ministerial order but an order which amounts to the grant of a certificate and allows simultaneous execution proceedings to go on in more than one Court is not a mere ministerial order. Such an order is a judicial order) (35) AIR 1935 Cal 268 (270)

**6. Appeal.** — An order directing or refusing the issue of a certificate of appealable<sup>1</sup>

**O. 21 R. 6**  
**Note 6**

**R. 7. [S. 225.]** The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof

**O. 21 R. 7**

Court receiving copies of decree, etc., to file same without proof.

[1877, S. 225; 1859, S. 286.]

### *Synopsis*

**1. Legislative changes**

**2. Without any further proof**

**3. Jurisdiction of the Court which passed the decree.** See Section 42, Note 1

**4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.**

**5. Whether a transferee Court can execute a decree in excess of its pecuniary jurisdiction.** See Section 38, Note 7

**1. Legislative changes.** — The words "or of the jurisdiction of the Court which passed it" which occurred in the old Section have now been omitted See Note 4

**2. Without any further proof.** — As soon as a copy of the decree which is sent for execution to another Court is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court<sup>1</sup>

**3. Jurisdiction of the Court which passed the decree.** — See Section 42, Note 1

**4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.** — Section 225 of the old Code contained the words "or of the jurisdiction of the Court which passed it" There was a conflict of decisions as to whether the transferee Court can go into the question of the jurisdiction of the Court which passed the decree, if it sees any reason to do so<sup>2</sup> The said words have now been omitted and it has been held that the transferee Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution<sup>3</sup> But it has been held that where the decree was passed against a dead person, it is a nullity and objection to the decree on this ground can be taken

**Note 6**

(186) 10 Bom 65 (68)

(82) 7 Bom 481 (433)

**Order 21 Rule 7 — Note 2**

**1.** (68) 10 South W R 46 (50) (FB)

(23) AIR 1923 Mad 212 (214)

**Note 4**

**1.** (80) 11 All 814 (818)

(95) 17 All 478 (482)

(04) 23 Bom 378 (382)

(91) 15 Bom 216 (219) (A case of foreign judgment)

O. 21 R. 6  
Notes 1-5a

the decree is sent for execution<sup>4</sup>. Where an application for execution has already been made to the Court which passed the decree, a fresh application for execution need not be made to the Court to which the decree is transferred for execution<sup>5</sup>. See also the undermentioned case<sup>6</sup>.

**2. Certificate, effect of not sending** — The omission to send the certificate as required by clause (b) of this rule is a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred for execution to entertain the application for execution<sup>1</sup>. Nor is it a ground for an application under O 21 R 90 to set aside a sale<sup>2</sup>. Similarly, it has been held that a mere mistake in the certificate of non satisfaction as to the number of the suit or the names of the judgment debtor, will not affect the jurisdiction of the execution Court to proceed with the execution<sup>3</sup>.

**3. Presumption as to compliance with the Rule.** — Where the validity of an attachment effected by the transferee Court is attacked on the ground that no copy of the decree was sent by the Court which passed the decree it lies upon the judgment debtor to prove that it was not transmitted the maxim applicable being *omnia præsumentur rite esse acta* — all things are presumed to have been rightly and duly performed<sup>1</sup>. Where a decree was passed by a Judge in the capacity of a Small Cause Judge and an application for execution of the decree was filed before the same Judge acting on the original side it was held that even though there was no formal order of transfer the provisions of this rule were sufficiently complied with<sup>2</sup>.

**4. Copy of any order.** — The words 'copy of any order for the execution of the decree' in clause (c) mean a copy of any subsisting order and not a copy of an order for execution in the previous execution application<sup>1</sup>.

**5. Small Cause Courts** — This rule applies to proceedings in the Small Cause Courts in the mofussil and if there is no sufficient property within the jurisdiction of the Small Cause Court to satisfy the decree it may be sent to another Court<sup>1</sup>.

**5a. Notice to judgment-debtor.** — Where the application for transmission of the decree for execution to another Court is made when the decree is already under execution in the Court which passed it, notice should be given to the judgment debtor and the transfer should not be ordered unless there is sufficient cause to order simultaneous execution<sup>1</sup>. See also Note 17 to Section 39 *ante*.

4 (10) 5 Ind Cas 852 (853) 35 Mad 588 (For rateable distribution)

[But see (28) AIR 1928 Mad 496 (497) (Obiter)]

5 (36) AIR 1936 Cal 267 (269)

6 (36) AIR 1936 Lah 369 (369) (Order transferring decree of High Court to another Court for execution may be signed by the Registrar and need not be signed by the Judge)

**Note 2**

1 (31) AIR 1931 Cal 619 (642)

2 (37) 20 Mad 10 (12)

3 (39) AIR 1938 Pat 518 (514)

[See also (36) AIR 1936 Lah 765 (765) (Certificate wrongly addressed to the Subordinate Judge instead of to the District Judge — Defect held cured in the circumstances of the case)]

(36) AIR 1936 Cal 571 (572) (Irregularity in manner of transfer does not prevent the transferee Court from having jurisdiction of the execution)]

**Note 3**

1 (72) 17 Buth W R 239 (991)

2 (27) AIR 1927 Cal 782 (783) (Appeal would lie from an order in execution)

(28) AIR 1928 Rang 15 (16) 5 Rang 613 (Transfer is not invalid)

**Note 4**

1 (69) 18 Bom 371 (378)

**Note 5**

1. (68) 9 Buth W R 175 (177)

**Note 5a**

1 (30) AIR 1930 Bom 258 (260) 41 Bom L R 431 (433) (A mere order transmitting a decree for execution to another Court may be said to be a purely ministerial order but an order which amounts to the grant of a certificate and allows simultaneous execution or proceedings to go on in more than one Court is not a mere ministerial order. Such an order is a judicial order)

(35) AIR 1935 Cal 269 (270)

signed by the sheristadar "by order" of the District Judge, is a valid endorsement complying with the provisions of this rule and is not vitiated by the absence of the signature of the Judge<sup>2</sup>

**O. 21 R. 8**  
**Notes 1-2**

Where an Assistant Judge is invested with all the powers of a District Judge within any part of the district of such Judge, he is the "District Court" in such part for the purposes of this rule<sup>3</sup>

**2. "Competent jurisdiction."** — There is a conflict of opinion as to the meaning of the expression "Court of competent jurisdiction." It was held by the Madras High Court in the undermentioned case<sup>1</sup> that the expression refers to *territorial* competence and therefore if the attached property is transferred from the jurisdiction of the transferee Court to some other Court, the sale by the transferee Court after the transfer of the property from its jurisdiction, is not valid even though the Court had jurisdiction over such property at the time of the transfer. But in a recent case<sup>2</sup> the same High Court has held that the expression means "competent to sell in execution."

**R. 9. [S. 227.]** Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

**O. 21 R. 11**

Execution by High Court of decree transferred by other Court.

[1877, S. 227.]

### Synopsis

#### 1 Scope.

#### 2. Ordinary original civil jurisdiction, meaning of.

#### 3 Limitation.

**1. Scope.** — It has been held in a very early case of the Calcutta High Court<sup>1</sup> that the functions of the High Court, in respect of the execution of a decree of another Court are limited to effecting execution and to the matters arising out of the proceedings in execution, and that the question whether or not the applicant had a right to obtain execution, must be judged by the Court in which the record was

Where a decree is transferred under this rule to the High Court for execution, the High Court cannot make the decree payable in instalments<sup>2</sup>. The reason is that though the decree could be executed as if it was passed by itself, still the High Court is not the Court which passed the decree, which Court alone can act under O. 20 R. 11, *ante*

**2. Ordinary original civil jurisdiction, meaning of.** — See Notes to Clause 13 of the Letters Patent of Calcutta, Bombay and Madras High Courts

**3. Limitation.** — The period of limitation applicable to the execution of a decree transmitted by one Court to another for execution depends upon the character

<sup>2</sup> (96) 23 Cal 480 (482)  
(10) 5 Ind Cas 155 (155) (Mad)  
<sup>3</sup> (70) 7 Mom II O R A C 37 (40)  
Note 2  
<sup>1</sup> (18) AIR 1918 Mad 17 (17)

<sup>2</sup> (34) AIR 1934 Mad 573 (574, 575)

Order 21 Rule 9 — Note 1

<sup>1</sup> (71) 6 Beng L R App 66 (66).

<sup>2</sup> (34) AIR 1934 Rang 197 (195)

O. 21 R. 9  
Note 3

of the Court which passed the decree and not on the character of the Court executing it<sup>1</sup> The manner of execution mentioned in this rule refers to the procedure under which the execution is to be had and has no reference to the law of limitation<sup>2</sup> It simply applies the High Court machinery to the execution of the decree<sup>3</sup> Thus where a decree passed by the Calcutta Small Cause Court was transferred to the High Court at Calcutta for execution it was held that the period of limitation applicable to the decree was Article 192 of the Limitation Act and that it was not governed by the law of limitation relating to decrees of the High Court<sup>4</sup>

### APPLICATION FOR EXECUTION

O. 21 R. 10

**R. 10.** [S 230, Para 1] Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof

[1877, Ss 230, 231; 1859, S 207]

#### Local Amendments

#### LAHORE

Add the following proviso

Provided that if the judgment debtor has left the jurisdiction of the Court which passed the decree or of the Court to which the decree has been sent the holder of the decree may apply to the Court within whose jurisdiction the judgment debtor is or to the officer appointed in this behalf to order immediate execution on the production of the decree and of an affidavit of non satisfaction by the holder of the decree pending the receipt of an order of transfer under Section 39

#### RANGOON

Add the following

at the time of presenting the application for execution or at the time of admission thereof the holder of a decree may if he wishes deposit in Court the fees requisite for all necessary proceedings in the execution

#### Synopsis

- |   |  |
|---|--|
| 1 Successive applications for execution                   | 6 Court to which the decree is sent for execution                      |
| 2 Who may apply for execution                             | 6a Time of presentation of application for execution.                  |
| 3 What decrees may be executed                            | 7 Executing Court cannot go behind the decree See Note 8 to Section 39 |
| 4 Court by which decree may be executed<br>See Section 38 | 8 Application for execution  |
| 5 'Court which passed the decree' See Section 37          | 9 Dismissal of application for default.                                |

#### Other Topics (miscellaneous)

Application by representatives of deceased decree holder—Succession

certificates if necessary See Note 2

Maintenance decrees—Execution of See Note 3

#### Note 3

1 (90) 17 Cal 491 (197)  
(11) 11 Ind Cas 63, (637) 36 Mad 208  
(68) 31 Mad 21 (27)

(11) 11 Ind Cas 216 (216) (Cal) (So assumed)  
2 (97) 21 Cal 473 (491)  
3 (90) 17 Cal 491 (496)

**1. Successive applications for execution.** — The Code does not bar a succession of applications for execution<sup>1</sup>. Thus, where an application for execution is withdrawn by the decree holder without leave to apply again having been granted by the Court, a second application is not barred. Section 141 cannot be invoked so as to apply O 23 R 1, since that Section does not apply to execution proceedings<sup>2</sup>. Similarly, O 2 R 2 does not apply to proceedings in execution,<sup>3</sup> and when a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, there is nothing which prevents separate and successive applications for execution as regards each of them<sup>4</sup>.

A decree in a suit for money, for principal and interest, is a single money decree and it is not permissible to levy execution thereof piecemeal. The rule is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time and if enforcement is sought for a lesser sum, he must be taken to waive his right to levy execution for the balance<sup>5</sup>. According to the Judicial Commissioner's Court of Nagpur, where an application for execution of part of a decree is made, the judgment debtor is bound to raise an objection at once and if he fails to do so, the piecemeal execution will not be invalid and a subsequent application is not barred inasmuch as O 2 R 2 does not apply to applications in execution<sup>6</sup>.

A subsequent application for execution in respect of reliefs *different* from those claimed in a prior application cannot be said to be one in continuation of the prior application.

**2. Who may apply for execution.** — It is only the decree holder whose name is on the record that is entitled to apply for execution of the decree<sup>1</sup>. A defendant in a partition suit in which a decree has been passed is in the position of a decree holder and will be entitled to apply for execution<sup>2</sup>. In the case of decrees in *representative suits* a person not on the record, but who was represented in the suit by the decree holder on record, can apply to be brought on the record and to execute the decree<sup>3</sup>. Similarly the representatives of a deceased decree holder can apply to be brought on the record and to execute the decree<sup>4</sup>.

Where an application was made by the guardian *ad litem* of a minor after the latter had attained majority, but the latter ratified the application subsequently, it was held that the ratification rendered the application valid from the date of the ratification<sup>5</sup>.

#### Order 21 Rule 10 — Note 1

- 1 (11) 11 Ind Cas 385 (386) (Cal)
- 2 (94) 17 All 106 (111 112) 22 Ind App 44 (F.C.) (Overruling 10 All 71)
- 3 (31) 18 Cal 635 (636)
- 4 (33) AIR 1933 Bom 364 (365) 57 Bom 468
- 5 (91) 18 Cal 515 (517)
- 6 (97) 1 J All 99 (100) (Possession and mesne profits)
- 7 (75) 7 W P H C R 95 (97) (Do)
- 8 (88) 17 Bom 98 (100) (Do)
- 9 (99) 4 I d Cas 408 (409) (Cal)
- 10 (But see 1 J) 76 Cal 888 (890) (Following 15 Bom 44)
- 11 (31) 15 Bom 212 (214) (Though not in accord with law yet it is a step in-and-)
- 12 (33) AIR 1933 Bom 364 (365 366) 57 Bom 468
- 13 (30) AIR 1932 Cal 59 (60) 25 Nag L R 77
- 14 (33) AIR 1933 Lah 3 (4) 15 Lah 205

#### Note 2

- 1 (17) AIR 1917 Oudh 183 (185) (Stranger not a party to the suit cannot apply)
- 2 (75) 21 Suth W R 10 (11) (Do)
- 3 (91) 18 Cal 639 (641)
- 4 (69) 11 Suth W R 271 (272)
- 5 See also S 2 sub s (3) note II
- 6 (23) AIR 1923 Bom 23 (23) 46 Bom 937
- 7 (23) AIR 1923 Mad 472 (473)
- 8 [See also (76) 1 All 510 (511) (Decree in favour of a firm in the name of agent—Another agent applying — Proceedings though irregular, not invalid)]
- 9 (37) AIR 1937 Pat 607 (608) (Father of joint Hindu family obtaining decree in respect of debt due to joint family after partition — Sons are interested in decree and can apply for execution)]
- 10 (70) 14 Suth W R 162 (162)
- 11 (31) AIR 1931 Lah 600 (601)

**O. 21 R. 10**  
**Notes 2-6**

Where a decree grants a relief to a person named in the decree, it has been held that such person so named can enforce the decree notwithstanding the fact that he is not party to the suit.<sup>6</sup>

As to the necessity for the production of succession certificate along with the application for execution where the decree holder is dead, see the undermentioned cases.<sup>7</sup>

It has been held that an insolvent is not debarred from making an application for execution of a decree which he has obtained before his adjudication.<sup>8</sup>

*Fresh takalatnama, if necessary for execution proceedings* — Proceedings in execution are proceedings in continuation of the suit, and therefore a fresh authority is not required for a plea to appear, act and plead on behalf of the decree holder in execution proceedings, if he was authorized by a takalatnama in the suit itself.<sup>9</sup> But an application for execution filed by a vakil who has no takalat from the decree holder at all is not one in accordance with law.<sup>10</sup>

Where an agent is authorized to apply for execution of a decree, he is also entitled to appeal against an order refusing to execute the decree.<sup>11</sup>

*Joint application for execution* — Persons entitled to separate amounts under a decree may join in one application. Where in such a case, one of them subsequently withdraws from the application, it may continue in the name of the other persons.<sup>12</sup>

**3 What decrees may be executed.** — See Section 38, Note 5 and Section 47, Note 33 and the undermentioned cases.<sup>1</sup>

**3. Court by which decree may be executed** — See Section 38

**3. "Court which passed the decree."** — See Section 37

**5. Court to which the decree is sent for execution.** — Where a decree is transferred to another Court for execution under Section 39 and the records are not sent back to the transferor Court, an application made to the Court which passed the decree is not an application made to the proper Court within the meaning of Article 182,

6 (32) AIR 1932 Bom 478 (379)

(32) AIR 1932 Mad 193 (194) (Decree holder need not be a party to the decree)

7. (97) 18 All 31 (35) (Succession certificate necessary — But may be produced during pendency of proceedings — It is not a condition precedent)

(07) 24 All 188 (142) (Do)

(92) 19 Cal 482 (485) (Do)

(04) 16 All 26 (28) (Application without certificate will save limitation)

(11) 9 Ind Cas 800 (501) (All) (Do)

(90) 10 Bom 76 (78) (Do)

(93) 20 Cal 755 (757) (Do)

(92) 16 Bom 819 (350) (Where claim is by survivorship certificate is not necessary — But where claiming as heir certificate is necessary)

(93) 22 Mad 300 (351) (Claim by survivorship — Certificate not necessary)

(93) 30 Cal 103 (105) (Decree in favour of mortant — Application by his successor — Certificate not necessary)

(35) AIR 1935 Nag 1 (2) 31 Nag L R 126 (Application according to O. 21 R. 11 to 14 —

Absence of succession certificate does not make application as one not in accordance with law)

8. (39) AIR 1939 Mad 196 (198)

9. (12) 13 Ind Cas 905 (369) (Cal)

(25) AIR 1925 Pat 692 (693)

(25) AIR 1925 Pat 369 (372) 4 Pat 878

(85) 7 All 564 (565) (An application by pleader after client's death is invalid)

10 (35) AIR 1935 Mad 736 (739)

(See also (37) AIR 1937 Mad 760 (762))

11. (36) AIR 1936 Lab 509 (506) (Agent competent to execute decree — Agent can remove objections to execution in both appellate and execution Courts)

12 (35) AIR 1935 All 402 (403-404) (Decree in favour of number of persons awarding separate costs)

**Note 3**

1 (70) 2 N W P H O R 303 (301) (Declaratory decrees cannot be executed)

(02) 26 Bom 707 (710) (But future maintenance awarded by decree must be enforced in execution)

(92) 19 Cal 199 (146) (Do)

clause 5 of the Limitation Act<sup>1</sup> See also Section 42 Note 3 A transfer made in an irregular manner is not null and void and if the irregularity is not objected to, an application made to the transferee Court is in order<sup>2</sup> Where a decree is transferred to another Court for execution, the mere fact that the transfer is made on the ground that the judgment debtor has immovable property within the jurisdiction of such Court does not deprive such Court of the power to entertain an application for the arrest of the judgment debtor<sup>3</sup>

Where an order has been made by the Court which passed a decree for transfer to another Court, the decree holder is entitled to apply for execution to the transferee Court, even before the copy of the decree has been received by the latter from the former Court<sup>4</sup> The reason is that the order of transfer is a judicial order and therefore takes effect from the date on which it was passed

**6a. Time of presentation of application for execution.** — It is in the discretion of the Judge or officer appointed in that behalf to accept an application for execution beyond office hours<sup>1</sup>

**7. Executing Court cannot go behind the decree.** — See Note 8 to Section 38

**8. Application for execution** — It has been already seen in Note 5 to Section 38, *ante*, that where a decree is reversed, modified or affirmed in appeal, the only decree capable of execution is the appellate decree Therefore, if a decree of a lower Court is confirmed on appeal while execution proceedings are pending a fresh application for execution is necessary<sup>1</sup>

When a decree follows an attachment before judgment O 38 R 11 does not exempt the plaintiff from making an application as required by this rule<sup>2</sup>

An application under Section 39 for transfer of a decree is not an application for execution<sup>3</sup> but is only an application to take some step in aid of execution<sup>4</sup> It is necessary, however, even for this purpose that the application for transfer should have been made to the Court *having jurisdiction in the matter*<sup>5</sup>

(25) AIR 1975 Mad 80 (84) (Satisfied decree can not be executed)

(94) 19 Bom 546 (549) (Do)

#### Note 6

1. (1c) AIR 1916 P C 16 (18) 89 Mad 610 43 Ind App 238 (PC) (Affirming AIR 1914 Mad 435 on appeal)

(84) AIR 1934 Lah 728 (780) 16 Lah 80 (The original Court has no power to execute until the decree is re-transferred)

(19) 1929 Pat 496

continuation of application is a defect curable by Section 39)

2. (10) 7 Ind Cas 856 (857) 31 Mad 25

(88) 12 Bom 400 (40c)

(66) 83 Cal 639 (643)

(29) AIR 1929 Nag 148 (150) 25 Nag L R 91

3. 22 Pat 222

4. 22 Pat 222

5. 22 Pat 222

6. 22 Pat 222

7. 22 Pat 222

8. 22 Pat 222

9. 22 Pat 222

10. 22 Pat 222

11. 22 Pat 222

12. 22 Pat 222

13. 22 Pat 222

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15. 22 Pat 222

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17. 22 Pat 222

18. 22 Pat 222

19. 22 Pat 222

20. 22 Pat 222

21. 22 Pat 222

22. 22 Pat 222

23. 22 Pat 222

24. 22 Pat 222

25. 22 Pat 222

#### Page

479 (479)

3 (99) AIR 1938 Mad 27 (28 29)

4 (33) AIR 1933 Mad 627 (627 628) 56 Mad 692 (Following 35 Mad 588 and dissenting from AIR 1929 Mad 496)

#### Note 6a

1 (38) AIR 1938 Nag 46 (47) ILR (1938) Nag 451

#### Note 8

1 (30) AIR 1930 Bom 225 (227) (A prayer for

4 (26) AIR 1926 All 473 (474)

(33) AIR 1933 Oudh 131 (131 132)

(33) AIR 1933 Sind 78 (80) 27 Sind L R 109

(32) AIR 1932 Pat 309 (310) 11 Pat 785 (But an application for transfer to a Court which has no jurisdiction to execute is not a step in aid)

(37) AIR 1937 Bom 365 (368) 11 L R (1937) Bom 691

5. (37) AIR 1937 Pat 309 (311) 11 Pat 785.



**O. 21 R. 10**  
**Notes 8-9**

Where a decree holder makes an application praying for a relief *not granted by the decree*, it is not an application which will save limitation under Article 182 of the Limitation Act<sup>6</sup> But an application which is merely incorrect in some respects would be one furthering execution<sup>7</sup>

Where a decree is transferred for execution to another Court, it is the application for execution that initiates the proceedings in execution The receipt of the decree on transfer is a mere ministerial act<sup>8</sup>

**9. Dismissal of application for default.**—A Court has inherent power to dismiss an application for execution when the applicant fails, through his own laches, to put the Court in a position to proceed with the application<sup>1</sup> But such dismissal does not bar a fresh application for execution<sup>2</sup>

As to whether a Court has power to restore to the file an application dismissed for default, see Notes to Order 9 Rule 9

### Local Amendment

#### RANGOON

Add the following as Rule 10A

**O. 21 R. 10A**  
**(Rangoon)**

' 10A If no application is made by the decree-holder within six months of the date of the receipt of the papers the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by Section 41 "

**O. 21 R. 11**

**R. 11.** [Ss. 256, 235.] (1) Where a decree is for the

**Oral application.**

payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution<sup>3</sup> thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

(2) Save as otherwise provided by sub-rule (1), every

**Written application.**

application for the execution of a decree shall be in writing, signed and verified<sup>4</sup> by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—

(a) the number of the suit ;

2 ( 201 ) 11 - 1950

Burman Court for purposes of execution and Burman Court could not execute it )

Note 9

1. ( 93 ) 15 All 84 (95) (F B)

( 83 ) AIR 1933 Mad 418 (422) 56 Mad 490 (F B)

2. ( 93 ) 15 All 84 (101) (F B)

( 95 ) 16 Mad 131 (133)

[But see ( 82 ) 1892 All W N 97 (27) (Under Code of 1877 when decree holder did not use due diligence subsequent application could not be granted Not law under this Code )

Decree must be treated as a foreign decree in the

(79) 2 All 381 (386) (Do )]

- (b) the names of the parties ;
- (c) the date of the decree,<sup>6</sup>
- (d) whether any appeal has been preferred from the decree;<sup>7</sup>
- (e) whether any, and (if any) what, payment or other adjustment<sup>8</sup> of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;<sup>9</sup>
- (g) the amount with interest (if any) due upon the decree,<sup>10</sup> or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs (if any) awarded ;
- (i) the name of the person against whom execution<sup>11</sup> of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required,<sup>12</sup> whether —
  - (i) by the delivery of any property specifically decreed ;
  - (ii) by the attachment and sale, or by the sale without attachment, of any property ,
  - (iii) by the arrest and detention in prison of any person ;
  - (iv) by the appointment of a receiver ;
  - (v) otherwise, as the nature of the relief granted may require

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.<sup>13</sup>

[1877, Ss 235, 256; 1861, S 13; 1859, S 212 See Ss 38, and 51 and 135 and O 40 R 1 ]

#### Local Amendments

#### ALLAHABAD

(1) For clause (f) of sub rule (2) substitute the following

(f) The date of the last application, if any, and

(2) Add the following proviso to sub rule (2)

Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application'

**O 21 R.11 MADRAS**

(1) In sub rule (2) *between* clauses (f) and (g) *insert* the following new clause (ff) whether the original decree holder has transferred any part of his interest in the decree and if so the date of the transfer and the name and address of the parties to the transfer

(2) *Add* the following to sub rule (2) (j)

In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub rule (1) of Rule 53 of this Order there shall not be included any other relief mentioned in this clause

(3) *Add* the following proviso at the end of sub rule (2)

Provided that when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b) (c) and (h) need not be given in the application

**NAGPUR**

*After* sub clause (v) of clause (g) of sub rule (2) *insert* the following proviso

Provided that when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b) (c) and (h) need not be given in the application

**ODISHA**

*For* clause (f) of sub rule (2) *substitute* the following

(f) the date of the last application if any

**PATNA**

(1) *Add* the following as sub rule (1A)

(1A) Where an order has been made under Section 39 for the transfer of a decree for the payment of money for execution to a Court within the local limits of the jurisdiction of which the judgment debtor resides such Court may on the production by the decree holder of a certified copy of the decree and an affidavit of non satisfaction forthwith order immediate execution of the decree by the arrest of the judgment debtor

(2) *Substitute* the words and figures : sub rules (1) and (1A) *for* the word and figure sub rule (1) in sub rule (2)

**SINDH**

*Add* the following as clause (ff) to sub rule (2)

(ff) Whether the original decree holder has transferred any part of his interest in the decree and if so the date of the transfer and the name and address of the parties to the transfer

**Synopsis**

- 1 Legislative changes
- 2 Scope of the Rule
- 2a Applicability of the Rule to execution of decrees under other Acts
- 2b Decree for payment of money
- 3 Immediate execution — Sub rule (1) — Privilege from arrest
- 4 Verification of application
- 5 Who may apply for execution See Notes to O 21 R 10
- 6 Date of the decree to be given—Clause (c)
- 7 Whether any appeal has been preferred from the decree—Clause (d)

- 8 Payment or other adjustment—Clause (e)
- 9 Previous applications and their results
- 10 Amount due upon the decree—Clause (g)
- 10a Amount of costs awarded — Clause (h)
- 11 Against whom execution is to issue — Clause (i)
- 12 Mode in which the assistance of the Court is required — Clause (j)
- 13 Certified copy of decree to be filed — Sub rule (3)
- 14 Concurrent applications for execution See Note 10 to Section 39
- 15 Amendment of application See Notes to Rule 17

*Other Topics (miscellaneous)*O 21 R 11  
Notes 1-2

Application in accordance with law or not	Decree burnt or destroyed	See Note 13
See Notes 9 8 9 11 and 13	Limitation	See Note 9
Breach of sub rule (2) and defects in applications	Mistake in date of decree	See Note 6
See Note 2	Omission to specify costs	— Clause (h) See Note 10
Date of decree to be taken as that of judgment	Wrong name of the judgment debtor	See Note 8
See Note 6	Wrong number of the suit—Clause (a)	See Note 2
Death of judgment debtor	See Note 11	

**1 Legislative changes** — Sub rule (1) corresponds to Section 256 of the old Code and sub rule (2) to Section 235. Sub rule (3) is new and empowers the Court executing the decree to call upon the decree holder to produce a certified copy of the decree<sup>1</sup>

The following are the points of difference between sub rule (1) and Section 256 —

- (1) Section 256 provided for immediate execution only where the amount decreed did not exceed the sum of one thousand rupees. This rule fixes no such limit.
- (2) Under Section 256 the Court could order immediate execution only by the issue of a warrant. Under this rule the order may be made even prior to the preparation of a warrant.
- (3) Under this rule execution cannot issue against the *moveable property* of the judgment debtor as was possible under the old Code.
- (4) Under the old Code execution could be ordered if the judgment debtor was within the local limits of the jurisdiction of the Court. Under this rule it can be ordered only if he is within the *precincts of the Court*.

The following are the important alterations in sub rule (2) —

- (1) The words *together with particulars of any cross decree whether passed before or after the date of the decree sought to be executed* in clause (g) are new.
- (2) The words *and sale or by the sale without attachment* in clause (j) sub clause (ii) are new.
- (3) Sub clause (iv) clause (i) is new.

**2 Scope of the Rule** — An application for execution should be in writing except in the case dealt with under sub rule (1) when it may be oral. Sub rule (2) says what particulars a written application for execution shall contain. But every omission to comply with the said requirements is not necessarily such a defect as will vitiate the execution proceedings<sup>1</sup>. Informalities of an immaterial character will not vitiate the proceedings<sup>2</sup>. Thus the omission to mention the amount of costs<sup>3</sup> or giving a wrong

**Order 21 Rule 11 — Note 1**

1 (22) AIR 1937 All 85 (88) 53 All 391

**Note 2**

Ja k o T Contra — Dec n on of Devadoss J

**O. 21 R. 11**  
**Notes 2-2a**

suit number,<sup>4</sup> or making mistakes in the name of the judgment debtor,<sup>5</sup> or omitting to state the names of all the persons interested in the decree,<sup>6</sup> or wrongly calculating the pleader's fee,<sup>7</sup> or the failure to draw up the petition in a tabular form,<sup>8</sup> is only an irregularity of an immaterial character which will not vitiate the proceeding. Where however the omissions relate to material particulars, the application cannot be considered to be one in accordance with law and cannot save limitation.<sup>9</sup> Whether an omission is material or not will depend upon the particular facts of each case.<sup>1</sup>

Where an application for execution complies with the requirements of O. 21, Rules 11 to 14, it is in accordance with law. Although in the absence of a succession certificate the decree holder may not be entitled to realize the fruits of his decree, yet, the want of a succession certificate will not make the application for execution itself one not in accordance with law.<sup>11</sup> See also Note 2 to Order 21 Rule 10.

Where an application for execution is made, which is not in proper form or is otherwise defective it is the duty of the Court to dispose of the application either by giving the decree holder an opportunity to amend his application or by rejecting it.<sup>12</sup>

This rule prescribes the form for an application for execution. There is no particular form in which an application for the transfer of a decree for execution to another Court should be made. Such application need not contain the particulars mentioned in this rule. Where the application gives sufficient particulars of the decree sought to be transferred to indicate with precision the decree which the Court is to transfer the application is one in accordance with law.<sup>13</sup>

**2a Applicability of the Rule to execution of decrees under other Acts.—**

Under the Oudh Rent Act, XXII of 1886 (Section 146), the Orissa Tenancy Act, II of 1913 [Section 19b (j)] and the Madras Estates Land Act I of 1908 [Section 192 (g)] the Court may order immediate execution, on the oral application of the decree-holder as enacted in sub rule (1) of this rule.

In applications for execution of decrees relating to immovable property under the Chota Nagpur Tenancy Act, VI of 1908, Section 210 (3) (b), as amended by Act VI of 1920 [Section 50 (1)], the application shall be accompanied by a certified copy of the decree as provided in sub rule (3) of this rule.

4 (38) 25 Cal 524 (597, 601) (F B)  
(84) 10 Cal 541 (514)

5 (30) AIR 1930 Mad 172 (178)

6 (32) 139 Ind Cas 151 (152) (Lab)

(31) AIR 1931 Lah 600 (601)

7 (18) AIR 1918 Mad 1090 (1092) 40 Mad 949

8 (21) AIR 1921 Low Bur 37 (39) 11 Low Bur  
Rul 163

9 (31) AIR 1931 AH 722 (723) (Incorrect entries  
in columns 2 G and 6)

(27) AIR 1926 Pat 533 (534) (Flagrantly defective  
application)

(74) 21 Suth W R 309 (310)

(68) 10 Suth W R 423 (428)

10 (26) AIR 1926 Cal 1146 (1149)

(24) AIR 19 4 Cal 938 (939)

(34) AIR 1931 Bom 507 (510) 59 Bom 1 (In  
accordance with law means that application  
though defective in some particular is one upon  
which execution can lawfully be ordered)

(34) AIR 1934 Cal 465 (466) (Application for  
execution not mentioning money realized by  
attachment of decrees obtained by judgment  
debtor—Omission does not vitiate application)

11 (35) AIR 1935 Nag 1 (2) 31 Nag L R 126

12 (34) AIR 1934 AH 491 (493) 56 AH 792 (F B)  
(Defective application — If no order is passed by  
Court it should be deemed to be pending)

(20) AIR 1920 Lah 122 (122)

(See (37) AIR 1937 Sind 109 (110) 31 Sind L  
R 14 (Application presented by son of decree-  
holder on father's behalf—No mention in applica-  
tion that son was appointed with facts of case  
—Court returning application for amendment as  
not being made by proper person—Application  
held rightly returned as not being proper under  
O. 21 R. 11 (2)—Application cannot be said to  
be pending in Court when it is not filed after  
amendment))

13 (37) AIR 1937 AH 397 (399)

As to what particulars are necessary when an application is made under sub rule (2) of this rule to execute a decree against the immovable properties of the judgment debtor, under the Bengal Tenancy Act VIII of 1885 and the Orissa Tenancy Act II of 1913, see Sections 163 and 216 of those Acts respectively.

See also the undermentioned case <sup>1</sup>

**2b "Decree for payment of money."** — A decree to come within the description of a decree for the payment of money need not state the exact amount due. A decree under which the amount due has to be ascertained subsequently may be a decree for the payment of money <sup>1</sup>

See also Note 6 to Section 73 *ante*

**3 Immediate execution — Sub-rule (1) — Privilege from arrest** — S 185 *ante* deals with exemptions from arrest. But sub section (3) thereof provides that 'nothing in sub section (2) shall enable a judgment debtor to claim exemption from arrest under an order for immediate execution' <sup>1</sup>

**4 Verification of application** — The application for execution should be signed and verified by (a) the applicant or (b) some other person acquainted with the facts of the case. Where there are several applicants it is not necessary that all of them should be acquainted with the facts of the case. <sup>1</sup>

Although this rule permits the signing and verification of an application for execution by some person other than the decree holder the application itself must be that of the decree holder or his recognized agent or pleader <sup>3</sup>

An application not signed and verified as required by this rule is a defective application which ought to be rejected <sup>4</sup>. Where the period of twelve years from the date

#### Note 2a

1 (89) AIR 1939 Bom 887 (889) (Consent order in proceedings under the Guardians and Wards Act for payment of schooling and maintenance expenses of minors by their father was held not to be a decree for the payment of money in favour of the wife and could not be executed as such)

(30) AIR 1930 Lah 603 (604) (Application by next friend of decree holder after his attaining majority — If bona fide will not be dismissed)  
(36) AIR 1936 All 17 (18) (Application signed and verified by person purporting to be mukhtar in am of decree holder — Mukhtarnama not pro-

#### Note 2b

1 (89) AIR 1939 Bom 867 (868) (In the circumstances of this case however it was held that the decree was not one for payment of money as the

#### Note 3

1 (69) 2 Suth WR 549 (551) (Case under Small Cause Courts Act S 19 of Act VI of 1865)

#### Note 4

1 (4) AIR 1924 Pat 23 (25) 2 Pat 809  
2 (24) AIR 19 4 Cal 811 (811)  
(20) AIR 1924 Bom 196 (196) (Verification by pleader)  
(20) AIR 1920 Pat 123 (129) (Verification by decree holder is sufficient)  
(25) AIR 19 5 Pat 637 (633) (Do)  
(01) 6 All 154 (155) (Verification by attorney)

Return of application for amendment held proper ]]

[But see (05) 29 Mad 396 (398) (Application by next friend after majority held to be not in accordance with law)]

3 (37) AIR 1937 Mad 760 (761)

4 [See (36) AIR 1936 All 17 (18) (Application signed and verified on behalf of decree holder by person purporting to be mukhtar in am of decree holder — Mukhtarnama not filed — Court not satisfied that he was authorized to sign — Rejection of application is proper)]

**O. 21 R. 11**  
**Notes 2-2a**

suit number,<sup>4</sup> or making a mistake in the name of the judgment debtor,<sup>5</sup> or omitting to state the names of all the persons interested in the decree,<sup>6</sup> or wrongly calculating the pleader's fee<sup>7</sup> or the failure to draw up the petition in a tabular form<sup>8</sup> is only an irregularity of an immaterial character which will not vitiate the proceeding. Where however the omissions relate to *material* particulars the application cannot be considered to be one in accordance with law and cannot give limitation.<sup>9</sup> Whether an omission is material or not will depend upon the particular facts of each case.<sup>10</sup>

Where an application for execution complies with the requirements of O 21 Rules 11 to 14 it is in accordance with law. Although in the absence of a succession certificate the decree holder may not be entitled to realize the fruits of his decree yet the want of a succession certificate will not make the application for execution itself one not in accordance with law.<sup>11</sup> See also Note 3 to Order 21 Rule 10.

Where an application for execution is made which is not in proper form or is otherwise defective it is the duty of the Court to dispose of the application either by giving the decree holder an opportunity to amend his application or by rejecting it.<sup>12</sup>

This rule prescribes the form for an application for execution. There is no particular form in which an application for the transfer of a decree for execution to another Court should be made. Such application need not contain the particulars mentioned in this rule. Where the application gives sufficient particulars of the decree sought to be transferred to indicate with precision the decree which the Court is to transfer the application is one in accordance with law.<sup>13</sup>

**2a Applicability of the Rule to execution of decrees under other Acts.—** Under the Oudh Rent Act XXII of 1896 (Section 146) the Oriasa Tenancy Act II of 1913 [Section 198 (j)] and the Madras Estates Land Act I of 1908 [Section 192 (g)] the Court may order immediate execution on the oral application of the decree holder as enacted in sub rule (1) of this rule.

In applications for execution of decrees relating to immovable property under the Chota Nagpur Tenancy Act VI of 1908 Section 210 (3) (b) as amended by Act VI of 1920 [Section 50 (1)], the application shall be accompanied by a certified copy of the decree as provided in sub rule (3) of this rule.

4 (38) 25 Cal 504 (507 C01) (F B)  
(84) 10 Cal 542 (544)

5 (30) AIR 1930 Mad 172 (173)

6 (32) 193 Ind Cas 151 (152) (Lah)  
(31) AIR 1931 Lah 600 (601)

7 (18) AIR 1918 Mad 1090 (1092) 40 Mad 949

8 (21) AIR 1921 Low Bur 37 (39) 11 Low Bur  
Rul 163

9 (31) AIR 1931 All 729 (723) (Incorrect entries  
in columns 2, 5 and 6)

(26) AIR 1926 Pat 533 (534) (Flagrantly defective  
application)

(24) 21 South W R 309 (310)  
(C) 10 South W R 429 (428)

10 (27) AIR 1926 Cal 1146 (1149)

(24) AIR 1924 Cal 338 (339)

(34) AIR 1931 Bom 307 (310) 59 Bom 1 (In  
accordance with law means that application  
though defective in so far as particulars are concerned  
which execution can lawfully be ordered)

(24) AIR 1931 Cal 465 (466) (Application for  
execution not mentioning money realized by  
attachment of decrees obtained by judgment  
debtor—Omission does not vitiate application)

11 (35) AIR 1935 Nag 1 (1) 21 Nag L R 176

12 (31) AIR 1931 41491 (480) 56 All 91 (17B)  
(Defective application—If no order is passed by  
Court it should be deemed to be pending)

(20) AIR 1920 Lah 142 (122)

(See (3) AIR 1937 Sind 103 (110) 31 Sind L  
R 15 (Application presented by holder of decree  
holder on latter's behalf—No order passed  
on that—Court  
not held  
held right  
O 21 R  
be pending  
amendment)

13 (37) AIR 1937 All 397 (399)

■ **Previous applications and their results.** — An omission to specify all the previous applications with their dates and their results is not a material defect such as would vitiate the application and render it one not in accordance with law within Article 182 of the Limitation Act.<sup>1</sup>

O. 21 R. 11  
Notes 9-11

**10. Amount due upon the decree — Clause (g)** — A Court will be justified in declining to act on an execution petition when the decree holder does not state the amount due upon the decree.<sup>1</sup> Where a decree awards interest and the application for execution specifies the interest from the date of the decree to the date of the application execution may be ordered for future interest also up to the date of sale, even though it is not specifically included in the application.<sup>2</sup>

See also the undermentioned cases<sup>3</sup>

**10a. Amount of costs awarded — Clause (h)** — The omission to mention the particulars mentioned in this clause is not a material omission and will not vitiate the application for execution.<sup>1</sup>

**11. Against whom execution is to issue — Clause (i)** — An application for execution must state the name of the person against whom execution is sought.<sup>1</sup> Where an application is made against a dead person it cannot be acted upon but it will be a step in aid of execution within the meaning of Article 182 of the Limitation Act if it has been made *bona fide* in ignorance of the death.<sup>2</sup> Similarly where in an application for execution the guardian *ad litem* of a minor defendant is described by mistake as the judgment debtor the application will give a fresh starting point for limitation.<sup>3</sup> But where a minor judgment debtor is not represented at all by a guardian the application is not one in accordance with law and is of no effect.<sup>4</sup> A decree for

#### Note 9

- 1 { 26 } AIR 1926 Cal 1146 (1148)
- { 24 } AIR 1924 Cal 898 (898)
- { 01 } 23 All 162 (168)
- { 01 } 1891 All W N 154 (155)
- { 28 } AIR 1928 Mad 440 (442 444)
- { 03 } 16 Mad 142 (148)
- { 02 } 1892 All W N 114 (115)

As to the period of limitation for an application for execution see Articles 182 and 183 of the Limitation Act

[But see { 22 } AIR 1922 Sind 20 (30) 15 Sind L R 156 (Would be not in accordance with law where it is necessary to determine whether application is barred or not)]

#### Note 10

- 1 { 21 } AIR 1921 Nag 90 (91)
- { 22 } 65 Ind Cas 120 (170) (Pat) (Such an application is not a step-in aid)
- { 00 } 1890 All W N 93 (93) (Decree holder deliberately omitted to correct error in calculation of interest — Petition struck off for non prosecution is not an application in accordance with law)

execution to describe the nature of the tenure or to do so necessarily according to the Record of Rights)

- { 32 } AIR 1932 Cal 858 (863) 50 Cal 1450 (The

#### Note 10a

- 1 { 28 } AIR 1928 Mad 440 (441)
- { 22 } AIR 1922 Sind 29 (30) 15 Sind L R 156

#### Note 11

- 1 { 72 } 18 South W R 55 (56)
- 2 { 94 } 17 Mad 76 (77)
- { 08 } 35 Cal 1047 (1049)
- { 97 } 19 All 337 (339) (Such application made with knowledge of death will not save limitation)
- [But see { 34 } AIR 1931 All 463 (464) 56 All 463]
- For execution against legal representative of a deceased judgment debtor see E 50 Notes 12 III and 14

Also see S 50 Notes 4 to 6 and the following case

- { 9 } 1897 All W N 241 (242) (Application against wrong legal representative — Step-in-aid of execution)

- 3 { 14 } AIR 1918 All 989 (989)
- { 88 } 11 Bom 427 (430)

- 4 { 11 } 12 Ind Cas 628 (629) (All)



**O. 21 R. 11** costs passed against a minor represented by his father as guardian (or next friend)  
**Notes 11-13** cannot be executed against the father \*

**12 Mode in which the assistance of the Court is required — Clause (j).** — An execution application which does not specify the manner in which the assistance of the Court is required is not an application in accordance with law<sup>1</sup>. So also is an application asking for a relief which the Court cannot grant inasmuch as the Court is asked to do something which it is not competent to do<sup>2</sup>.

The words otherwise, as the nature of the relief granted may require<sup>3</sup> in clause (j) show that the modes of execution mentioned above are not exhaustive<sup>4</sup>. But where the decree holder prays for a particular mode of execution he cannot ask the Court to give a different mode of execution upon that application<sup>5</sup>.

This rule should be read with Section 51 *ante* and O 40 R 1, *infra* and in relation to the appointment of a receiver by way of execution of a decree must be deemed to be made under O 40 R 1 and must satisfy the requirements thereof<sup>6</sup>.

Where the property sought to be attached is inalienable under the law, the Court has no power to attach it: the reason is that attachment will be futile in such a case<sup>7</sup>.

**13 Certified copy of decrees to be filed — Sub-rule (3)** — It is not imperative that an application for execution should in all cases be accompanied by a copy of the decree<sup>1</sup>. The Court can order the execution to proceed without a copy of the decree

- (18) AIR 1918 Pat 69 (69) 4 Pat L Jour 37  
 (But where a guardian is proposed though with an application it is a step-in aid)  
 [See however (36) AIR 1936 Nag 77 (78) (Decree against a minor represented by guardian — Death of guardian subsequently — Execution then out in ignorance of such death — Held that the application was a step-in aid of execution and could save limitation)]  
 5 (35) AIR 1931 All 359 (360)

#### NOTE II

- 1 (5) 19 Bom 34 (35)  
 (11) 11 Ind Cas 696 (696) (Cal) (Unless the defect is remedied the application must be dismissed)  
 (29) 9 Suth W R 590 (591)  
 (75) 7 N W P H C R 79 (79)  
 (20) AIR 1929 Nag 146 (150) 25 Nag L R 94  
 (82) AIR 1932 Lab 734 (734) 14 Lab 6 (It was held on the facts that the mode of execution was sufficiently described and that therefore it was a step-in aid of execution)  
 [See also (91) 18 Cal 169 (169) (But where it refers to previous application in which mode of execution is mentioned this is in accordance with law)]  
 [But see (83) 1883 Pan Re No 23 (Such an application is cured by Court without objection as in accordance with law)]  
 2 (60) 27 All Glor (621)  
 (20) 12 All R 2 (65)  
 (82) 4 All 34 (35)  
 (18) AIR 1918 Bom 236 (240) 42 Bom 420  
 (10) 5 Ind Cas 601 (609) 31 Bom 189  
 (50) 18 Bom 237 (289)  
 (60) 2 Ind Cas 911 (912) (Cal)  
 (82) 8 Cal 174 (177)  
 (10) 11 Ind Cas 440 (199) (Cal)

- (95) 2 Nag L R 61 (63, 64)  
 (31) AIR 1931 Sind 160 (161) 25 Sind L R 525  
 (May be in accordance with law if there is a bona fide belief about competency)  
 (14) AIR 1914 Mad 663 (664) (Do — In such a case the application can be amended)  
 (19) 17 Ind Cas 210 (212) 37 Bom 42  
 [But see (95) 96 Bom 983 (287)]  
 3 (13) 18 Ind Cas 691 (695) (Mad) (Case under oil Code)  
 (20) AIR 1930 Lab 117 (115) (Temporary alienation)  
 [See also (39) AIR 1939 Oudh 110 (116) 14 Luck 538 (It is proper for the Court to order execution of a decree for the payment of money by means of appointment of a receiver when it is just and convenient from the point of view of both of the decree holder as well as judgment debtor)]  
 4 (99) 1939 Pan Re No 21 p. 121  
 (11) 9 Ind Cas 210 (241) (Oudh)  
 [But see (66) 93 Cal 906 (309)]  
 5 (32) AIR 1932 Cal 189 (192) 29 Cal 209  
 [See also (33) AIR 1933 Nag 266 (267) (Jabag unattachable — Still receiver can be appointed on suitable allowance to judgment debtor)]  
 6 (35) AIR 1935 Nag 183 (185) 31 Nag L R 239  
 (Case under S 16 of the C I and Alienation Act)

#### NOTE 13

- 1 (07) 31 Bom 172 (171)  
 (30) AIR 1930 Cal 804 (805, 806) 37 Cal 206  
 (Especially when it is the Court which passed the decree or when the decree is voluminous)  
 (71) 16 Suth W R 25 (24)  
 (69) 11 Suth W R 25 (29)

being filed.<sup>2</sup> An application not accompanied by a copy of the decree cannot be said to be one not in accordance with law for the purposes of limitation.<sup>3</sup> It will be in accordance with law even if it is dismissed for non compliance with an order of the Court requiring a copy of the decree to be produced.<sup>4</sup>

**O. 21 R. 11**  
**Notes 13-15**

**14. Concurrent applications for execution** — See Note 10 to Section 38

**15. Amendment of application.** — See Notes to Rule 17 *infra*

**R. 12.** [S 236.] Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

**O. 21 R. 12**

Application for attachment of moveable property not in judgment debtor's possession

[1877, S. 236; 1859, S. 214. See Ss 2 (13) and 60.]

### Synopsis

#### 1 Scope of the Rule. | 2 Failure to annex inventory — Effect of

**1. Scope of the Rule.**—This rule applies to moveables in the possession of third parties. When a third party has some moveables belonging to himself and others belonging to the judgment debtor, an inventory is obviously necessary before an attachment can be made.<sup>1</sup> But, where a decree is passed under Section 52 of the Code against the legal representatives of a deceased debtor and the moveable property attached is in their possession, the rule has no application.<sup>2</sup> The reason is that the legal representatives themselves are the judgment debtors and therefore the property sought to be attached cannot be said to be property belonging to, but not in the possession of, the judgment debtor. No inventory is necessary where the property sought to be attached is in the possession of the judgment debtor himself.<sup>3</sup>

**2. Failure to annex inventory.—Effect of.**—Where a decree holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same as required by this rule,

(68) 10 Suth W R 144 (145)

(68) 9 Suth W R 802 (802)

(1865) 4 Suth W R Misc 15 (16) (Original decree may not be filed)

(10) 5 Ind Cas 660 (660) (Cal)

(19) 11 Suth W R 271 (272)

2 (10) 11 Cal L Jour 243 (247) (Decree burnt or destroyed)

7

4. (18) AIR 1918 All 242 (248) 40 All 209

(18) AIR 1918 Pat 547 (518)

#### Order 21 Rule 11 — Note 1

1 ('80) AIR 1930 Bom 65 (68) (Execution against legal representatives under § 50 of the Code—Inventory not necessary)

(93) 15 All 84 (86)

(81) 7 Cal 556 (559)

(11) 9 Ind Cas 729 (729) (Mad) (Inaccurate description—Wrong date—No prejudice—Sale valid—S 236 requires only a reasonably accurate description)

(69) 11 Suth W R 8 (16) (FB)

2. (27) AIR 1927 Bom 52 (52) 50 Bom 730  
[See also (92) 1892 All W R 55 (56) 14 All 193.  
(Facts not clear)]

3. ('85) AIR 1935 Cal 235 (235)

**O. 21 R. 12** the application is not one in accordance with law within the meaning of Article 152 of  
**Note 2** the Limitation Act and cannot save limitation<sup>1</sup>

**O. 21 R. 13**

Application for attachment of immovable property to contain certain particulars

**R. 13.** [S. 237.] Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot —

- (a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and
- (b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same

[1877, Ss 237, 238; 1859, S. 213]

#### Local Amendment

#### RANGOON

The following shall be substituted for Rule 13

"R 13 (1) When application is made, for execution of a decree relating to immovable property included within the cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *kun* or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immovable property, must also be furnished so far as they are not given in the plan. In the case of other immovable property, a plan is not required, but each of the particulars in the annexed instructions as can be given must be supplied —

1 If the property, to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, *kun* number, latest holding number (if different kinds of holdings, e g, rice land and garden holdings are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding), year of *kun* map from which the holding number is taken and revenue last assessed upon the land, must be given

2 In the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified

#### Note 2

1 (15) AIR 1915 All 320 (321) 37 All 527

(92) 1892 All W N 47 (47)

(92) 1892 All W N 70 (71) (Though the execution application expressly stated that it was filed to save limitation)

[See (34) AIR 1934 Pat 75 (75) (In this case, it was held that it was not right to hold an application not in accordance with law merely because it did not contain an inventory of the property sought to be attached without considering whether such property was in the possession of the judgment-debtor or not)]

3 In the case of land in large towns the area, block or quarter, name or number, the lot number (if there are separate series of lots the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map if any, and year of the map, the rent or revenue last assessed on the land, must be given

4 In the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number the quarter or block name or number, the number of the building in the street or if it has no number, the lot number must be given

5 In the case of immovable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given

6 The purpose to which land or buildings are put, the material and age of buildings, all incumbrances and municipal taxes should be stated

7 The judgment debtor's share or interest in the property should be specified.  
(2) The cost of the certified extract should be reckoned in the costs of the application "

### Synopsis

#### 1 Legislative changes | 2. Specification of property.

**1. Legislative changes.** — This rule corresponds to the first paragraph of Section 237 of the old Code, except that the words "and in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers have been newly added in clause (a)

The second paragraph of Section 237 requiring the list of properties to be verified has been omitted from this rule and reproduced in sub rule (3) of Rule 66 of this Order<sup>1</sup>

**2. Specification of property.** — The rule applies only to execution of money decrees and not to decrees made upon a charge or a mortgage<sup>1</sup>

The object of requiring the boundaries and numbers to be specified is to easily identify the property<sup>2</sup> Clause (b) imposes a duty on the decree holder to specify the judgment debtor's share or interest, to the best of his belief<sup>3</sup> Thus, where the share is undivided it should be so specified<sup>4</sup>

An application which does not contain the particulars required by this rule cannot be treated as an application in accordance with law within the meaning of Article 182 of the Limitation Act, unless the defects are remedied by amendment under Rule 17<sup>5</sup> See also Notes to Rule 17, *infra*

#### Order 21 Rule 13 — Note 1

#### 3 (89) 12 Bom 678 (689)

1 For cases under the old Code which required verification see (OG) 29 All 244 (245)  
(92) 27 All 65 (64)

#### Note 2

1 (16) AIR 1916 Pat 373 (373)  
2 (19) 11 South W II 175 (176)  
(69) 12 South W R 488 (488)  
(72) 18 South W R 411 (411)

by evidence.)  
(12) 14 In I Cas 588 (589) (Ma I) (Do)

**O. 21 R. 13**  
Note 2

This rule applies to proceedings under the Chota Nagpur Tenancy Act 1908 Section 210 as amended by Act VI of 1920 Section 50

**O. 21 R. 14**

**R. 14.** [S 238] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors

[1877, Ss 237, 238; 1859, S 213]

### Synopsis

- |                             |   |  |
|-----------------------------|---|--|
| 1 Legislative changes       | } | 3 Application for time to produce certified extracts is a step in aid of execution |
| 2 Applicability of the Rule |   |  |

**1 Legislative changes** — Section 238 of the old Code corresponding to this rule provided that the application *shall* be accompanied by an authenticated extract from the register of such office <sup>1</sup> The present rule leaves it to the *option of the Court* to require the applicant to produce a certified extract

**2 Applicability of the Rule** — Where an application for sale is made in pursuance of a mortgage decree a preliminary attachment of the mortgaged properties is not necessary and therefore this rule does not apply to such a case and a Court cannot dismiss the application for failure to produce the certified extract <sup>1</sup> This rule applies to the proceedings under the Chota Nagpur Tenancy Act 1908 Section 210 as amended by Act VI of 1920 Section 50

**3 Application for time to produce certified extracts is a step-in-aid of execution** — An application by a decree holder for time to produce the certified copies or extracts required by this rule is a step in aid of execution <sup>2</sup>

**O. 21 R. 15**

**R. 15.** [S 231.] (1) Where a decree has been passed jointly <sup>3</sup> in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, <sup>5</sup> apply for the execution

Application for execution by joint decree holder

(93) 15 All 84 (87)  
(1r) AIR 1916 Lah 316 (316)

Order 21 Rule 14 — Note 1

1 (69) 11 South W R 175 (176)  
(CJ) 12 South W R 493 (493)

Note 2

1 (14) AIR 1916 Oudh 413 (413)

(37) AIR 1937 Oudh 233 (234) 18 Luck 1r<sup>9</sup>

Note 3

1 (12) 1<sup>st</sup> Ind Cas 909 (909) 37 Bom 31<sup>7</sup>  
(10) 5 Ind Cas 579 (581) (Cal) (App'l on re turned for amendment is a step in aid)  
(1r) AIR 1916 Ma 1 510 (510) (1 ven appl'cation not re presented is a step-in aid)

of the whole decree<sup>1</sup> for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

O. 21 R. 15  
Notes 1-2

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application

[1877, Ss. 230, 231; 1859, S. 207]

### Synopsis

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1 Legislative changes</li> <li>2 Scope of the Rule</li> <li>3 'Where a decree has been passed jointly'</li> <li>4 "Any one or more of such persons may apply for the execution of the whole decree"</li> <li>■ Application by one of several decree holders for execution in respect of his share of the decree</li> </ol> | <ol style="list-style-type: none"> <li>6 Unless the decree imposes a condition to the contrary</li> <li>7 Execution against one of the joint judgment debtors — Limitation See Article 182 of the Limitation Act</li> <li>8 Payment by judgment debtor out of Court to one of several decree holders</li> <li>9 Defective application under the Rule, if can be amended</li> <li>10 Appeal</li> <li>11 Limitation</li> </ol> |
|---|--|

### Other Topics (miscellaneous)

Court can make such order for protecting interests of other decree holders See Note 2  
For the benefit of them all See Notes 4 and 9  
Issue of notice before execution—Whether necessary See Note 4  
Objection to execution—Whether can be taken in second appeal See Note 2  
Where any of them has died See Note 4  
Where the Court sees sufficient cause See Note 4

#### 1. Legislative changes —

- 1 The words 'or his or their representatives' in Section 231 of the old Code, after the words 'one or more of such persons' have been omitted as unnecessary in view of the provisions of Section 146 *ante*
- 2 The words 'unless the decree imposes any condition to the contrary' are new See Note 6

**2 Scope of the Rule.** — There are two rules of general application governing the execution of joint decrees in favour of several persons —

(1) One of the decree holders alone cannot apply for execution of *his share* only of the decree leaving the other decree holders to take out execution for their shares<sup>1</sup>

(2) One of the decree holders alone cannot execute the *whole* decree so as to bind the other decree holders by the result of such execution

The first rule is based on the principle that the *judgment debtor* should not be harassed by a number of applications for execution. As observed by Sir Barnes Peacock C J, in *Haro Shankar Sandyal v Taral Chandra Buttacharyee*, 11 *Suth W R* 484 at page 490

Suppose there was a decree for a *lac* of rupees it could not be contended that the decree holder could assign it to a *lac* of assignees so as to give to each of them power to take out execution for one rupee his portion of it. Otherwise there might be a *lac* of executions under the decree a *lac* of seizures and a *lac* of sales under each one of which there can be no doubt that the judgment debtor would suffer loss. If this were allowed the judgment debtor must necessarily be ruined.

O. 21 R. 15  
Notes 2-3

The second rule is based on the principle that the interests of the other decree-holders should not be jeopardised, and also on the principle that all persons representing a *single and indivisible* right must be parties before the right can be adjudicated upon. See Note 7 to O 1 R 1.

This rule is an exception to the second of the two rules abovementioned, in that it provides that one of several joint decree holders can execute, under certain circumstances the *whole* decree. In order, however, to prevent the interests of the other decree holders from being jeopardised, the Court is given power, and is indeed bound, to make such order as is necessary to safeguard such interests.<sup>7</sup>

**3. "Where a decree has been passed jointly."** — A decree directing the defendant to pay a certain sum of money to several persons *specifying their shares* therein is not a joint decree, even though the amount is made payable as an entire sum.<sup>1</sup> The High Court of Patna has, however, in the undermentioned case,<sup>2</sup> expressed an *obiter dictum* that a decree does not cease to be a joint decree merely because the shares of the decree-holders in the decretal amount have been determined by the decree. According to the High Courts of Lahore and Madras where a suit is filed in the name of a firm, the decree passed in the suit in favour of the firm must be held to be a decree passed jointly in favour of all the partners, since a firm name is only a compendious method of writing the names of all the partners.<sup>3</sup> But the Judicial Commissioner's Court of Sind has held that unless a declaration of the names of all the partners has been made under O 30 R 2, the decree in favour of the firm cannot be said to be a joint decree.<sup>4</sup>

This rule can apply only where a decree has been *passed jointly* in favour of more persons than one.<sup>5</sup> Where a portion of a decree is transferred to another, either by assignment in writing or by operation of law, the transferee is in the position of a joint decree holder and the Court has got the *inherent* power to grant him relief in

- (72) 4 N W P H C R 90 (97)
- (70) 2 N W P H C R 413 (413)
- (91) 15 Bom 242 (244)
- (89) 11 Suth W R 488 (490)
- (89) 11 Suth W R 241 (242)
- (75) 23 Suth W R 312 (313)
- (72) 17 Suth W R 19 (20)
- (67) 7 Suth W R 10 (11)
- (66) 6 Suth W R Misc 64 (65)
- (75) 24 Suth W R 11 (12)
- (95) 18 Mad 464 (465)
- (19) AIR 1919 Pat 286 (287, 288) 4 Pat L Jour 575

- (69) 1 Beng L R A C 28 (29)
- (27) AIR 1922 Pat 611 (612)
- (19) AIR 1919 Pat 286 (287, 288) 4 Pat L Jour 575
- (25) AIR 1925 Pat 591 (597)
- [See (33) AIR 1933 Pat 609 (611) (Heirs of deceased decree holder themselves parties to execution application—There is no question of any order having to be made under sub-rule (2))]

**Note 3**

- 1 (70) 13 Suth W R 244 (245)
- (22) 2 Mad L Jour 14 (15) (Suit on a mortgage)

appeal]]  
[But see (79) 11 Suth W R 343 (344) (S 207 of the Code of 1859 did not contain the words 'the whole decree')]

- 2 (05) 1 Nig L R 24 (30)
- (67) 2 Agra 163 (165, 166)
- (18) AIR 1918 Cal 153 (154)
- (75) 23 Suth W R 2-2 (292)
- (74) 22 Suth W R 204 (201)
- (73) 19 Suth W R 302 (302)
- (71) 15 Suth W R 159 (159)

- (25) AIR 1925 Mad 1265 (1266) (Do)]
- 2 (32) AIR 1932 Pat 261 (265) 11 Pat 445
- 3 (31) AIR 1931 Lah 507 (503)
- (32) AIR 1932 Lah 596 (597) 13 Lah 546 (Some of the partners can therefore execute for the benefit of all)
- (31) AIR 1931 Mad 330 (331) 57 Mad 696
- 4 (29) AIR 1923 Sind 37 (35)
- 5 (34) AIR 1934 Pat 627 (629) (One of the several legal representatives of a deceased decree holder applying for execution—This rule does not apply)

execution by applying general principles of law analogous to this rule<sup>6</sup> It has been held that where a decree has been passed awarding separate amounts to several persons, they can all make a single application for execution<sup>7</sup>

O.21 R.15  
Notes 3-4

See also the undermentioned case<sup>8</sup>

**4. "Any one or more of such persons may apply for the execution of the whole decree."** — As has been seen in Note 2 above, this rule makes an exception to the general rule that all decree holders must join in an application to execute the joint decree, and permits one or more of several joint decree-holders to apply for execution of the whole decree,<sup>1</sup> unless the decree imposes a condition to the contrary<sup>2</sup> But it does not confer an unconditional right on one of the decree-holders to execute the decree It is within the discretion of the Court to allow such execution and the Court will act only if it sees sufficient cause for allowing such a course to be taken<sup>3</sup> It may allow other decree holders to intervene in a pending execution, if it is not being properly conducted<sup>4</sup> It is also in the discretion of the Court whether or not notice should be given to the other decree holders or to the judgment debtor before making an order for

[See however ('29) AIR 1929 Pat 232 (232, 233)  
(191) AIR 1931 Lah 5 (6) (Where it is assumed  
that O 21 R 15 applies to the legal representa  
tives of a deceased decree holder)]

6 ('21) AIR 1921 Mad 599 (601, 603) 44 Mad  
919 (FB)  
(127) AIR 1927 Bom 123 (124) 51 Bom 143  
(Application for execution presented by one of the

(129) AIR 1929 All 933 (957) 51 All 998 (De  
posit of pre-emption money is proceeding in  
execution and O 21, R 15 applies—Per Boys, J.,  
Sulaiman J., *contra*)

(18) AIR 1918 Mad 56 (56) (One decree holder  
dying—Surviving decree holders may execute for  
benefit of all including that of legal representa  
tives of deceased)

(168) 10 Suth W R 95 (96) (Joint judgment for  
damages obtained by several persons — Some of  
them dying— Execution may be carried by sur  
vivors under R 207)

(137) AIR 1937 Pat 253 (256)

(136) AIR 1936 Cal 571 (572) (All that he is re  
quired to do is to state to the Court the fact of  
death of his co decree-holder and the names of  
his legal representatives)

[See also (106) 10 Cal W N 1000 (1002)]

(132) AIR 1932 Pat 359 (360) 12 Pat 42 (De  
cree holders members of joint Hindu family—

on review)

(119) AIR 1919 Lah 429 (430) 1917 Pan Re No  
15

(174) 22 Suth W R 354 (354) (One decree passed  
in favour of B—B transferring his decree in  
favour of three persons — One of such persons

holders)

(135) 39 Cal W N 901 (906) (One of two joint  
owners of a decree, though such decree was  
passed in favour of one single decree holder,

2.

3. (10) AIR 1910 Pat 253 (253)

7. (10) AIR 1910 Pat 253 (253)  
8. (10) AIR 1910 Pat 253 (253)  
remaining absent — Decree in favour of father  
for one third share — Possession of remaining

1. (150) 11 Mad 79 (81)

(173) 5 N W P H O R 16 (17)

(106) 5 Suth W R Misc 59 (58)

(120) AIR 1920 Pat 672 (673)

(197 01) 11 Upp Bur Rul 247

(107) 10 Oudh Cts 378 (381)

ution]]

[See also ('35) AIR 1935 Nag 25 (27) 31 Nag  
L R 271]

4. (121) AIR 1921 Mad 599 (601) 44 Mad 919  
(FB) (Similarly in the case of part transferee of  
a decree)



**O. 21 R. 15**  
**Note 4**

execution under this rule. Where one of several decree holders applies for execution and the others do not object to execution being granted to him it is not for the judgment debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree holders.<sup>6</sup>

When one of several joint decree holders executes a decree, he executes the decree *prima facie* for the benefit of all, unless there is a direction by the Court or in the decree itself which permits execution for the benefit of the executing creditor alone.<sup>7</sup> Therefore where one decree holder executes a joint decree and realizes the amount due under it the realization is made on behalf of, and for the benefit of all the joint decree holders and they are entitled to recover their respective shares from him by a separate suit.<sup>8</sup>

The High Court of Lahore has held in the undermentioned cases<sup>9</sup> that it need not be stated in the body of the application that it is being made for the benefit of all the decree holders and that when the application is for execution of the entire decree it should be assumed that the person applying is attempting to execute it on behalf of all the decree holders. But the High Court of Patna has held that such an application is invalid and must be disallowed.<sup>10</sup>

The omission on the part of the decree holder to state in his application the names of all the persons who are interested in the decree is not such a defect as would invalidate the execution proceedings.<sup>11</sup>

Where an application for execution is made by two persons, the execution proceedings do not terminate automatically on the death of one of them. The surviving

5 (66) 83 Cal 806 (310) (Notice is not necessary where the decree grants injunction—21 Suth W R 31 Distinguished)

(38) AIR 1933 Lah 655 (656) 14 Lah 212 (AIR 1931 Lah 600 Followed)

(26) AIR 1976 Cal 811 (812)

(31) AIR 1931 Lah 600 (601)

(74) 21 Suth W R 31 (30) (Notice is obviously desirable in the case of decree for money—See observations on this case in 83 Cal 806)

(See also (80) 7 Cal L Rep 537 (538) (But ordinarily it should hear the other decree-holders))

(93) 8 Mad L Jour 91 (91)

(33) AIR 1933 Lah 655 (656) 14 Lah 212

(20) AIR 19 8 Nag 40 (41)

(34) AIR 1934 Pesh 76 (77) (Decree in favour of joint Hindu firm—Execution application by one member)

(31) AIR 1931 Lah 600 (601)

(83) AIR 1933 Lah 655 (656) 14 Lah 212 33 Pun L R 549 (550)

(71) 16 Suth W R 29 (29)

(35) AIR 1935 Lah 484 (486) 17 Lah 115 (Decree in favour of two brothers—Execution application signed by one alone—Purchase made by him in his name—Other brother is entitled to share)

(29) AIR 1978 Mad 800 (800 803)

9 (30) AIR 1930 Lah 603 (604)

(33) AIR 1933 Lah 655 (656) 14 Lah 212 (AIR 1919 Pat 286 Not approved)

(32) AIR 1933 Lah 536 (597) 13 Lah 516 (Decree in favour of dissolved firm—Such decree is in favour jointly of its partners)

10 (19) AIR 1919 Pat 36 (287, 288) 4 Pat L Jour 575 (Application was not allowed to be remitted)

(38) AIR 1933 Pat 457 (460) 17 Pat 223 (Application for execution alleged to have been on behalf of applicant and another person holding interest in portion of decree—It must be stated that application is also for benefit of other person—If not application cannot be regarded as having been on his behalf)

11 (20) AIR 1920 Cal 811 (812)

(31) AIR 1931 Lah 600 (601)

(33) AIR 1933 Lah 655 (656) 33 Pun L R 513 (540) 14 Lah 212

(3) AIR 1933 Pat 359 (360) 12 Pat 42 (Omission to mention the death of coparcener—Co-decree holder will not entitle a rejection of the petition)

339 (Judgment debtor cannot object to arrange ment between decree holders permitting one of them to apply for execution—Judgment-debtor can only apply for the protection of his own interests.)

7 (24) AIR 1975 Mad 800 ( 01)

decree holder can continue the application for the benefit of himself and the legal representatives of his co decree holder <sup>1</sup>

O.21 R.15  
Notes 4-8

**5. Application by one of several decree holders for execution in respect of his share of the decree.** — It has been seen in Note 3 above that it is not open to one of several joint decree holders to apply for execution in respect of *his share* only of the decree, and that the rule is based on the principle that the judgment debtor should not be harassed by a multiplicity of applications by different decree holders. Where, therefore, there is no possibility of the judgment debtor being harassed by different applications, the bar against one of the decree holders applying for execution will not apply. Thus where some of the joint decree holders apply for execution with regard to a certain portion only of the decree giving up the rest and the other decree holders, being made parties, do not object to such a giving up by the applicants, the execution asked for may be allowed and the other decree holders cannot subsequently apply for execution of the balance of the decree <sup>1</sup> Similarly, where one of the joint decree holders intimates to the Court satisfaction of his share in the decree, this rule does not bar an application by the others for execution for the balance remaining due under the decree <sup>2</sup> So also, where *A* and *B* jointly obtain a decree for money or for possession of immovable property against *C*, and *C* as judgment debtor either purchases his share in the decree or inherits such share from *A*, the result would be the extinguishment of the decree *pro tanto* and *B* can therefore, execute the decree in respect of his share <sup>3</sup>

**6 Unless the decree imposes a condition to the contrary.** — This rule is not applicable to the case of joint decree holders where the execution of a joint decree is made dependent upon all the decree holders joining in the application <sup>1</sup>

**7. Execution against one of the joint judgment-debtors — Limitation.** — See Article 182 of the Limitation Act

**8 Payment by judgment-debtor out of Court to one of several decree-holders** — One of several joint decree holders cannot, as a general rule, give a valid discharge of the entire decree without the concurrence of others. A payment, therefore, to one of several decree holders out of Court is valid only to the extent of the share of that decree holder, <sup>1</sup> unless it can be proved that the decree holder who

[See also (39) AIR 1930 Mad 278 (280) ILR (1930) Mad 838 (One of several decree holders

#### Note 5

1 (28) AIR 1928 Cal 529 (60) 56 Cal 12 (Subsequent application for balance cannot be filed)  
(31) AIR 1934 Cal 403 (47) (Rule does not apply where joint decree has been satisfied in part before application for execution — Notice given to other joint decree holders — No objection to

1 (83) E All 69 (70)

#### Note 8

1 (1605) 3 Cal L Rep 513 (514)  
(35) AIR 1935 Nag 25 (27) 31 Nag L R 271  
(69) 11 South W R 262 (263)

**O.21 R.15**  
**Note 8**

granted the discharge was an agent of the other decree holders or otherwise had legal authority to bind them by his acts. On the same principle one of two or more joint decree holders is not competent without being authorized by the other or others to certify a payment made to him under O 21 R 2 so as to operate as a satisfaction of the entire decree and the others are not debarred from executing the decree as to their shares. The reason is that "when one of two or more joint decree holders takes it upon himself to certify satisfaction of the whole decree it is clear that no provision can be made by the Court for safeguarding the interests of the other decree holder or decree holders and that if a Court was bound to recognize such an adjustment out of Court the remaining decree holders might be driven to another suit to recover money for which a decree had already been passed in their favour."

Where the joint decree holders are *partners* or members of a *Hindu coparcenary* a payment to one of them or a certificate by him under O 21 R 2 cannot according to the High Court of Madras<sup>5</sup> be treated as satisfaction of the decree *even in part*. This view is based on the ground that a decree debt in favour of a firm or of a coparcenary is only one asset out of the numerous other assets and that one of the decree holders cannot legally claim any definite share in the particular decree debt. The same High Court has also held that the fact that the decree holder receiving payment is a partner or is the managing member of the joint family is not enough to clothe him with authority to act as the agent of the other decree holders in receiving such payment.<sup>6</sup> The High Courts of Allahabad<sup>7</sup> and Patna<sup>8</sup> and the Judicial Commissioner's Court of Oudh<sup>9</sup> have on the other hand held that a *karta* of a joint Hindu family has legal authority to act on behalf of the family and that a payment to or a certificate by him will bind the other decree holders. It has been held by the High Court of Lahore<sup>10</sup> and the Court of the Judicial Commissioner of Sind<sup>11</sup> that one

(30) AIR 1930 Lah 814 (815) (Shares can be ascertained in execution)

(97) 15 Mad 843 (845)

(05) 1 Nag L R 74 (30)

[See (06) 23 All 252 (255) (But payment to one

be ascertained in execution)

(83) 9 Cal 831 (837) (Do)

(79) 4 Cal L Rep 70 (72)

See also (35) AIR 1935 Oudh 813 (816) 11 Luck 116 (Joint decree in favour of several mortgagees - One of them cannot give valid discharge)

See also (35) AIR 1935 Nag 25 (27) 31 Nag L R 71

(3) (01) 20 All 334 (336)

(35) AIR 1935 Nag 25 (28) 31 Nag L R 271

(23) AIR 1923 All 494 (495) 45 All 401

(01) 26 All 818 (820)

(66) 1 Agra Misc App 16 (17)

(73) 5 W L H C R 16 (17) (One of the joint decree holders forgoing right to execute the decree - Others are not bound by the compromise)

(33) 1593 Bom P J 4

(30) AIR 1930 Cal 78 (79) (Extent of shares can

[See also (19) AIR 1919 Mad 193 (196) (When payment is in fact made to all certificate by one only will bind all)]

[But see (74) 22 Suth W R 77 (78) (Certification of satisfaction of the whole decree by one of the joint decree holders is binding on all the decree holders unless fraud is proved)]

4 (01) 26 All 334 (336)

5 (17) AIR 1917 Mad 983 (989)

(31) AIR 1934 Mad 830 (833) 57 Mad 609

(25) AIR 1925 Mad 930 (23 933)

[But see (13) 21 Il Cas 177 (175) (Mistake)]

[There was no joint decree with the meaning of this rule but as regards the decree of the

9 (13) 20 Ind Cas 457 (455) 16 O d L Cas 146

[See also (08) 11 Oudh Cas 246 (247)]

10 (97) AIR 1917 Lah 945 (947)

11 (27) AIR 1916 Sind 167 (169)

partner is the *agent* of the others and that where a decree is obtained in the name of a firm, one of the partners can receive the entire money due under the decree and certify the payment

O. 21 R. 15  
Notes 8-11

Although a payment to one of two joint decree holders of the whole decree amount does not, even when certified, absolve the judgment debtor from liability to the other decree holder, such decree holder is not bound to proceed against the judgment debtor in execution, but may sue to recover his share from the other decree holder<sup>12</sup>

See also Note 8 to Order 21 Rule 1, *ante*

**9. Defective application under the Rule, if can be amended.** — It has been held by the High Court of Patna in the undermentioned case<sup>1</sup> that where in an application for execution of a decree by one of several joint decree holders, it is not stated that the application is for the benefit of all the decree holders, the application is invalid and cannot be allowed to be amended. It proceeds upon the view that the requirements of this rule go to the root of the execution of the decree and that while Rule 17 of this Order empowers the Court to allow a defect in the requirements of Rules 11 to 14 to be amended, it does not include this rule. But the High Court of Allahabad<sup>2</sup> has taken a contrary view that there is nothing in Rule 17 which deprives the Court of its powers to allow amendments in relation to matters required to be mentioned by this rule. The Calcutta High Court also holds a similar view<sup>3</sup>

**10. Appeal.** — The question whether an appeal lies from an order passed under this rule depends upon the consideration whether the question decided is one within Section 47 of the Code. Thus, an order allowing or refusing execution in favour of one of the decree holders when an objection is raised by the judgment debtor is one falling under Section 47 and, therefore, appealable as a decree<sup>1</sup>. But no appeal will lie against an order refusing to allow execution in favour of one joint decree holder on the objection of another joint decree holder<sup>2</sup> or against an order protecting the interests of the non applying decree holder<sup>3</sup>

**11. Limitation.** — An application for execution by one of several joint decree holders is an application in accordance with law and will afford a fresh starting point of limitation under Article 182 of the Limitation Act<sup>1</sup>. It has been held by the High Courts of Calcutta, Bombay and Madras that although this rule does not allow one of such decree holders to apply for partial execution of a joint decree, yet such an

12. (1968) 29 Mad 183 (183)

(28) AIR 1928 Mad 800 (803) (Plaintiff entitled to interest from date of plaint and not from the date of receipt of such amount by defendant)

Note II

1

2

(72) 17 Suth W R 136 (136)

(72) 17 Suth W R 415 (415)

(24) AIR 1924 Mad 518 (519) (But if the Court purports to pass an order under S 47 of C P C an appeal lies)

3 (1960) 5 Cal 592 (593)

Note 11

1. (1926) AIR 1926 Pat 160 (161)

(1922) AIR 1922 Pat 597 (597) 1 Pat 609 (Appl)

Note 10

1 (191) 17 Mad 304 (304)

(191) 2 Mad L Tim 307 (309)

(193) 1933 Pun Re No 25 p 86

2. (199) 23 Bom 623 (625)

(1966) 6 Suth W R Misc 59 (59)

(1966) 1 Suth W R Misc 1 (2)

[See also (1963) 13 Cal L Rep 13 (22)]

O. 21 R. 15  
Note 11

application may keep alive the right to execute the decree.<sup>2</sup> But the High Court of Allahabad and Judicial Commissioners Court of Oudh have taken the contrary view that such an application is not one in accordance with law and therefore will not save limitation.<sup>3</sup>

Where there is a decree in favour of two or more joint decree holders and one of them is a minor, can the minor decree holder apply to execute the decree on behalf of *all*, more than three years after the last starting point of limitation but within three years of his attaining majority? There is a conflict of opinion on this question. It has been held by the High Courts of Allahabad,<sup>4</sup> Bombay,<sup>5</sup> Calcutta<sup>6</sup> and Lahore<sup>7</sup> that the ex minor decree holder can apply to execute the *whole* decree even though the other decree holders would be barred by limitation. But the High Court of Madras<sup>8</sup> has held that the decree cannot be executed as a joint decree. See Section 7 of the Limitation Act.

O. 21 R. 16

**R. 16.** [S 232] Where a decree or, if a decree has been

Application for execution by transferee of decree

passed jointly<sup>7</sup> in favour of two or more persons, the interest of any decree-holder in the decree is transferred<sup>3</sup> by assignment in writing<sup>4</sup> or by operation of law,<sup>5</sup> the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed<sup>11</sup> in the same manner and subject to the same conditions<sup>21</sup> as if the application were made by such decree-holder :

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice<sup>14</sup> of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections<sup>15</sup> (if any) to its execution :

Provided also that, where a decree for the payment of

- 2 (28) AIR 1928 Cal 861 (862)
- (91) 15 Bom 242 (244)
- (92) 26 Cal 888 (890)
- (76) 25 Suth W II 70 (70)
- (71) 16 Suth W R 267 (268)
- (71) 16 Suth W R 29 (30)
- (71) 15 Suth W II 449 (450)
- (77) 8 Mad 79 (81)
- (66) 6 Suth W II 1150 76 (77)
- 3 (75) 1 All 231 (234)
- (81) 4 All 72 (71)

[See however (80) 7 All 287 (288) (If not subsequent)

- 4 - - - - - 1884 411
- 5 " " " " " "
- 5 (26) 20 Bom 393 (395)
- (01) 6 Bom L R 617 (618)
- 6 (01) 23 Cal 465 (468)
- (08) 7 Cal L Jour 303 (303) (Joint and several decree)
- (87) 14 Cal 50 (51 55)
- 7 (31) AIR 1931 Lah 5 (6) (Original decree holder deceased — Application for execution of the whole decree by one of his sons who was a minor after attaining majority)
- 8 (07) 23 Mad 431 (435) (PB) (The ex minor decree holder can execute the decree *qua* his interest)
- (90) 12 Mad 236 (241)
- [See also (05) 23 Mad 479 (485)]

money<sup>17</sup> against two or more persons has been transferred to one of them,<sup>16</sup> it shall not be executed against the others. 0.21 R.16

[1877, S. 232; 1859, S. 208.]

### Local Amendments

#### CALCUTTA

In the first proviso *cancel* the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and *substitute* therefor the following words

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections"

#### LAHORE

In the first proviso *omit* the words "and the judgment debtor," and for the word "their" *substitute* the word "his"

#### NAGPUR

*After* the words, "which passed it," *insert* the words "or to any Court to which it has been sent for execution"

#### N-W F P

*For* the first proviso, *substitute* the following proviso

"Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor, and unless an affidavit by the transferor admitting the transfer is presented with the application, the decree shall not be executed, until the Court has heard his objections (if any) to its execution"

#### PATNA

*Add* the words "or to the Court to which the decree has been sent for execution, as the case may be" after the words "to the Court which passed it,"

*Delete* the words "and the judgment debtor" from the first proviso, and in the said proviso after the word "transferor," *insert* the words "unless an affidavit of the transferor admitting the transfer is filed with the application," and *substitute* the word "his" for the word "their" and the word "objection" for the word "objections".

#### RANGOON

*For* the first proviso, *substitute* the following, namely

"Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor, and, unless an affidavit by the transferor admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution"

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Decree</li> <li>3. Where a decree has been transferred.             <ol style="list-style-type: none"> <li>4. Transfer by assignment in writing.</li> <li>5. Transfer by operation of law.</li> <li>6. Benamidar.</li> <li>7. Part transfer of a decree.</li> </ol> </li> </ol> | <ol style="list-style-type: none"> <li>8. Pledge of decree.</li> <li>9. Assignment of rent decrees under the Tenancy Acts</li> <li>10. Transfer, when takes effect.</li> <li>11. Rights of the transferee.</li> <li>12. Application for execution must be made to the Court which passed the decree.</li> </ol> |
|--|---|

O 21 R 16  
Notes 1-3

- 13 Award
- 14 Notice to transferor and judgment debtor
- 15 Objections to be heard
- 16 Transfer of decree for payment of money against two or more persons to one of them
- 17 'Decree for the payment of money'
- 18 Attachment of decree by co judgment debtor

- 19 Application for substitution by transferee
- 20 Transfer of decree against company in liquidation
- 21 Equities enforceable against the original decree holder
- 22 Appeal
- 23 Suit by assignee for declaration of right or for refund of price

### Other Topics (miscellaneous)

Application by transferee—Whether a step in aid of execution See Note 19  
Application by a transferee from the original transferee See Note 12  
Assignment of decree pending execution See Note 19  
Death of decree holder — Legal representative must apply for fresh execution See Note 19  
Decree holder meaning of See Note 3  
May be executed — Discretion of Court See Note 11  
Principle of rule See Note 3

Person entitled to assignment of decree — Whether can apply before assignment See Note 4  
Registration of assignment — Whether necessary See Note 4  
'Subject to the same conditions' See Note 21  
The interest of any decree holder' See Note 3  
The transferee may apply for execution See Note 11  
Transfers of maintenance decrees—Whether can apply See Note 3  
Transfer of property dealt with by decrees — Whether transfer of decrees See Note 3

### 1 Legislative changes. —

1 The words or if a decree has been passed jointly in favour of two or more persons the interest of any decree holder in the decree are new See Note 7, *infra*

2 The words if that Court thinks fit which occurred in the old Section 232 before the words the decree may be executed in the same manner have been omitted See Note 11 *infra*

3 The words decrees for money in the second proviso have been changed into 'a decree for the payment of money' See Note 17 *infra*

2 Decree — The provisions of this rule in the first paragraph as well as in the first proviso are not restricted to money decrees but apply to mortgage decrees also As to the applicability of the second proviso, see Note 17, *infra*

3. Where a decree has been transferred — The principle of this rule is that no one can execute a decree except the decree holder or a person to whom the decree has been transferred by assignment in writing or by operation of law<sup>1</sup> A third person cannot therefore, apply for execution of a decree unless there is a transfer to him of the decree by the original decree holder<sup>2</sup> Where on the death of A, the plaintiff in a suit his widow B continues the proceedings as his legal representative and obtains a decree, C claiming to be the real heir of A cannot apply to execute the decree inasmuch as there is no transfer of the decree by B in his favour<sup>3</sup> The rule is however intended primarily for those cases where the applicant for execution does not appear as decree holder in the decree and he applies for execution on the basis of a transfer of the decree<sup>4</sup> it does not therefore apply where the applicant is one whose name is already in the decree as one of two persons in whose favour the decree has been passed and who claims on the death of the other decree holder to execute the decree as the surviving decree holder<sup>5</sup>

### Order 21 Rule 16 — Note 3

1 (1972) AIR 1972 All 99 (99)  
(37) AIR 1937 Nag 30 (30) I L R (1937) Nag 62 (A) advancing money to B to lent by latter to C—Executing mortgage in favour of B and B obtaining decree on mortgage—A has no interest

in the mortgage decree and he cannot execute it)  
2 (77) 2 Cal 897 (334) 4 Ind App 66 (PC)  
3 (77) 2 Cal 827 (334) 4 Ind App 66 (PC)  
4 (39) AIR 1933 Pat 462 (461) 17 Pat 906  
5 (32) 18 Pat L Tim 579 (580 581)

A transfer in writing of the *property* dealt with by the decree is not a transfer of the decree itself and the transferee cannot apply under this rule<sup>6</sup> It has, however, been held by the High Court of Rangoon<sup>7</sup> that it is a matter of construction of the deed of transfer whether the decree also was intended to be transferred by the transfer of the property, and the words of the rule relating to the transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment The assignee of a decree to be subsequently passed cannot apply for execution under this rule<sup>8</sup> Thus, a person who obtains a transfer, pending suit, of the property forming the subject matter of the suit is not entitled to execute the decree subsequently passed unless his name has been substituted in place of his vendor under O 22 R 10<sup>9</sup> Similarly, the assignee of a preliminary decree who has not taken steps to be impleaded in the suit cannot apply to execute the final decree in the suit<sup>10</sup>

The High Court of Bombay has, however, held in the undermentioned case<sup>11</sup> that the effect of the transfer was, in equity, to vest in the transferee, the interest in the decree which was afterwards obtained and that the decree must be taken to have been transferred by *operation of law* The High Court of Rangoon<sup>12</sup> has dissented from the above reasoning of the High Court of Bombay and has held that the words "by operation of law" cannot be invoked so as to make an assignment in writing, an assignment by operation of law

When a decree is assigned, what is really transferred is not the decree alone but the interest of the decree holder in the decree as may be finally determined Therefore, an assignment of the decree of the trial Court carries with it the right to execute the decree passed in appeal<sup>13</sup>

It has been held by the High Court of Calcutta in the undermentioned case<sup>14</sup> that the transferee of a decree for future maintenance is entitled to apply for execution in respect of the amounts that fall due from time to time and that Section 6 of the Transfer of Property Act will not apply when the cause of action has merged in the decree But the High Court of Madras<sup>15</sup> has held that only that portion of the maintenance decree which related to the arrears of maintenance already accrued due can legally be transferred

**5. Transfer by assignment in writing.** — An assignee of a decree under an oral transfer has no *locus standi* to apply for execution under this rule<sup>1</sup> In order to

[See also (89) AIR 1938 Pat 462 (464) 17 Pat 206 (Where a preliminary decree for means

6 (27) AIR 1927 Mad 240 (241)  
(09) 30 All 28 (30)  
(85) 7 All 107 (110) (Purchaser from pre emptor  
decree holder)  
(27) AIR 1932 All 98 (99) (Transfer after decree  
but pending appeal)

subsequent to the assignment is binding on  
him]

14 (10) 6 Ind Cas 826 (829) 33 Cal 13  
15 (09) 3 Ind Cas 444 (444 445) 83 Mad 80  
Note 4

1. (21) 15 Bom 307 (309)



21 R. 16  
Notes 4-5

enable a transferee to apply, the transfer must be effected by an instrument in writing<sup>2</sup> A mere contract for sale of a decree without an assignment in writing in favour of the purchaser is not enough<sup>3</sup> The High Court of Patna<sup>4</sup> has held that a release of his rights by a decree holder in favour of another does not operate as an assignment But the High Court of Allahabad<sup>5</sup> has held that a release may operate as an assignment of the decree

It has been held by the High Courts of Allahabad Calcutta and Lahore that a decree for sale of immovable property is itself not immovable property and therefore an assignment of such a decree does not require to be registered<sup>6</sup> But the High Court of Bombay has taken a contrary view<sup>7</sup> In any view a personal decree against a defendant is transferable without registration even though the decree may be a mortgage decree as against the other defendants<sup>8</sup>

The rule does not require any particular form of writing<sup>9</sup> In the under mentioned case<sup>10</sup> an order of the Court acting on behalf of the decree holders and directing the sale of the decree by auction to the highest bidder was held sufficient to constitute an assignment in writing for the purposes of this rule But the assignment of certain funds recoverable under a decree is not an assignment of the decree<sup>11</sup>

**5 Transfer by operation of law** — Ordinarily transferees by operation of law would include the following persons<sup>1</sup>

- (1) In the case of a deceased decree holder his legal representatives
- (2) In the case of an insolvent debtor the Official Assignee or Official Receiver
- (3) The purchaser of a decree at a court sale

- { 86 } 9 Bom 179 (181)  
{ 94 } AIR 1924 Cal 661 (662) 51 Cal 703  
{ 10 } 16 Ind Cas 807 (807) (Mad)  
{ 12 } 13 Ind Cas 78 (78) (Mad)  
2 { 16 } AIR 1916 PC 147 (147) 43 Cal 900 43 Ind App 108 (PC)  
{ 34 } AIR 1931 Lah 828 (829) (A mere receipt acknowledging payment of money therefor is not enough)  
{ 84 } 1884 All W N 89 (80) (In life-time of father sons not competent to apply in the absence of assignment in writing)  
{ 89 } AIR 1930 Bom 84 (87) (But an agreement to transfer a decree need not be in writing)  
{ See } { 25 } AIR 1925 Oudh 417 (417 418) 29 Oudh Cas 98 (Assets of decree holder bank transferred to another)  
3 { 16 } AIR 1916 PC 147 (148) 43 Cal 900 43 Ind App 108 (PC)  
{ 90 } AIR 1935 Bom 472 (472) (Similarly a person entitled to obtain an assignment of a decree under another decree cannot apply)  
4 { 90 } AIR 1937 Pat 170 (171)  
■ { 33 } AIR 1933 All 189 (189)  
■ { 13 } 21 Ind Cas 467 (467) 35 All 521  
{ 21 } 13 All 82 (91 97)  
{ 96 } 23 Cal 450 (453 454)  
{ 05 } 12 Cal W N 695 (677)  
{ 28 } AIR 1923 Lah 70 (70)  
[But see { 83 } 9 Cal 839 (842) (Entitled to execute it only as a money decree)]  
7 { 75 } 1 Bom 267 (269)  
8 { 28 } AIR 1928 Mad 142 (142)  
9 { 36 } AIR 1936 Mad 543 (545)  
{ 39 } AIR 1939 Bom 221 (221) AIR (1939) Bom

- 271 (Decree obtained by sons—In suit by father against sons for declaration on of his title to decree joint application signed by both parties stating that sons had no objection to surrender decree to father and requesting Court to pass a decree for father declaring his title to that decree—Writing of old amounted to assignment of decree)  
10 { 36 } AIR 1936 Mad 543 (545) Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient)  
11 { 37 } AIR 1937 Cal 570 (572)

#### Note 5

- 1 { 21 } AIR 1924 Cal 661 (662 663) 51 Cal 703  
{ 33 } AIR 1933 Bom 307 (308) 57 Bom 513  
{ 34 } AIR 1934 Mad 471 (472)  
{ 77 } 2 Cal 327 (334) & Ind App 50 (PC)  
{ 09 } 31 Mad 77 (79) (Legal representative)  
{ 12 } 13 Ind Cas 321 (326) (Purchaser of decree in court sale)  
{ 1900 } 4 Cal W N 785 (787) (Decree in favour of insolvent transferred to surety on annulment of adjudication)  
{ 30 } AIR 1936 Mad 513 (513) (The words operation of law apply to cases where the decree has been transferred from one to another by way of success on or where there is bankruptcy or any similar event which has the effect in law of bringing about such a transfer)  
{ See } { 30 } AIR 1930 Cal 614 (615) 57 Cal 1137 (Legal representative)  
{ See also } { 39 } AIR 1939 Bom 221 (221) I LR (1939) Bom 271 (The trust as operation of law are obviously intended to be confined to testamentary and intestate succession for future insolvency and the like )}

The following are also some of the instances of transfer by operation of law

(1) A obtains a decree against X B, his son, sues A for partition and obtains a decree for 1/5th share of the decree obtained by A B is entitled to apply for execution as transferee by operation of law<sup>3</sup>

(2) A, a trustee, obtained a decree for rent against certain tenants A filed another suit and obtained therein a declaration that the trust was incapable of being executed It was held that thereafter the original owner of the properties could apply to execute the decree for rent without actual assignment<sup>4</sup>

(3) Where on the revocation of a probate of a will, the minor son of the testator succeeds to the estate, he is entitled to execute the decree obtained by the executrix<sup>5</sup>

(4) A mortgagee who has obtained a final decree for foreclosure against the mortgagor who in turn has obtained a decree for possession of the immovable properties comprised in the mortgage is an assignee by operation of law<sup>6</sup>

(5) Where a mortgage is foreclosed and a pre emptor obtains a decree for pre emption of the same properties, he is a transferee of the foreclosure decree<sup>6</sup>

(6) A holder of a certificate of administration granted under Section 3 of the Bombay Regulation VIII of 1827 is a transferee by operation of law<sup>7</sup>

For other instances, see the undermentioned cases<sup>8</sup>

The words 'operation of law' cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos*<sup>9</sup> If a decree obtained by a member of a joint Hindu family is allotted to another member at a family partition, the latter is not a transferee by operation of law and, therefore, must get an assignment in writing from the decree holder to enable him to apply under this rule<sup>10</sup> The High Court of Lahore has held in the undermentioned case<sup>11</sup> that where three brothers obtained a joint decree in their favour and at a family partition the decree was allotted to the share of one of the brothers, he could apply under this rule to execute the whole decree and that Rule 15 *ante* would not apply to such a case A person does not become a transferee by operation of law from a decree holder by merely obtaining another decree against him<sup>12</sup> Thus, where R, the widow of G, obtained a decree in respect of a debt due to the estate of G and in a separate suit against R, D obtained a declaration that he was adopted to G, and that he was entitled to his estate, it was held that D was not an assignee by operation of law and was not therefore entitled to

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(38) AIR 1938 All 256 (258) ILR (1938) All 425  
(A manager of joint family, missing and lost for a number of years—His eldest son as manager

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7

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has held that the *benamidar* has the right to execute the decree. The High Court of Calcutta<sup>12</sup> is on the other hand of opinion that he cannot so apply and that his application will not therefore be one in accordance with law.

O 21 R 18  
Notes 6-9

**7 Part transfer of a decree** — Under Section 232 of the old Code it was held that the transferee of the interest of any one of several joint decree holders in the decree could apply to execute the decree<sup>1</sup>. This principle has been given effect to in the present Code by adding in this rule the words "or if a decree has been passed jointly" in the decree (see Note 1 *supra*). Similarly there is nothing in this rule or elsewhere which prohibits the transferee of a *portion* of the decree from applying under this rule<sup>2</sup>. The only qualification in such a case is that the transferee is in the position of a *joint decree holder* and can execute the decree only subject to general provisions of law analogous to Rule 15 *supra*<sup>3</sup>. But the High Court of Bombay has in the undermentioned case<sup>4</sup> taken the contrary view that a transferee of a part of a decree is not entitled to execute his part of the decree nor even the whole decree since he cannot be regarded as a joint decree holder. See also Notes to O 21 R 15.

**8 Pledge of decree** — The transfer of a decree by way of a mortgage is an assignment in writing of a fractional interest in the decree and the mortgagee is therefore entitled to apply under this rule<sup>5</sup>.

**9 Assignment of rent decrees under the Tenancy Acts** — Section 148 clause (c) of the Bengal Tenancy Act (VIII of 1885) provides that notwithstanding anything contained in Section 232 Civil Procedure Code (of 1889) an application for the execution of a decree for arrears of rent shall not be made by an assignee of the decree unless the landlord's interest in the land has become vested in him<sup>6</sup>. The

[See also (28) AIR 1923 Mad 817 (817) (Where benamidar's application on a pending real owner's behalf was treated as a party)]

of a decree)  
(19) AIR 1919 Lah 429 (429) 1917 Pun Re

12 (14) 25 Ind Cas 555 (556) (Cal)

[See also (28) AIR 1928 Cal 685 (686) (Real owner can apply)]

#### Note 7

1 (96) 19 Mad 806 (807)

(87) 11 Bom 153 (158)

(86) 1886 Bom P J 287 (287)

[But see (75) 24 Suth W R 11 (10) (D sented from in 17 Cal 811)]

2 (90) 17 Cal 311 (313)

(96) AIR 1920 All 316 (316) 43 All 437

(28) AIR 1928 Lah 70 (71) (D sented ng from AIR 1919 Lah 429)

(21) AIR 1921 Mad 692 (601) 44 Mad 919

(74) 24 Suth W R 245 (246) (Must execute the whole decree)

(78) 20 Suth W R 51 (51) (Court should protect the interest of others)

4 (84) AIR 1934 Bom 59 (62) 53 Bom 920

#### Note 8

1 (26) AIR 1926 All 316 (318) 48 All 437 (AIR 19 2 All 101 D sented from)

(9) AIR 19 9 Cal 676 (6 9) 67 Cal 549

(09) 1 Ind Cas 535 (535) 34 Mad 419

#### Note 9

1 (31) 51 Cal L Jour 596 (597 600) (Cannot be executed even as a simple money decree)

(18) 18 Ind Cas 699 (699) 40 Cal 467 (Landlord's interest defined)

(14) AIR 1914 P C 111 (114) 41 Cal 926 41 Ind App 91 (P C) (The relationship of landlord and tenant must exist)

(99) 96 Cal 176 (1 2)

(2) 1 Cal W N 183 (184)

(97) 1 Cal W N 694 (694)

(02) 6 Cal W N 91 (91)

entitled to apply for execution of a part of the decree)

[See also (80) 5 Cal 592 (593)]

(28) AIR 1929 Mad 713 (716) (TB) (Partal transfer of a decree is valid)

(33) AIR 1933 Lah 473 (473) (Decree in favour of several persons — Assignment of decree by one of them — Assignee takes only interest of assignor decree-holder)

[But see (20) AIR 1920 Lah 324 (325) (This rule does not contemplate a transfer of a part

**O. 21 R. 16**  
**Notes 9-11**

word 'assignee' in that Section refers only to purchasers for consideration and does not include a person in whom the legal estate is vested by an act of the owner, as for instance, a trustee, who has no independent interest in the property.<sup>2</sup> It has been held in the undermentioned case<sup>3</sup> that a Court executing a rent decree cannot refuse execution when the assignment had been recognised by the Court before the Tenancy Act came into force.

A provision similar to that in Section 148 of the Bengal Tenancy Act has been made also by Section 198 (k) of the Orissa Tenancy Act (II of 1913). By Schedule II, List II of the Agra Tenancy Act (III of 1926) it is provided that no application for the execution of a decree shall be made by an assignee of the decree unless the assignor's interest in the land to which it relates has become and is vested in such assignee.

**10. Transfer, when takes effect.** — The transfer of a decree made by an instrument in writing takes effect from the date of such instrument, irrespective of its recognition by the Court on an application made to it under this rule.<sup>1</sup>

*Illustrations*

1 A brought certain properties to sale in execution of a decree obtained by him against F. Pending execution proceedings A assigned his decree to D. Subsequently two days before sale A reported that the decree had been satisfied by payment. D intervened and objected to the record of satisfaction being made. It was held that if his transfer was true he was a representative of A and the matter must be enquired into. *Duar Buksh v Fatih Jali*, 1 L R 26 Calcutta 250.

2 M had obtained a money decree against H. In execution of a decree obtained by him against V applied under O 21 R 53 and recovered the amount due under M's decree. Thereupon O claiming under an assignment of the decree in writing from M prior to R's attachment sued R for the recovery of the money drawn by him. It was held that O's title to the decree was complete on the date of the assignment and therefore prevailed as against R's attachment. *Co-operative Town Bank of Padigan v Raman Chelliar*, 1 L R 5 Rangoon 595. A I R 1909 Rangoon 25 (26) [Reversing A I R 1927 Rangoon 55].

**11 Rights of the transferee.** — Section 232 of the old Code contained the words "and if that Court thinks fit, the decree may be executed." It was, therefore held that the executing Court had a discretion to allow or to refuse an application made by the transferee.<sup>1</sup> Under the present Code, those words have been omitted and the transferee's right to execution does not depend upon the discretion of the Court.<sup>2</sup>

[See (93) 11 Ind Cas 324 (329) (Cal) (A case where landlord's interest vested by operation of law)]

2 (99) 20 Cal 750 (757)

3 (87) 14 Cal 380 (381 389)

**Note 10**

1 (87) 9 All 46 (51)

(31) 16 All 483 (492)

(93) 26 Cal 250 (258)

(09) 11 Ind Cas 938 (939) 33 Mad 62

(09) 1 Ind Cas 353 (353) (Mad) (An attachment after date of assignment does not prevent recognition of the transferee as such.)

(07) 2 Mad L Tim 93 (93)

(09) 11 Ind Cas 938 (939) 33 Mad 62

(07) 2 Mad L Tim 93 (93)

(09) 11 Ind Cas 938 (939) 33 Mad 62

(07) 2 Mad L Tim 93 (93)

(09) 11 Ind Cas 938 (939) 33 Mad 62

(07) 2 Mad L Tim 93 (93)

(09) 11 Ind Cas 938 (939) 33 Mad 62

(07) 2 Mad L Tim 93 (93)

(09) 11 Ind Cas 938 (939) 33 Mad 62

(07) 2 Mad L Tim 93 (93)

(28) AIR 1928 Mad 478 (478) 51 Mad 681 (Auction sale of decrees in favour of company by liquidator—Deed of transfer after dissolution—*Mad valid*.)

[But see (80) 5 Cal 809 (870 871)]

**Note 11**

1 (91) 15 Bom 307 (309)

(80) 9 Bom 179 (181)

(93) 20 Cal 368 (395)

(88) 15 Cal 446 (449 449)

(71) 15 Suth W R 293 (293)

(70) 13 Suth W R 224 (225)

(70) 13 Suth W R 207 (207)

(68) 10 Suth W R 354 (355)

(67) 8 Suth W R 202 (202)

(96) 19 Mad 306 (307)

(85) 8 Mad 455 (463)

(89) 2 C M L R 45 (46)

(And the Appellate Court will not interfere unless it is shown that the discretion is improperly exercised.)

2 (10) 6 Ind Cas 826 (329) 88 Cal 13

after transfer }  
[See also (32) AIR 1932 Sind 164 (164) 26 Sind L R 158]

Where a transfer is recognized by the Court on an application under this rule the transferee is entitled to execute the decree as if the application were made by the original decree holder<sup>3</sup>. The absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his rights to execute the decree provided the assignment is not a sham transaction<sup>4</sup>.

It has already been mentioned in Notes to O 21 R 10 *ante* that the person appearing on the face of the decree as the decree holder is the person entitled to execution. Therefore where the transferee of a decree does not apply under this rule for execution the executing Court is bound to allow execution at the instance of the transferor even after the date of the transfer till the transfer is recognized by the Court<sup>5</sup>.

The assignee of a decree can transfer it to another although the name of such assignee has not been substituted on the record<sup>6</sup>.

As to the right of the transferee to apply for execution where the decree has been attached by the holder of a decree against the transferor see Notes to O 21 R 53 *infra*.

Where an *ex parte* decree was assigned and the assignee did not take any step under this rule and thereafter on an application made by the defendant as against the original decree holder alone the *ex parte* decree was set aside it was held that the transferee could not proceed with the execution until he got an order cancelling the order setting aside the *ex parte* decree<sup>7</sup>.

See also Note 9 to O 21 R 2

- (82) AIR 1982 Cal 430 (440) 59 Cal 207  
(84) AIR 1984 Lah 648 (651) 16 Lah 63  
(87) AIR 1987 Bom 365 (367) 1 L R (1987) Bom 601

- 3 (67) 7 Suth W R 205 (205)  
(81) AIR 1981 All 209 (211) 56 All 694 (Judgment debtor cannot set up an uncertified payment as against transferee also)  
(87) 11 Bom 153 (158)  
(94) 16 All 183 (185) (Entitled to the benefit of attachment effected before transfer)

- (24) AIR 1924 Lah 615 (616) (Pre-empt on decree)  
(13) 18 Ind Cas 97 (98) 16 Oudh Cas 70  
(21) AIR 1921 Low Bur 37 (39) 11 Low Bur Rul 163

- 5 (17) AIR 1917 Mad 691 (692)  
(33) AIR 1933 Lah 638 (639) 14 Lah 744 : execute it subsequently)  
(Decree handed over to trustee by decree holder — No legal application by trustee under O 21 R 16 — Joint application by decree holder and trustee — Decree holder can be allowed to execute decree)

# 0.21 N 16 Notes 12-13

**12 Application for execution must be made to the Court which passed the decree** — An application by the transferee of a decree under this rule can be entertained only by the Court which passed the decree, the Court to which the decree has been transferred has no jurisdiction to entertain the same<sup>1</sup> The reason is as stated in *Sheo Narain Singh v Hurbans Lall* (1870) 14 W R 65 (GG), that

It would lead to the greatest difficulties if in one Court one party was recognised as being the holder of and having the control over, a decree and at the same time in another Court another party was recognised as being in that position

Where however an application under this rule is made to the transferee Court and it recognises the transfer it is only an irregularity which may be waived by acquiescence and if the judgment debtor has as a matter of fact, waived it, he cannot subsequently turn round and question the jurisdiction of the executing Court<sup>2</sup>

As to whether a transferee can continue the execution proceedings initiated by the original decree holder without a fresh application see Note 10 *infra*

Where a decree is passed in favour of a company which afterwards goes into liquidation, the Official Liquidator is not a transferee of the decree and hence he can apply for the execution of the decree to the Court to which the decree has been transferred for execution<sup>3</sup>

See also the undermentioned case<sup>4</sup>

**13 Award** — A having obtained an award against B and filed it in Court assigned the same to C C applied to execute it under Section 15, Arbitration Act (IX of 1899) which provides that the award on being filed in Court shall be enforceable as a decree It was held that C could execute it and that the Court in which the award

## Note 12

1 (1900) 27 Cal 498 (491) (If entertained by transferee Court the order is without jurisdiction)

tion — Objection to execution by transferee of decrees cannot be entertained by the transferee Court )  
( 27 Cal 498 (491) )

(02) 29 Cal 235 (236) (Notice under this rule must also be issued by the executing Court )

(70) 14 Buth W R 65 (66)

(31) AIR 1931 Lah 499 (499 500)

(81) AIR 1931 Lah 690 (690 691) (Transferee Court can entertain the objection that R 16 has not been complied with before transfer )

(18) AIR 1918 Lah 211 (218) 1918 Pun Ro No 97 (Sections 200 and 201 Companies Act of 1913 are subject to Order 21 Rule 16 )

(07) 17 Mad L Jour 300 (301) (But it may be waived )

(03) 26 Mad 258 (259)

(20) AIR 1920 Nag 174 (175)

(57) AIR 1932 Pat 168 (169) 11 Pat 94

(78) 2 All 283 (283)

(37) AIR 1937 Bom 265 (269) I L R (1937) Bom 691 (Notice cannot be issued by Court to which

of the decision in the analogous case AIR 1914 P C 162 arising under Section 50 )

(07) 17 Mad L Jour 300 (301)

3 (36) AIR 1936 Lah 150 (153)

4 AIR 1937 Bom 265 (269)

1930 has been transmitted for execution has jurisdiction to recognise an assignment of the award under O 21 R 16 C P Code Under the

executing Court must be presumed to be empowered to recognize the transfer.—In any case where assignment was recognized after due notice to judgment debtor it is only an irregularity }

was filed must be deemed to be the Court which passed the decree for the purposes of this rule<sup>1</sup>

O. 21 R. 16  
Notes 13-14

**14. Notice to transferor and judgment-debtor.**—The provisions of this rule as to notice are imperative, the giving of notice of the application, to the assignor and to the judgment debtor, is an indispensable condition of jurisdiction and the failure to give it renders all the proceedings in execution void as against them<sup>2</sup> It has, however, been held that if the persons directly interested waive their right, acknowledge the validity of the assignment and raise no objection so far as the execution proceedings are concerned, non compliance with the technical requirements of this rule will not render an execution sale a nullity<sup>3</sup> Under the amendment of this rule by the Lahore High Court, notice to the *judgment debtor* is not necessary<sup>4</sup>

Where the assignee applied under this rule for notices to the assignor and the judgment debtor and also for *attachment* of a certain property, and the notice as well as the warrant of attachment were issued together, it was held that the attachment was illegal inasmuch as the objections of the judgment debtor were not heard at that time<sup>5</sup> Where, in an application under this rule by the assignee of a mortgage decree, notice is given only to the mortgagor and not to the subsequent mortgagee who was also a judgment debtor under the decree, the latter will not be bound by such execution and the auction purchaser will acquire only the rights of the mortgagor, but not those of the subsequent mortgagee<sup>6</sup>

The notice that is to be given under this rule is of the *application* for execution and not of the *assignment*<sup>7</sup> But a written notice is not always necessary, if the judgment debtor is present in Court at the time the order on the application is made, and has thus notice of the application, the fact that no written notice was given will not vitiate the proceedings<sup>8</sup>

#### Note 13

1

(See ('33) AIR 1933 Lah 432 (433) (Though failure to give notice will affect the validity of the proceedings, it does not warrant dismissal of application)

(‘31) AIR 1934 Pat 9 (10) (Execution application by assignee—Notice sent to assignor and judgment debtor under O 21 R 22 but not under II 16—Assignment not impugned by judgment debtor—Assignee can proceed with execution without first proving assignment))

(See however (87) 9 All II (49) (Judgment-debtor cannot object on the ground of want of notice to the transferor))

2. ('33) AIR 1933 Cal 419 (421) (Notice to which reference is made in O 21 R 16 is merely for the benefit of the transferors and the judgment debtors)

3. ('37) AIR 1937 Lah 465 (467) I L II (1937) Lah 162

4 ('11) 12 Ind Cas 547 (547) . 36 Bom 59

5. ('30) AIR 1930 All 627 (627, 628) 52 All 593 (Reversing AIR 1929 All 437)

6 ('24) AIR 1924 Pat 576 (578, 580) 3 Pat 696

#### Note 14

1. (27) AIR 1927 Cal 781 (782) 54 Cal 624

(Want of notice to the transferor)

(‘10) 6 Ind Cas 262 (263) (Cal) (Do)

(‘21) AIR 1921 Lah 143 (144) 2 Lah 230 (Want

(The fact that a notice purporting to be under S 158B (2) Bengal Tenancy Act (1885), has been shown to the assignor will not dispense with the necessity of complying with the rule.)

(17) AIR 1917 Lah 195 (196) (Want of notice to judgment debtor)

(37) AIR 1937 Bom 365 (367) ILR (1937) Bom 631

(‘39) AIR 1939 Cal 781 (786) (The non service of such notice makes the sale held in execution of that decree void ab initio although the purchaser is not the decree holder himself but an absolute stranger.)

7. (24) AIR 1924 Pat 576 (580) 3 Pat 596  
[See also ('33) AIR 1933 Pat 130 (131)]



O 21 R 16  
Notes 14-15

The object of issuing notice under this rule is to determine once for all and in the presence of all the parties the validity of the instrument of transfer. It is therefore not necessary that notice must be issued on every subsequent application by the transferee under this rule.<sup>8</sup>

Where the Court which passed the decree substitutes the name of the alleged transferee of the decree on the record and transfers the decree to another Court for execution the latter Court must presume that the Court passing the decree has complied with the provisions of this rule.<sup>9</sup>

If the judgment debtor is dead when the assignee applies for execution the notice required by this rule may be served on his legal representatives.<sup>10</sup> If the original decree holder becomes insolvent the Official Receiver will be entitled to notice.<sup>11</sup>

In the case of a transfer by operation of law, it is not necessary that the notice referred to in the first proviso to this rule should be given.<sup>12</sup>

**15 Objections to be heard** — After the service of the notice mentioned in the first proviso to this rule the Court is bound to hear the objections if any of the transferor and of the judgment debtor.<sup>1</sup> As has been already mentioned in Note 11 it is not a valid objection that the assignment is not supported by consideration.<sup>2</sup> Nor can the judgment debtor raise the plea that the decree is not valid.<sup>3</sup> As to the right of the judgment debtor to plead an uncertified payment or adjustment see Note 23 to O 21 R 2.

A held a decree against B and B had a decree against A. A attached in execution of his decree the decree which B had against him. Thereafter B assigned the decree to C. C applied under this rule. It was held that A could take objection to the execution of the decree on the ground that under Section 64 ante the assignment of the decree to C was void.<sup>4</sup>

An assignment of a decree is not valid as against the judgment debtor until the debtor has had notice of the assignment and therefore any payment made to the original decree holder before notice is valid as against the transferee.<sup>5</sup>

The failure of the judgment debtor to object to the validity of the assignment when an application under this rule is made will preclude him under general principles of *res judicata* from raising such objection at a subsequent stage of the proceedings.<sup>6</sup>

8 (27) AIR 1927 Cal 601 (606)

(34) AIR 1934 Rang 101 (103)

[See also (30) 1930 Mad W N 166 (168)]

9 (36) AIR 1936 S and L 191 (193) 30 S and L R

242

10 (87) 11 Bom 727 (730)

[See also (77) AIR 1977 Loh 398 (397)]

2 (13) 20 Ind Cas 635 (639) (Cal)

(32) AIR 1937 Mad 377 (377) (378)

(15) AIR 1915 Mad 1138 (1140) (In the absence of fraud)

As to objections to the executability of the decree under similar circumstances see Note 23 to Section 11 *ante* and also the undermentioned cases<sup>7</sup>

**16 Transfer of decree for payment of money against two or more persons to one of them** — It is a general principle of law that when one of the persons jointly liable under a decree unites in himself the two opposite characters of creditor and joint debtor in respect of the whole decretal debt the effect is to extinguish the liability of all the co judgment debtors under the decree<sup>1</sup> The second proviso to this rule is based on this general principle and provides that in such a case the transferee cannot enforce the decree by execution against his co debtors<sup>2</sup> On the same principle where a decree has been passed jointly in favour of two or more persons and the interest of one of such decree holders devolves upon a judgment debtor the decree is extinguished *pro tanto*<sup>3</sup> When the alleged transferee of a decree for money is found to be the *benamidar* of one of the judgment debtors the Court is bound under the second proviso to this rule to refuse to allow the assignee to execute the decree against the other judgment debtors<sup>4</sup> But it has been held that where the judgment debtor did not raise the objection when notice was issued to him under the first proviso to this rule he cannot subsequently raise the objection<sup>5</sup> But an agreement between the decree holder and some of the judgment debtors that the decree holder should execute the decree against the other judgment debtors and pay the amount realized to them in consideration of the fact that they have paid the

ment due for not contesting assignment—Judgment-debtor and executing Court cannot question validity of assignment)

(See also (20) AIR 19 0 Pat 146 (147) 5 Pat L Jour 639 (Object on as to want of proper notice under this rule not taken in first execution—Objection not allowed in an application for setting aside sale under O 21 R 50)  
(25) AIR 1925 All 200 (208)

**7** that decree is nullity is barred by *res judicata*)  
(82) AIR 1932 Pat 168 (160) 11 Pat 94 (Transferee put on record by Court passing decree—Decree transferred to Court of another district—Objection as to transferee's right to execution cannot be taken in transferee Court)  
(39) AIR 1930 Pat 411 (412) 10 Pat 318 (In execution proceedings it is not open to the judgment debtor to assert that the real holder of the decree is any person other than the person named as decree-holder in the decree unless there has been a valid assignment or devolution by process of law)  
(33) AIR 1933 Cal 1919 (1920) 60 Cal 1181 (Application by assignee for substitution in place of

(This principle will not apply to a converse case where decree holder acquires a share in the estate of one of the judgment debtors)])

2 (68) 9 South W R 230 (234)  
(26) AIR 1926 Mad 1141 (1147) (Transfer of personal decrees brought about by death is not excluded from the operation of Proviso 2)  
(15) AIR 1915 Mad 799 (800)  
3 (76) 25 South W R 313 (313)  
(83) 5 All 27 (34)  
(94) 1891 All W N 15 (16)  
(67) 7 South W R 136 (136)  
4 (29) AIR 1922 Mad 510 (510)  
(17) AIR 1917 Mad 590 (591) 40 Mad 996  
(17) AIR 1917 Mad 889 (889)  
(20) AIR 1920 Lah 431 (430 433)  
(21) AIR 1921 Nag 41 (42) 19 Nag L R 151  
(See (29) AIR 19 9 All 793 (793) (Transfer of

(26) AIR 1926 Lah 666 (66) (Do)  
(39) 2 C P L R 45 (47) (Assignee benamidar for judgment debtor—His right to execute decree doubted))

5 (37) AIR 1937 Oudh 111 (110) 19 Luck 55  
(See also AIR 1937 Oudh 111 (110) 19 Luck 55)

#### NOTE 20

I (23) 5 All 27 (33)  
(See (39) AIR 1932 All 701 (700) 51 All 413

(See however (39) AIR 1932 Rang 215 (217) 1932 Rang L R 157)

**O.21 E 16**  
**Notes 16-17**

amount in advance, does not fall under the prohibition in this rule.<sup>6</sup>

This proviso does not make the assignment of a decree in favour of one of several judgment debtors invalid in law, it only provides that the transferee is not entitled to enforce his rights by execution<sup>7</sup> His remedy is therefore to sue his co judgment debtors for contribution having regard to the proportion in which they were bound *inter se* to satisfy the decree<sup>8</sup>

The words 'decree for the payment of money against two or more persons' mean a decree against two or more persons *jointly*

### Illustration

A decree directed that A should pay Rs 90 and Rs 11 5 3 as costs and A should pay Rs 80 with Rs 112 4 as costs. A afterwards took an assignment of the decree in writing and applied to execute it against N to the extent of Rs 90 and costs. It was held that the decree for money so far as it related to Rs 90 and costs was not a decree against several persons but against one person A and therefore A could execute it.<sup>9</sup>

The second proviso to this rule does not apply to the converse case of the decree holder acquiring a share in the estate of one of the judgment debtors. The decree holder is however bound to give credit for a *proportionate* amount of the decree.<sup>10</sup>

The proviso applies whether the transfer of the decree is by act of parties or by operation of law.<sup>11</sup>

It has been held by the Rangoon High Court that where a decree for the payment of money has been passed against two or more persons and one of them dies his legal representative does not become a 'judgment debtor' and the transfer of the decree to him is not a transfer to which proviso 2 applies.<sup>12</sup>

17 "Decree for the payment of money"—The second proviso to this rule does not apply to decrees other than money decrees<sup>1</sup>. Thus, it does not apply to mortgage decrees for sale and therefore, an assignment of a mortgage decree in favour of one of the judgment debtors does not extinguish the decree<sup>2</sup>. But in such cases the decretal amount that can be recovered from the other judgment debtors will be reduced proportionately<sup>3</sup>.

The expression decree for money in Section 232 of the old Code (corresponding to this rule) was interpreted by the High Courts of Bombay and Calcutta to mean a personal decree for the payment of money. Thus a decree against a legal

6 (38) AIR 1938 Pat 462 (483) 17 Pat 200

(74) 6 N W P H O R 1 (9)  
(89) 1899 Bom P J 262 (263)  
(13) 20 Ind Cas 569 (570) (Cal)

1

1141 }  
 (35) AIR 1935 Oudh 449 (450) 11 Luck 409  
 11 (36) AIR 1938 Mad 814 (814) 1 L R (1939)  
 Mad 78  
 12 (39) AIR 1939 Rang 82 (84) 1938 Rang L R  
 602

(37) AIR 1937 S and 112 (113) 31 Sind L R 47  
(37) 1937 And W N 394 (395)  
(20) AIR 1930 All 129 (131) 42 All 514  
(20) AIR 1930 C 25 26 1 of most

### Note 17

1 (83) 13 Cal L Rep 272 (274)  
(12) 17 Ind Cas 323 (327) (Mad)

(Person acquiring a portion of the mortgaged property subsequently becoming a transferee of

representative for payment of money out of the assets of the deceased,<sup>4</sup> or a decree against a purchaser of the equity of redemption in a mortgage suit,<sup>5</sup> was held not to come within that Section. The High Court of Allahabad<sup>6</sup> has in the undermentioned case held that the substitution of the expression "for the payment of money" for the words "for money" in the proviso is intended to emphasise the fact that the proviso is confined to cases of personal decrees. On the other hand, the Judicial Commissioner's Court of Nagpur<sup>7</sup> has held that this is an unduly narrow interpretation of the rule and that it is immaterial whether the assignee decree holder is one against whom a personal money decree has been passed or one who has been directed to pay the decretal debt out of the assets in his hands.

For meaning of 'decree for payment of money', see Note 6 to Section 73 *ante*.

**18. Attachment of decree by co-judgment-debtor.** — One S obtained a decree against A, B, C and D. A obtained decree against S and attached the decree of S and applied under O 21 R 53 for execution of S's decree against his co-judgment debtors B, C and D. It was held that A, by attaching S's decree, did not become an assignee thereof, that the prohibition in this rule did not therefore apply to such a case and that A was entitled to execute the decree.<sup>1</sup>

**19. Application for substitution by transferee.** — A transferee from a decree holder can only apply under this rule to *execute* the decree, an application *merely for recognising* him as transferee is legally incompetent and must be rejected.<sup>1</sup> It is not also necessary for the validity of the proceedings that the substitution of the name of the transferee is actually made.<sup>2</sup> All that is necessary is that the transferee should merely file his application for execution of the decree setting out either in it or in an affidavit filed in support thereof that he is such a transferee, thereupon the Court orders the application for execution to proceed or rejects it.<sup>3</sup> But, although a separate application by the transferee of a decree merely for substitution in place of the original decree holder is not formally required under the Code, the prayer for such substitution is necessarily implied in an application by him for execution of the decree under O 21 R 16 and the substitution of his name is, in practice, generally

O. 21 R. 16  
Notes 17-19

4. (07) 81 Bom 308 (312, 318)

5. ('55) 11 Cal 393 (396)

6. (32) AIR 1932 All 704 (707) 54 All 448

7. ('24) AIR 1924 Nag 41 (41) 19 Nag L R 151

Note 18

1. (09) 2 Ind Cas 626 (627) (All)

Note 19

2.

by assignee to be recognized as decree holder and for transmission of decree for execution is a

[See also (09) 29 Cal 230 (236) (Application to transmit to another Court treated as an application under this rule)]

2. (09) 3 Ind Cas 321 (326) (Cal)

(09) 1 Ind Cas 168 (174) 36 Cal 543

[See also (73) 19 Sath W R 255 (260)]

3. (25) AIR 1925 Mad 701 (707) 48 Mad 553

('38) AIR 1938 Bom 309 (310).

[See however (37) AIR 1937 Bom 365 (369) I L R (1937) Bom 691 (Transferee must first apply for execution to Court passing decree praying for notice — After notice is made absolute, he must apply for execution under O 21 R 11)]

O 21 R. 16  
Note 19

made before the execution is proceeded with<sup>4</sup>

Where during the pendency of execution proceedings the decree holder dies or transfers the decree by an assignment in writing can the transferee apply under this rule to continue the execution proceedings? It has been held by the High Courts of Bombay Calcutta Madras and Patna and the Judicial Commissioner's Courts of Sind and Peshawar that it is open to the transferee either to apply for continuing the proceedings in execution or to make a fresh application<sup>5</sup>. The reason is that a pending execution application does not abate by reason of the death or devolution of any interest of the decree holder and therefore the transferee can apply by virtue of Section 146 and this rule. Similarly where the decree holder dies while his application is pending in a Court to which the decree has been transferred for execution his legal representatives may either apply to the Court which passed the decree for fresh execution after bringing their names on the record or may apply to the executing Court for continuing the proceedings subsequently producing from the Court which passed the decree the necessary order under this rule<sup>6</sup>. According to the High Court of Allahabad<sup>7</sup> however the transferee must apply whenever he does apply for *fresh execution* even when the application by his predecessor is pending.

Though an application by the transferee *merely* for substitution of his name is not competent still it is a step in aid of execution within the meaning of Article 182 of the Limitation Act so as to give a fresh starting point of time<sup>8</sup>. In cases governed by Article 183 of the Limitation Act the order of the Court allowing the transferee to execute the decree after recognition of his transfer will operate as a revivor and be a fresh starting point of limitation<sup>9</sup>. The mere issue of a notice under this rule without a decision of the Court that the decree is executable will not however operate as a revivor<sup>10</sup>.

See also the undermentioned cases<sup>11</sup> holding that an application under this rule is an application in accordance with law within the meaning of Article 182 of the Limitation Act.

4 (85) AIR 1935 Nag 230 (233) 31 Nag LR  
Sup 111

Bench ruling in AIR 1927 All 165 ]  
8 ( 07 ) 29 All 301 (302)

( 33 ) AIR 1935 Nag 230 (233) 31 Nag LR  
Sup 111

( 38 ) AIR 1938 Bom 300 (311) (Although such application is dismissed for non payment of process fees and for failure to serve notices on the judgment debtors )

[But see ( 34 ) AIR 1934 Pat 662 (666) (Application under O 21 R 16 P O 1903 is not a step in aid )

( 33 ) AIR 1933 Sind 341 (343) 27 Sind LR  
314 ]]

9 ( 29 ) AIR 1909 Mad 252 (256) 52 Mad 590  
[But see ( 36 ) AIR 1936 Pat 393 (399) 15  
Pat 102 ]

10 ( 03 ) 30 Cal 979 (982)

( 25 ) AIR 1925 Cal 23 (25) (As to the meaning

**20. Transfer of decree against company in liquidation** — An application by a transferee of a decree obtained against a limited company which has since gone into liquidation, for substitution of his name as decree holder must in spite of the provisions of Section 171 of the Companies Act be made to the execution Court and not to the Court in which the winding up proceedings are pending<sup>1</sup>

O.21 R.16  
Notes 20-22

**21. Equities enforceable against the original decree holder.** — See Notes to Section 49. As to whether the prohibition under O 34 R 14 applies to the assignee of a decree see Note 4 to Section 49 and O 34 R 14 and also the undermentioned case<sup>1</sup>

**22 Appeal** — An order allowing or dismissing an application by a transferee from a decree holder made under this rule is appealable as a decree<sup>1</sup>. The reason is that, as mentioned already in Note 24 to Section 47, the transferee is a representative of the decree holder and therefore a decision on a question whether any person is a representative or not of a party is one within the scope of Section 47 sub section (3). Sub section (3) to Section 47 was first introduced in Section 244 of the old Code by the Amending Act VII of 1883 and the undermentioned decisions<sup>2</sup> prior to that Act holding that no appeal lay in such a case are no longer good law

- { 16) AIR 1916 Cal 471 (472) (Genuineness of purchase between assignee and attaching creditor of the decree )  
(1900) 27 Cal 670 (672 673)  
(99) 26 Cal 250 (252 253)  
(07) 11 Cal W N 230 (241) (Question between

- { 17) AIR 1917 Mad 605 (605 606) (The subsequent dismissal does not take away the right of the judgment debtor to appeal )  
(16) AIR 1915 Mad 1138 (1140)  
(02) 25 Mad 383 (385)  
(01) 25 Mad 545 (546)  
(06) 16 Mad L Jour 27 (28)  
(98) 21 Mad 388 (390) (Real transferee applying for execution of decree — Question determining whether he is real transferee is one falling under Section 47 )

non certificate is obtained )

- (99) 1899 All W N 16 (16)  
(80) 5 Cal L Rep 253 (256)

Note 20

- I (19) AIR 1919 All 337 (337) 41 All 429

Note 21

- I (01) 14 All P L 35 (36) (Assignee cannot bring to sale the equity of redemption )

Note III

Incompetent )

- { See (85) 11 Cal 150 (152) (Person adversely claiming against decree holder is not a representative of the decree holder )]  
[But see (98) 20 All 539 (542)  
(96) 1896 Pan Re No 78 page 245  
(33) AIR 1933 Lah 473 (473) (Order recognizing transfer — Appeal by non signing decree holder held to be not competent )  
(35) AIR 1935 Lah 609 (611) (Reversing on

**O.21 R.16**  
**Note 19**

made before the execution is proceeded with <sup>4</sup>

Where, during the pendency of execution proceedings, the decree holder dies or transfers the decree by an assignment in writing, can the transferee apply under this rule to continue the execution proceedings? It has been held by the High Courts of Bombay, Calcutta, Madras and Patna and the Judicial Commissioners Courts of Sind and Peshawar that it is open to the transferee either to apply for continuing the proceedings in execution or to make a fresh application <sup>5</sup> The reason is that a pending execution application does not abate by reason of the death or devolution of any interest of the decree holder and, therefore, the transferee can apply by virtue of Section 146 and this rule. Similarly, where the decree holder dies while his application is pending in a Court to which the decree has been transferred for execution, his legal representatives may either apply to the Court which passed the decree for fresh execution after bringing their names on the record, or may apply to the executing Court for continuing the proceedings, subsequently producing from the Court which passed the decree the necessary order under this rule <sup>6</sup> According to the High Court of Allahabad, <sup>7</sup> however, the transferee must apply, whenever he does apply, for *fresh execution*, even when the application by his predecessor is pending.

Though an application by the transferee *merely* for substitution of his name is not competent, still it is a step in aid of execution within the meaning of Article 182 of the Limitation Act so as to give a fresh starting point of time <sup>8</sup> In cases governed by Article 183 of the Limitation Act, the order of the Court allowing the transferee to execute the decree after recognition of his transfer will operate as a revivor and be a fresh starting point of limitation <sup>9</sup> The mere issue of a notice under this rule without a decision of the Court that the decree is executable will not, however, operate as a revivor <sup>10</sup>

See also the undermentioned cases <sup>11</sup> holding that an application under this rule is an application in accordance with law within the meaning of Article 182 of the Limitation Act

<sup>4</sup> (35) AIR 1935 Nag 230 (233) 31 Nag LR  
<sup>5</sup> Sup 111

Bench ruling in AIR 1927 All 165 )  
<sup>8</sup>. ( 07) 29 All 301 (302)

( 07) 30 Mad 541 (543)  
( 80) 5 Bom 246 (248)  
( 35) AIR 1935 Nag 230 (233) 31 Nag LR  
Sup 111

(38) AIR 1938 Bom 309 (311) (Although such application is dismissed for non payment of process fees and for failure to serve notices on the judgment debtors)

[But see ( 34) AIR 1934 Pat 663 (666) (Application under O 21 R 16 C P C, 1903 is not a step in aid )

( 33) AIR 1933 Sind 341 (343) 27 Sind LR  
314 )]

<sup>9</sup> (29) AIR 1929 Mad 252 (256) 52 Mad 590  
[But see ( 36) AIR 1936 Pat 398 (399) 15  
Pat 102 ]

as ineffectual and to maintain a suit, unless he has taken steps to have his transfer recognized. Thus where, after a transfer was effected the decree was attached at the instance of a third person, and the assignee's application for execution was dismissed wrongly on the ground that the decree had been attached, and thereupon the assignee filed a suit for refund of the purchase money, it was held that it was his duty to have the attachment removed by presenting a claim to the attaching Court on the strength of his assignment and that, unless such a claim was presented and rejected, he could not succeed in the suit.<sup>9</sup>

**O.21 R.16**  
**Note 23**

**R. 17. [S. 245.]** (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

**O.21 R.17**

*Procedure on receiving application for execution of decree*

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

#### Local Amendments

##### ALLAHABAD

Between the words "been complied with" and "the Court may" insert the words "and if the decree holder fails to remedy the defect within a time to be fixed by the Court"

##### CALCUTTA

In sub rule (1) cancel the words "the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" and substitute therefor the following

"the Court shall allow the defect to be remedied then and there or within a



**O 21 R 17** time to be fixed by it. If the defect is not remedied within the time fixed the Court may reject the application.

#### LAHORE

*For the words "and if they have not been" to be fixed by it in sub rule (1) substitute the following words*

*and if they have not been complied with the Court shall fix a time within which the defect shall be remedied and if it is not remedied within such time may reject the application*

#### MADRAS

*(1) For the words "or may allow" fixed by it in sub rule (1) substitute the words "if the defect is not remedied within a time to be fixed by it"*

*(2) Add the following proviso at the end of the rule*

*Provided that where an execution application is returned on account of inaccuracy in the particulars required under Rule 11 (2) (g) the endorsement of return shall state what in the opinion of the returning officer is the correct amount*

#### NAGPUR

*In sub rule (1) for the words "and if they have not been complied with" within a time to be fixed by it substitute the words "and if they have not been complied with the Court may allow the defect to be remedied then and there or may fix a time within which it should be remedied and in case the decree holder fails to remedy the defect within such time the Court may reject the application"*

#### ODDH

*In sub rule (1) delete the last sentence beginning with the words "and if they" and ending with the words "to be fixed by it" and substitute the following sentence in lieu thereof*

*and if they have not been complied with the Court may allow the defect to be remedied then and there or may fix a time within which it should be remedied and in case the decree holder fails to remedy the defect within such time the Court may reject the application*

#### PATNA

*In sub rule (1) substitute the following for the words "the Court may reject the application etc." to the end of the sub rule*

*the Court shall allow the defect to be remedied then and there or within a time to be fixed by it and if the decree holder fails to remedy the defect within such time the Court may reject the application*

#### RANGOON

*In sub rule (1) for the words "the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" the following shall be substituted namely*

*the Court may reject the application if the defect is not remedied within a time to be fixed by it*

### Synopsis

- |  |   |
|--|---|
| 1 Legislative changes  | 6 Execution of declaratory decree                 |
| 2 Procedure on receiving an application for execution              | 7 Execution of rent decree under the Tenancy Acts |
| 3 Amendment and limitation   | 8 Execution of maintenance decree                 |
| 4 Non compliance with the order of amendment within the time fixed | 9 Value of property attached                      |
| 5 Procedure on admission of application                            | 10 Appeal   |

*Other Topics (miscellaneous)*

Amendment not made — How far application in accordance with law See Note 4

Sale of more properties than sufficient — Court, whether can set aside the sale See Note 9

Scope of the Rule, See Notes 2 and 3

Sub rule (2) See Note 3.

O. 21 R. 17  
Notes 1-

**1. Legislative changes. —**

1. The words "may allow it to be amended" have been replaced by the words "may allow the defect to be remedied". The object is to make the rule clear and comprehensive so as to include cases of *defects* such as omission to file a copy of the decree.

2 Sub-rule (2) is now See Note 3, *infra*.

**2. Procedure on receiving an application for execution. —** Sub-rule (1) prescribes the procedure to be followed on receiving an application for execution of a decree. It casts a duty upon the Court to ascertain whether such of the requirements of Rules 11 to 14 as are applicable have been complied with or not. If they are not complied with, the Court can either reject the application at once or allow the defect to be remedied then and there or within a time fixed<sup>1</sup>. If it does neither, it cannot, after the period of limitation for execution has expired, reject the application without giving the decree-holder an opportunity to amend the application<sup>2</sup>. Under this rule the executing Court has got a discretion to allow the necessary amendments<sup>3</sup>.

**3. Amendment and limitation. —** This rule contemplates the amendment of defects in the execution application before *admission and registration*. But supposing the Court overlooks the defects and registers the application, can they be subsequently amended during the pendency of the application? The answer to this depends upon the question whether the decree is or is not barred by limitation on the date of the amendment. If there is no bar of limitation, the amendment can, according to the Patna High Court, be allowed<sup>1</sup>. The reason is that a substantive fresh application can be entertained on that date, and that there is nothing which prevents the Court from treating the amended application as a fresh application for execution<sup>2</sup>. A Full Bench of the Calcutta High Court has, on the other hand, held in *Asgar Ali v Trailokyanath*, 1 L R 17 Calcutta 631 (F B), that "Section 245 by implication excludes the power of the Court to amend after admission and registration". It was held by the Patna High Court in *Ram Sumran v Ram Bahadur*, AIR 1923 Patna 224, that the said observations should be understood only as referring to the particular case before the Full Bench where the decree was *barred* on the date when the defect (*viz.*, omission to file a list of property) was sought to be amended. The decision in *Asgar Ali's* case

**Order 21 Rule 17 — Note 2**

1 (1900) 47 P. 1000 [A. 1902] 1000

(21) AIR 1924 Mad 367 (367)

refused to interfere)

Note 3

O. 21 R. 17  
Note 8

was distinguished by the Calcutta High Court itself in a recent decision<sup>3</sup> in which it was held that even after an execution application is registered, the Court has jurisdiction to allow an amendment of the application, provided the period of limitation for the application for execution has not expired.

Where, however, on the date when the defect is sought to be amended the decree would be barred by limitation, there is a conflict of opinion as to whether or not an amendment can be allowed. On the one hand, the High Court of Calcutta<sup>4</sup> holds that no amendment is permissible on the ground that the Court is not empowered under the rule to allow such an amendment. The Sind Judicial Commissioner's Court<sup>5</sup> also has held that an application for execution cannot be allowed to be amended after the period of limitation for the application has expired. On the other hand, the High Court of Madras<sup>6</sup> holds that the Court can allow such an amendment under sub rule (1) and that such amendment relates back to the date of the application. The reasoning of the Madras High Court is that the law casts a duty upon the Court to notice the defects in the application before admission and if the Court had done its duty properly, the defects could have been remedied within time, and that the decree holder should not be made to suffer for the failure of the Court to do its duty. The High Courts of Allahabad<sup>7</sup>, Lahore<sup>8</sup> and Patna<sup>9</sup> and the Judicial Commissioner's Court of Peshawar<sup>10</sup> have also allowed the defects to be amended, though the decree had become barred on the date of the amendment. The Bombay High Court<sup>11</sup> has also held that the Court has power to allow an application for execution to be amended even after the expiry of the period of limitation for such application.

Sub rule (1) refers only to the requirements of Rules 11 to 14. Consequently the rule does not apply where the defect in the execution application is one which has no

3. (35) AIR 1935 Cal 614 (617)

[See also (195) 39 Cal W N 1144 (1145) (The Court has always got the power to make an

from date of original presentation)

(129) AIR 1933 Mad 24 (25) (Following AIR 1924 Mad 867) ---

4

14 Cal 244

(14) AIR 1914 Cal 319 (460)

(25) AIR 1925 Cal 1014 (1010) (Following 17 Cal 631 (FB))

(86) 12 Cal 161 (165)

[But see 10 Cal 112]

(The petitioner is not entitled to insist for amendment as of right)

(11) 9 Ind Cas 760 (760) (Mad) (Amendment can not be allowed to the prejudice of the judgment-debtor by inserting a prayer for attachment after the decree is barred)

631))

5. (35) AIR 1935 Sind 26 (26)

[See also (33) AIR 1930 Sind 272 (276) (It can

14 Cal 244)]

7. (98) 1893 AH W N 112 (113)

(98) 20 All 478 (480)

8. (120) AIR 1920 Lah 122 (122)

from the ordinary consequences which follow when his request to the Court for its assistance is barred by time))

6. (24) AIR 1924 Mad 367 (368) (Following 17 Mad 87)

(1924) AIR 1924 Mad 367 (368)

(88) AIR 1938 Bom 403 (405) I L N (1938) Bom 709 (Application for execution by attachment—Particulars of property to be attached not spec-

t 546.

1937)

reference to Rules 11 to 14<sup>18</sup> The Court can however amend such defects under its general powers<sup>19</sup> As to whether a defect by reason of non compliance with O 21 R 16 can be amended under this rule see Rule 15 *ante*

**Effect of amendment** — In the absence of any provision under the old Code corresponding to sub rule (2) there was a conflict of opinion as to whether an amendment took effect only from the date of the *amendment* or from the date of the application and whether the original application which was defective could be considered as being in accordance with law within the meaning of Article 179 clause 4 of the Limitation Act of 1877 (Article 182 clause 5 of the present Limitation Act of 1908) so as to operate as a fresh starting point of limitation<sup>15</sup> Under sub rule (2) of this rule it is now clear that the application though defective when presented should be deemed to be in accordance with law when the defect is subsequently amended and the amendment dates back to the original date of the application<sup>1</sup> The effect of the sub rule is to preclude the judgment debtor from raising any objection at a later stage on the ground that the application was not in accordance with law at the time it was presented<sup>16</sup> If however the Court without giving an opportunity to amend *rejects* the application the rejected application cannot be considered to be in accordance with law<sup>17</sup> Similarly where the subsequent application is not one for *amendment* of the original application but is really an independent application for execution asking for a relief not included in the original application sub rule (2) cannot apply and the subsequent application cannot be deemed as presented on the date of the original application<sup>18</sup>

As to whether an application returned for amendment and not re presented is one in accordance with law see Note 4 below

**4 Non compliance with the order of amendment within the time fixed** — Sub rule (1) empowers the Court to fix a time for the amendment of the execution application If the party fails to amend within the time fixed or such further time as the Court may extend the proper course is to reject the application<sup>1</sup> If notwithstanding the decree holder's failure to amend the defect within the time fixed the Court does not reject the application it is not precluded from allowing a fresh application for amendment at a subsequent stage<sup>2</sup>

If the Court returns an application for amendment of the defects and the

filed—Application to amend by giving particulars after limitation can be allowed)

**12** (See (33) AIR 1933 Oudh 288 (283) (Execution on application filed within time illegally returned by Court for correction — Application filed after some months is not fresh but same application))

**13** (32) AIR 1937 Cal 766 (768) 50 Cal 1266 (See (35) AIR 1935 Sind 26 (26) (Application by assignee merely asking for assignor to be brought on record without prayer for execution

**18** (38) AIR 1938 Cal 169 (163) (Application

#### Notes

1 (90) 17 Cal 631 (635) (FB)

(84) 10 Cal 541 (544)

(96) 23 Cal 217 (221)

(16) AIR 1916 Cal 856 (357) (Court can extend time under E 148)

(21) AIR 1921 Nag 28 (29) 17 Nag L R 1 9

2 (84) 10 Cal 541 (544)

# **O. 21 R. 17** **Note 3**

was distinguished by the Calcutta High Court itself in a recent decision<sup>3</sup> in which it was held that even after an execution application is registered, the Court has jurisdiction to allow an amendment of the application, provided the period of limitation for the application for execution has not expired

Where, however, on the date when the defect is sought to be amended the decree would be barred by limitation, there is a conflict of opinion as to whether or not an amendment can be allowed. On the one hand, the High Court of Calcutta<sup>4</sup> holds that no amendment is permissible on the ground that the Court is not empowered under the rule to allow such an amendment. The Sind Judicial Commissioner's Court<sup>5</sup> also has held that an application for execution cannot be allowed to be amended after the period of limitation for the application has expired. On the other hand, the High Court of Madras<sup>6</sup> holds that the Court can allow such an amendment under sub rule (1) and that such amendment relates back to the date of the application. The reasoning of the Madras High Court is that the law casts a duty upon the Court to notice the defects in the application before admission and if the Court had done its duty properly, the defects could have been remedied within time, and that the decree holder should not be made to suffer for the failure of the Court to do its duty. The High Courts of Allahabad<sup>7</sup>, Lahore<sup>8</sup> and Patna<sup>9</sup> and the Judicial Commissioner's Court of Peshawar<sup>10</sup> have also allowed the defects to be amended, though the decree had become barred on the date of the amendment. The Bombay High Court<sup>11</sup> has also held that the Court has power to allow an application for execution to be amended even after the expiry of the period of limitation for such application.

Sub rule (1) refers only to the requirements of Rules 11 to 14. Consequently the rule does not apply where the defect in the execution application is one which has no

3 (35) AIR 1935 Cal 614 (617)

[See also (35) 89 Cal W N 1144 (1145) (The

from date of original presentation)

(28) AIR 1928 Mad 24 (25) (Following AIR 1924 Mad 367)

[See also (15) AIR 1915 Mad 837 (337) (Court has wide powers of amendment under S 153 and under such powers execution application prayer

4

14 Cal 121)

(14) AIR 1914 Cal 350 (360)

(25) AIR 1925 Cal 1048 (1050) (Following 17 Cal 631 (FB))

(86) 12 Cal 161 (165)

[But see (18) AIR 1918 Cal 73 (74) (Where the original application was one in accordance with law, and a supplementary list of properties was allowed to be filed Distinguishing 17 Cal 631)]

(260)  
1st for

(14) AIR 1914 Mad 663 (664)]

[But see (13) 21 Ind Cas 609 (609) (Mad)

7. (93) 1893 All W N 112 (113)

(98) 20 All 478 (480)

8. (20) AIR 1920 Lah 122 (122)

516

977)

(35) AIR 1935 Mad 161 (163) (Execution application filed bona fide against wrong legal representative within time—Amendment allowed but after 12 years' time—Amendment takes effect

(38) AIR 1938 Bom 405 (405) I L R (1933) Bom 708 (Application for execution by attachment—Particulars of property to be attached not speci-

reference to Rules 11 to 14 <sup>18</sup> The Court can, however, amend such defects under its general powers <sup>19</sup> As to whether a defect by reason of non compliance with O 21 R 15 can be amended under this rule, see Rule 15, *ante*

**O. 21 R. 17**  
**Notes 3-4**

**Effect of amendment** — In the absence of any provision under the old Code corresponding to sub rule (2), there was a conflict of opinion as to whether an amendment took effect only from the date of the *amendment* or from the date of the *application*, and whether the original application which was defective could be considered as being in accordance with law within the meaning of Article 179, clause 4 of the Limitation Act of 1877 (Article 182 clause 5 of the present Limitation Act of 1908) so as to operate as a fresh starting point of limitation <sup>14</sup> Under sub rule (2) of this rule it is now clear that the application though defective when presented should be deemed to be in accordance with law when the defect is subsequently amended and the amendment dates back to the original date of the application <sup>15</sup> The effect of the sub rule is to preclude the judgment debtor from raising any objection at a later stage on the ground that the application was not in accordance with law at the time it was presented <sup>16</sup> If, however the Court without giving an opportunity to amend *rejects* the application, the rejected application cannot be considered to be in accordance with law <sup>17</sup> Similarly, where the subsequent application is not one for *amendment* of the original application but is really an independent application for execution asking for a relief not included in the original application, sub rule (2) cannot apply and the subsequent application cannot be deemed as presented on the date of the original application <sup>18</sup>

As to whether an application returned for amendment and not re presented is one in accordance with law see Note 4 below

#### 4. Non-compliance with the order of amendment within the time fixed.

— Sub rule (1) empowers the Court to fix a time for the amendment of the execution application. If the party fails to amend within the time fixed or such further time as the Court may extend the proper course is to reject the application <sup>1</sup> If notwithstanding the decree holder's failure to amend the defect within the time fixed, the Court does not reject the application it is not precluded from allowing a fresh application for amendment at a subsequent stage <sup>2</sup>

If the Court returns an application for amendment of the defects, and the

fixed—Application to amend by giving particulars after limitation can be allowed )

( 37 ) AIR 1937 Bom 365 (370) I L R (1937) Bom 691  
16 ( 28 ) AIR 1928 Mad 410 (443)  
( 30 ) AIR 1930 Cal 353 (355)  
17. ( 18 ) AIR 1918 Cal 245 (246)

of the judgment debtor

Rule 4

( 90 ) 17 Cal 631 (635) (FB)

**O. 21 R. 17**  
**Notes 4-6**

decree holder does not re present it within the time fixed the question arises whether such an application can be treated as one in accordance with law within the meaning of Article 182 clause 5 of the Limitation Act so as to operate as a fresh starting point of limitation for execution. The answer to this question depends upon another question namely whether the defect for the amendment of which the application was returned was a *material* defect without the amendment of which further proceedings could not be taken or was only a *formal* defect<sup>3</sup>. In the latter case the application will be one in accordance with law<sup>4</sup> while in the former case it will not<sup>5</sup>.

Where the application is returned not for any defect in Rules 11 to 14 but for some other defect it has been held by the Allahabad and the Patna High Courts that the application will be one in accordance with law<sup>6</sup>.

**5 Procedure on admission of application** — Sub rule (4) prescribes the procedure to be followed after admission of the application. If it is not in any way defective the Court is bound to order execution according to the nature of the application<sup>1</sup>. Thus if the decree holder prays for the arrest of the judgment debtor, the Court cannot refuse the same and direct him to proceed against the property in the first instance<sup>2</sup>. No enquiry as to whether the property sought to be proceeded against belongs to the judgment debtor is contemplated under the rule before execution can be ordered<sup>3</sup>.

**6 Execution of declaratory decrees** — See Note 38 to Section 47 and Note 5 to Section 38 and the undermentioned cases<sup>1</sup>.

- { 83) 12 Cal L Rep 279 (180)  
{ 82) 8 Cal 479 (481)  
3 { 33) 16 Mad 142 (143)  
{ 94) 17 Mad 76 (77)  
{ 83) 6 Mad 250 (251)  
{ 14) AIR 1914 Mad 632 (633)  
{ 16) AIR 1916 Mad 356 (358)  
{ 88) 25 Cal 591 (597-598) (FB) (Explaining 23 Cal 217)

5 { 90) 17 Cal 631 (637) (FB) (Last of property not filed)

1  
cases and costs not shown—*Lizajima et al v*

- 6 { 32) AIR 1932 All 481 (484)  
{ 24) AIR 1924 Pat 23 (24) 2 Pat 803

**Note 5**

- 1 { 26) AIR 1926 Lah 110 (110) 6 Lah 549  
{ 67) 8 South W R 289 (294)  
{ 96) 18 All 492 (486)

2 { 82) 11 Cal 97 (299) (The word granted is equivalent to admitted)

3 { 60

{ 35) A

attach

name

debtor — Court has no power to do so where the third person does not take any objection)

**Note 6**

- 1 { 85) 9 Bom 109 (110) (Declaratory decree can not be executed)  
{ 94) 21 Cal 784 (789) 21 Ind App 89 (PC) (Do)

**7. Execution of rent decrees under the Tenancy Acts.** — A landlord who obtains a decree for arrears of rent of an under-tenure is not restricted by the provisions of the Bengal Tenancy Act to execute the decree in the first instance by sale of the under-tenure. He is at liberty to execute it in the ordinary manner against the person or property of his judgment-debtor<sup>1</sup> Section 163 of the Bengal Tenancy Act, VIII of 1885, and Section 217 of the Bihar and Orissa Tenancy Act, II of 1913, prescribe that the Court shall, on the admission of the application for execution, order the issue simultaneously of the order of attachment and the proclamation for sale.

**8. Execution of maintenance decree.** — A decree declaring a person's right to maintenance at a certain rate and also directing the payment of such maintenance by future instalments is not a mere declaratory decree and can be executed as each instalment falls due.<sup>1</sup>

Where a decree awarding future maintenance also charges certain property for the due payment thereof, the decree-holder can, if there is default, apply for an order for the sale of the property or file a fresh suit to enforce the charge.<sup>2</sup> The High Court of Calcutta<sup>3</sup> has held that, to avoid the difficulty of a further suit, the Court can provide in the decree for maintenance for the appointment of a receiver with directions to take possession of the property in case of default and sell the same and pay the maintenance from out of the sale proceeds.

**9. Value of property attached.** — Under the proviso to the rule the Court should call upon the decree-holder to specify the approximate value of the property to be attached, to see that the value of the property to be attached corresponded as nearly as may be with the amount due under the decree.<sup>1</sup> But, if more property than is necessary is attached and sold and a purchaser buys the same without notice of the fact that the amount realized by sale of the other plots was more than sufficient to satisfy the decree, the sale in his favour cannot be set aside.<sup>2</sup>

**10. Appeal.** — An appeal lies against an order returning an execution application on the ground that the decree holder is not entitled to calculate the amount due to him on the basis adopted in the petition, and directing him to amend the same.<sup>1</sup> But an order allowing the decree holder to withdraw the execution proceedings does not determine anything under Section 47 and is not appealable.<sup>2</sup>

**Note 7**

1. ('88) 15 Cal 492 (494, 496)
- ('90) 17 Cal 301 (303)
- ('99) 26 Cal 103 (108)
- (04) 8 Cal W N 575 (577)

**Note 8**

1. . . . .

- . . . . .
- . . . . .
- . . . . .
- . . . . .

2. ('97) 2 Cal W N 33 (33).
- [See however ('95) 22 Cal 903 (908)]

3. ('99) 26 Cal 441 (448)

**Note 9**

1. ('29) AIR 1929 Nag 305 (306, 308)
- ('98) 20 All 412 (418) 25 Ind App 145 (PC).
- [See ('35) AIR 1935 Pat 143 (144) (Execution

- n be  
the
- [See also ('92) 16 Bom 91 (114)]
2. ('19) AIR 1919 Cal 1095 (1096)

**Note 10**

1. ('14) AIR 1914 Mad 532 (533) 18 Ind Cas 607 (607) 37 Mad 314
2. ('13) 19 Ind Cas 904 (905) (Cal).



O.21 R.18  
Notes 2-4

stranger<sup>4</sup>. Similarly, where *A, B, C* and *D* hold decrees against *X*, and *X* holds a decree against *A* and the circumstances are otherwise such that the two decrees can be set off against each other, *B, C* and *D* cannot object to such setting off on the ground that *X*'s decree against *A* should be executed and the proceeds of execution should be rateably distributed among all the decree holders of *X*<sup>5</sup>.

Where an application is made for the execution of a decree and a suit which is capable of resulting in a cross decree of the kind contemplated by this rule is at that time pending in the Court which passed that decree, the execution may be stayed under Rule 29. But if such suit is pending in any other Court, Rule 29 will not apply.<sup>6</sup>

In *Hazariram v Bansidhar*,<sup>7</sup> their Lordships of the Privy Council observed as follows: 'It is true that under Rules 18 to 20 the set off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction. Whatever they arise from circuity of proceedings thereunder can be avoided and should be avoided this is the principle of the rules.

It has been held that apart from the provisions of this rule and Rule 19 *infra* the Court has inherent power to allow a set off in execution proceedings.<sup>8</sup>

**3 Cross-decrees for the payment of two sums of money.**—The first condition for claiming a set off under this rule is that the decrees should be for the payment of money and that the amounts under each decree should be *definite and ascertained*.<sup>1</sup> A decree directing recovery of money by sale of immovable property is a decree for the payment of money under this rule<sup>2</sup> even though it may be in enforcement of a charge.<sup>3</sup> But a mortgage decree in which there is no personal liability does not fall within this rule.<sup>4</sup> See Notes to Rule 20 *infra*.

A decree for mesne profits of which the amount has not been ascertained cannot be set off under this rule as the amount is not *definite*.<sup>5</sup>

**4. Cross-decrees in separate suits.**—The second condition is that there must be cross decrees and they must have been passed in *separate suits*. An adjudication under Section 144 of the Code is a decree to which this rule will apply,<sup>1</sup> but a private award is not an adjudication.<sup>2</sup>

AIR 1935 Cal 102 (104)  
1 see (37) AIR 1937 Pesh 83 (84) ]  
Note 3

re amount is not ascertained at the parties  
e to a mode of execution involving a set-off  
ould be allowed )

Note 4

(5) AIR 1935 Cal 102 (103, 104)

(2) 11 Satth W R 144 (144)

Cross claims in the *same suit* do not fall within this rule but come under Rule 19<sup>1</sup>

O.21 R.18  
Notes 4-7

5 "Between the same parties" — It is necessary that the parties should be the same in both suits<sup>1</sup> For this purpose it is the party *on the record* that has to be considered

#### Illustrations

1 A holds a decree against B B holds a decree against C The two cannot be set off on the ground that in respect of the first decree A is *benamidar* for C<sup>2</sup>

2 A holds a decree against B B holds a decree against A A set off between the two cannot be objected to on the ground that in respect of the first decree A is a *benamidar* for C<sup>3</sup>

### 6 Same character in both suits necessary —

#### Illustrations

1 A holds a decree against B personally B files a suit on a mortgage executed by C, implied no A as a purchaser of a portion of the equity of redemption and obtains a decree The two decrees cannot be set off<sup>1</sup> In this illustration A is no doubt acting in his own interest But his character in the mortgage suit is *different* from that in the other suit inasmuch as the mortgage decree is as against him not a decree for payment of money *personally* If he had himself been the mortgagor there would have been his personal liability and the two decrees could have been set off (See for fuller discussion Notes to O 21 R 20) The expression same character etc does not mean that the liability to pay which resulted in the decree should have been incurred by the parties themselves in both suits Thus a decree against a widow in respect of a debt contracted by her deceased husband can be set off against a decree obtained by the widow on a debt due to herself<sup>2</sup> But in the undermentioned case<sup>3</sup> it was held that a decree obtained against the assets in the hands of the heir of a deceased person and a decree obtained by such heir against the holder of the former decree personally cannot be set off against each other

2 A decree against a firm is binding on the partners personally It can be set off against a decree obtained by one of the partners against the holder of the former decree<sup>4</sup>

7. Decrees must be capable of execution at the same time — It is necessary that the decrees should be capable of execution at the *same time*<sup>1</sup> Thus there can be no set off if one of the decrees is only a preliminary decree<sup>2</sup> or if its execution is time barred<sup>3</sup> or if its execution is expressly postponed till the happening of a certain contingency and the contingency has not happened<sup>4</sup> or if it has already been satisfied<sup>5</sup> But the fact that the judgment debtor under one decree intends appealing against the decree will not make it inexecutable so as to prevent a set off being allowed<sup>6</sup>

It has been held in some decisions that apart from this rule and Rule 19 *infra*, the Court has inherent power to allow a set off in execution proceedings even if the

3 (83) 5 All 272 (273)

[See also (32) AIR 1932 Lah 537 (537) (Costs in Letters Patent Appeal and under the decree in same suit—Neither Rule 18 nor Section 151 applies)]

#### Note B

- 1 (66) 5 Suth W R Misc 12 (12)
- (66) 5 Suth W R Misc 22 (23)
- (87) 9 All 64 (67)
- 2 (68) 10 Suth W R 450 (451)
- 3 (93) 11 Wd L Jour 220 (221)

#### Note C

- 1 (16) AIR 1916 All 200 (203) 38 Mad 669
- 2 (1864) 1 Suth W R Misc 23 (23)
- (14) AIR 1914 Mad 2 (3) (A decree obtained against husband can after his death be set off against a decree obtained by the widow against holder of decree against the husband)
- 3 (39) AIR 1939 All 25 (27)

4 (27) AIR 1927 Bom 255 (256)

#### Note 7

- 1 (31) AIR 1931 Cal 23 (24) 57 Cal 855
- (33) AIR 1933 Lah 372 (373)
- 2 (31) AIR 1931 Cal 23 (24) 57 Cal 855
- 3 (83) AIR 1933 Lah 372 (373) (Maintenance decree in favour of one of the parties payable periodically)
- (66) 5 Suth W R Misc 16 (16)
- (66) 5 Suth W R Misc 43 (43)
- (71) 16 Suth W R 303 (309)
- (18) AIR 1918 Cal 631 (632)
- 4 (67) 7 Suth W R 535 (536)

O 21 R. 18  
Notes 2-4

stranger<sup>4</sup> Similarly where *A B, C* and *D* hold decrees against *X*, and *X* holds a decree against *A* and the circumstances are otherwise such that the two decrees can be set off against each other *B C* and *D* cannot object to such setting off on the ground that *X*'s decree against *A* should be executed and the proceeds of execution should be rateably distributed among all the decree holders of *X*<sup>5</sup>

Where an application is made for the execution of a decree and a suit which is capable of resulting in a cross decree of the kind contemplated by this rule is at that time pending in the Court which passed that decree the execution may be stayed under Rule 29 But if such suit is pending in any other Court Rule 29 will not apply<sup>6</sup>

In *Hazariram v Bansidhar*,<sup>7</sup> their Lordships of the Privy Council observed as follows It is true that under Rules 18 to 20 the set off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction Whatever they arise from circuitry of proceedings thereunder can be avoided and should be avoided this is the principle of the rules

It has been held that apart from the provisions of this rule and Rule 19 *infra* the Court has inherent power to allow a set off in execution proceedings<sup>8</sup>

**3 Cross-decrees for the payment of two sums of money** — The first condition for claiming a set off under this rule is that the decrees should be for the payment of money and that the amounts under each decree should be *definite and ascertained*<sup>1</sup> A decree directing recovery of money by sale of immovable property is a decree for the payment of money under this rule<sup>2</sup> even though it may be in enforcement of a charge<sup>3</sup> But a mortgage decree in which there is no *personal* liability does not fall within this rule<sup>4</sup> See Notes to Rule 20 *infra*

A decree for mesne profits of which the amount has not been ascertained cannot be set off under this rule as the amount is not *definite*<sup>5</sup>

**5. Cross-decrees in separate suits.** — The second condition is that there must be cross decrees and they must have been passed in *separate suits* An adjudication under Section 144 of the Code is a *decree* to which this rule will apply<sup>1</sup> but a private award is not an adjudication<sup>2</sup>

4 (80) 2 All 866 (868) (Case under S 409 of the Code of 1859)

1 (20) 170 200 2 100

(25) AIR 1925 Cal 102 (104)  
(But see (37) AIR 1937 Pesh 83 (84)]

Note 3

1 (66) 5 Suth W R Mac 12 (12)  
2 100 170 200 2 100

where amount is not ascertained if the parties agree to a mode of execution involving a set-off it should be allowed

Note 4

1 (25) AIR 1925 Cal 102 (103, 104)  
2 (69) 11 Suth W R 144 (144)

Similarly, the assignee of a decree is entitled to set off such decree against a decree which the judgment debtor has obtained against such assignee<sup>2</sup>

O.21 R.18  
Notes 10-11

#### Illustrations

1 A holds a decree against B for Rs 5,000 B holds a decree against A for Rs 3,000 A assigns his decree to C B can claim a set off to the extent of Rs 3,000 even as against C, and C will be entitled to execute the decree only for Rs 2,000<sup>3</sup>

2 A holds a decree against B for Rs 5,000 B holds a decree against A for Rs 6,000 A assigns his decree to C B can claim a set off and C will not be entitled to execute his decree for any amount<sup>4</sup>

The fact that the assignment took place before the one or the other decree had been passed will not affect the right to set off, provided that the assignee had notice thereof

#### Illustrations

1 A who holds a decree against B assigns it to C Before the assignment B has filed a suit against A and the suit results in a decree B can set off the decree even as against C<sup>5</sup>

2 A holds a decree against B B who has filed a suit against A assigns his interest in the suit to C The suit is decreed A can set off his decree as against the decree in favour of C<sup>6</sup>

This right to set off will be available even though the judgment debtor had filed an appeal against the assigned decree and the assignee had not been made a party to the appeal<sup>7</sup>

In the undermentioned case<sup>8</sup> it was held by the Nagpur High Court that the assignee of a decree is not entitled to a set off under this rule unless the decree was assigned to him before applications were made for the execution of the two decrees sought to be set off against each other Thus where A had a decree against B, and C had a decree against A and after applications had been made for the execution of both the decrees, C assigned his decree to B, it was held that B was not entitled to claim that such decree should be set off against the decree which A had obtained against him The decision proceeds on the ground that under sub rule (1) the right to claim a set off arises when applications for execution are made and that unless the right to set off existed at such time, it cannot be claimed

An attaching decree holder is an "assignee" within the meaning of this rule<sup>9</sup>

**11. Sub-rule (4).** — This sub rule is new Where a person holds a decree against several persons *jointly and severally* and *singly* liable under another decree in favour of one or more of such persons, he can claim a set off between the two decrees<sup>1</sup> He cannot, however, do so if his decree is not a *joint and several* decree as

(72) 18 Suth W R 442 (442 443)

(73) 19 Suth W R 85 (87)

(74) 21 Suth W R 141 (143)

(11) 12 Ind Cas 205 (206) (Low Bar)

(74) 22 Suth W R 235 (237, 238)

(36) AIR 1936 Pesh 33 (34) (Where the assignee of a decree has at the time of assignment

Notes...

1 (99) 14 All 339 (340 341)

(83) 9 Cal 479 (480, 481)

(37) AIR 1937 P C 39 (41)

Pat 127 (PC)

64 Ind App 67 - II

O 21 R 18  
Note 11

against his judgment-debtors<sup>2</sup> or if he is not the sole decree holder in his decree. This sub-rule deals with a case where there is a single decree holder and several judgment debtors under the same decree. In the converse case viz. where there is a joint decree in favour of several persons against a single judgment debtor, the holder is not entitled to set off against each joint debtor a decree obtained by him against one of the decree holders. Thus where X obtains a decree against A and A and B obtain a decree against X, X cannot insist on a set-off<sup>3</sup> (See Illustration (b) to the rule). But where X's decree against A is based on a debt incurred by A on behalf of himself and B, and both A and B claim to set off their joint debts against X's decree against A, the set-off must be allowed.<sup>4</sup>

O 21 R 19

**R. 19. [S 247]** Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

Execution in case of  
cross claims under same  
decree

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and,
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree

[1877, S 247]

### Synopsis

- |                                |   |                                |
|--------------------------------|---|--------------------------------|
| 1 Scope and object of the Rule | } | 3 Two sums unequal — Procedure |
| 2 "Two parties."               |   | 4 Set-off of costs.            |

### Other Topics (miscellaneous)

- |   |   |
|---|---|
| * Are entitled to receive sums of money from each other. See Notes 1 and 4.                           | Executed by party entitled to the larger sum. See Note 3. |
| Courts more than the amount decreed—Court fees while recover all from the amount decreed. See Note 4. | Execution for difference only. See Note 3.                |
|   | Of a decree. See Note 1.                                  |

**1 Scope and object of the Rule** — This rule provides a set-off in the case of cross-claims contained in the same decree.<sup>1</sup> The object of the provision is to prevent each side taking out execution in respect of sums due under the same decree.<sup>2</sup> It is however not necessary that the remedy of each party against the other should be identical. In an old Allahabad case it was held that a set-off could not be ordered unless

**2** (17) AIR 1917 All 20 (203 209) (A mortgage decree can never be termed a joint and several decree within O 21 R 18 (4) and therefore the same cannot be a set-off of two mortgages.)

16 Pat 17 (PC)  
5 (3) AIR 193 P C 39 (41) 64 Ind App 67  
16 Pat 12 (PC)

Order 21 Rule 19 — Note 1

3 (1) 15 South W P 167 (1905)  
4 (3) AIR 1937 P C 39 (41) 64 Ind App 67

the parties had identical rights of execution in respect of their claims<sup>3</sup> This is no longer good law and it is now well settled that a set off under this rule will be ordered even though the remedy of each party against the other is not precisely of the same nature<sup>4</sup> Thus costs awarded can be set off against —

(1) Money directed to be realized by sale of hypothecated property<sup>5</sup> or against redemption amount awarded by the decree<sup>6</sup>

(2) Against mesne profits decreed<sup>7</sup>

(3) Against pre-emption amount to be deposited under the decree<sup>8</sup> But in pre-emption suits under Sections 14 and 15 of the Oudh Laws Act the purchase money must be deposited also, the right is lost In such suits it has been held that the costs cannot be set off against the pre-emption amount<sup>9</sup>

(4) Amount decreed as rent and directed to be realised by sale of property<sup>10</sup>

It has been held by the High Court of Allahabad in the undermentioned case<sup>11</sup> that where A, a mortgagee, sues B, the mortgagor and C a subsequent mortgagee, and a decree is passed in favour of A but awarding costs to C, A cannot set off the costs against his decree inasmuch as A could not have recovered any amount from C

Set off under this rule and Rule 18 *ante* is not a discretionary matter depending on equitable considerations<sup>12</sup>

On general principles and in exercise of its inherent power, an executing Court can entertain and give effect to a claim of set off even in cases which do not come strictly within the provisions of this rule<sup>13</sup>

The rule applies to cases in which two parties are entitled to recover sums of money from each other under the same decree In the undermentioned case<sup>14</sup> it was held by the Allahabad High Court that an order against a garnishee in proceedings under O 21 Rr 181 to 189 of that High Court directing him to pay a certain sum to the decree holder forms part of the original decree and hence the garnishee is entitled to set off against such sum the amount awarded to him as costs by the original decree

3 (88) 5 All 272 (274)

4 (94) 16 All 895 (896)

(88) AIR 1938 Mad 638 (639 640)

5 (94) 16 All 395 (397)

(14) AIR 1914 Oudh 416 (417)

[See (38) 16 C P L R 72 (75) (Decree for foreclosure—Execution for costs—Doctrine of set off not applicable)]

6 (93) 17 Bom 39 (34)

(1900) 93 Mad 121 (123)

7 (15) AIR 1915 Bom 226 (226 227) 40 Bom 60

8 (80) AIR 1930 All 418 (418) 52 All 589

(22) AIR 1973 Lah 142 (143) 2 Lah 294

(93) Oudh Cas 93 (24)

(39) AIR 1939 All 298 (229) 1 L R (1939) All 261

(Plaintiff awarded certain sum as costs—Defendant awarded less sum as costs—Plaintiff

12 Court and defendant required to execute

9

345

10 (88) AIR 1938 Mad 638 (639 640)

11 (84) AIR 1934 All 8 (9 10)

12 (37) AIR 1937 P C 39 (41) 64 Ind App 67

16 Pat 127 (PC) (But the circuitry of proceedings

can be avoided and should be avoided this is

the principle of the rules)

13 (96) AIR 1936 Cal 409 (412) 1 L R (1937) 1

Cal 57

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deed of re-conveyance to plaintiff — Defendant  
also to pay costs — Plaintiff depositing amount  
deducting costs—Chums held to be in nature of  
cross demands — Doctrine of equitable set off  
applied )  
(39) AIR 1939 Lah 85 (86) (Even if the right  
is bar

O.21 R.19  
Notes 1-3

By Section 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908), this rule has been made applicable to execution of decrees under that Act, subject to the other provisions of the Act and the rules that may be made under sub section (1)

2. "Two parties." — The expression "two parties" includes two sets of parties<sup>1</sup> It also includes the legal representatives of a party but not *two different legal representatives of the same party*<sup>2</sup> See also the undermentioned case<sup>3</sup>

3. Two sums unequal — Procedure. — If the amounts under the two claims are unequal, the claim for the smaller amount is automatically satisfied and no execution should be allowed in respect of it<sup>1</sup> Execution under the claim for the larger amount should be allowed only to the extent of the difference<sup>2</sup> The Court should first ascertain the amounts due, enter satisfaction in respect of the claim for the smaller amount and enforce execution for the balance of the amount due under the larger claim<sup>3</sup> Since the two claims form a single indivisible decree, and only enforceable for the difference, the fact that one of the claims is barred by limitation, does not alter the position<sup>4</sup>

If in executing the decree for the larger claim, no deduction is made for the amount due under the smaller claim and the claim is executed in full, the Court may order refund of the excess under Section 151<sup>5</sup>

Where a plaintiff obtained against the defendants a decree for costs and realized the same and in appeal by the defendant the High Court vacated the decree for costs and in a further appeal to the Privy Council the appeal was dismissed and the defendant was ordered to pay the costs of the plaintiff, it was held that the defendant could, in answer to the execution of the decree for costs by the plaintiff, claim to set off the amount of costs recovered from him under the decree of the trial Court which was later on set aside<sup>6</sup>

As seen in Note 1 above, where under a decree for pre-emption, the plaintiff is awarded costs, he is entitled to deduct such costs from the pre-emption money which he is required to deposit under the decree Where in such a case, a certain sum is awarded to the plaintiff as costs and a smaller sum is awarded to the defendant as costs and the decree does not direct the plaintiff to deposit the costs of the defendant also in Court, it has been held that a deposit made by the plaintiff deducting the whole amount awarded to him as costs and without giving credit for the sum awarded as costs to the defendant is not bad and that clause (b) of this rule does not strictly apply

#### Note 2

1. (17) AIR 1917 Mad 226 (227) (A plaintiff who holds a joint and several decree against two defendants (who under the same decree are individually entitled to different amounts for costs which in the aggregate exceed the amount due to the plaintiff) can take out execution of the decree against one defendant alone for the balance due to him by both defendants until the other defendant makes an application in execution to recover the amount due to him by the plaintiff under the decree)

#### Note 3

1 (70) 18 Satb W R 105 (107)  
(18) AIR 1918 Cal 153 (154)  
(18) AIR 1918 Cal 133 (134)  
(23) AIR 1923 Mad 638 (639, 640)  
(33) AIR 1938 Mad 638 (640)  
2 (01) 5 Cal W N 497 (507)  
(20) AIR 1920 Cal 438 (439)  
(23) AIR 1923 Lah 151 (153)

money from each other — As such it cannot cover a case in which the creditors of one of the parties are also concerned)

cross claim powers)

to such a case, inasmuch as there is no question of the plaintiff taking out *execution* for the larger sum.<sup>7</sup>

O.21 R.19  
Notes 3-4

**4. Set-off of costs.** — From the illustrations given in Note 1 above it is seen that an award of costs is a claim to "recover money" within the meaning of this rule. Thus, costs awarded to one party in a suit may be set off either against costs awarded to the other party in the suit<sup>1</sup> or against other sums awarded to the latter party.<sup>3</sup> Such costs should, however, have been *actually* awarded.<sup>3</sup>

When costs have been awarded on interlocutory matters in the same suit between the same parties and against each other they will be deemed to be incorporated in and to form part of, the final decree in the suit and will therefore be set off against each other under this rule.<sup>4</sup>

## R. 20. [New] The provisions contained

O.21 R.20

Cross decrees and cross claims in mortgage suits

in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge

**1. Scope and object of the Rule.** — This rule makes the provisions of Rules 18 and 19 applicable to cases where the decrees are, or one of the decrees is a mortgage decree.<sup>1</sup> Thus

- (1) a simple money decree can be set off against a mortgage decree if the other conditions laid down in Rule 18 are satisfied<sup>2</sup> and
- (2) costs awarded to a judgment debtor may be set off against a mortgage decree obtained against him in the suit if the other conditions laid down in Rule 19 are satisfied.<sup>3</sup>

The Rangoon High Court has however held that a set off cannot be allowed if there is no *personal liability* under the mortgage decree.<sup>4</sup> The High Court of Patna has held that it is not necessary that the mortgage decree should be actually one for

7 (33) AIR 1939 All 228 (229) 1 L R (1939) All 261 (Reversing on Letters Patent Appeal AIR 1937 All 750)

Note 4

1 (66) All 676 (677)

2 (14) AIR 1914 Oudh 418 (417)

(11) 10 Ind Cas 454 (455) (All) (On this principle where a pauper suit was decreed only partially and the amount decreed to the plaintiff was less than what plaintiff had to pay to

In execution of decree for costs in Privy Council judgment debtor is entitled to set off costs in trial Court realized by decree holder.)

Order 21 Rule 20 — Note 1

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

decrees for sale but not for possession in enforcement of mortgage or charge.)

Before sale)

(37) AIR 1937 P C 39 (40) 16 Pat 127 64 Ind App 67 (P C) (Contention that R 20 only applies where both the decrees are mortgage decrees rejected)

[But see (36) AIR 1936 All 639 (641) 58 All 907 (Submitted not correct)]

3 (14) AIR 1914 Oudh 418 (417)

4 (30) AIR 1930 Rang 68 (70 71) 7 Rang 505

must yield to the right of the Government for a first charge for court fee on amount decreed in pauper suit.)

3 (71) 16 Suth W R 308 (309)

4 (17) AIR 1917 Pat 239 (260)

[See also (35) AIR 1935 Cal 225 (226) 62 Cal 298 (Decree for costs awarded by the trial Court set aside on appeal to High Court—Appeal to Privy Council dismissed with costs—



O. 21 R. 22

## Local Amendments

## ALLAHABAD

(1) For the words 'one year', wherever they occur in this rule, read the words "three years"

(2) To sub rule (2) of this rule shall be added the following proviso

'Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment debtor has sustained substantial injury by reason of such omission'

## BOMBAY

The words "two years" shall be substituted for the words "one year" wherever they occur

## CALCUTTA

Add the following sub rule (3)

(3) Omission to issue a notice in a case where notice is required under sub rule (1) or to record reasons in a case where notice is dispensed with under sub rule (2), shall not affect the jurisdiction of the Court in executing the decree'

## LAHORE

(1) The words 'two years' shall be substituted for the words "one year" wherever they occur

(2) Add the following at the end of the rule

Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction'

## MADRAS

(1) In sub rule (1) the words "two years" shall be substituted for the words one year: wherever they occur

(2) In sub rule (1) after clause (b), insert the following

'or (c) where the party to the decree has been declared insolvent, against the Assignee or Receiver in insolvency

(3) Between sub rules (1) and (2) insert the following

(1a) Where from the particulars mentioned in the application in compliance with Rule 11 (2) (ff), *supra*, or otherwise the Court has information that the original decree holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer'

(4) Add the following proviso to sub rule (2)

Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons unless the judgment debtor has sustained substantial injury as the result of such omission

## NAGPUR

(1) For the words "one year" wherever they occur, substitute the words "three years"

(2) To sub rule (2), add the following proviso

'Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment debtor has sustained substantial injury by reason of such omission'

## N. W. F. P.

For the words "one year," wherever they occur, read 'two years'

**POUDH**  
(1) For the words 'one year,' wherever they occur in this rule read the words 'three years'

(2) To sub rule (2) of this rule add the following proviso

' Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment debtor has sustained substantial injury by reason of such omission

#### **PATNA**

For sub rule (1) substitute the following

' Where an application for execution is made in writing under Rule 11 (2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed why the decree should not be executed against him

#### **RANGOON**

(1) In clause (a) of sub rule (1) for the words 'one year' the words 'three years' shall be substituted

(2) In the second line of the proviso to sub rule (1) for the words 'one year' the words 'three years' shall be substituted

### *Synopsis*

- |  |   |
|--|---|
| 1 Legislative changes                              | 10 Remedy when property has been sold without notice under this Rule              |
| 2 Scope and object of the Rule                     | 11 Date of the decree   |
| 2a Legal representative                            | 12 Notice, when not necessary   |
| 3 Shall issue notice                               | 13 Notice and limitation  |
| 4 Proof of notice                                  | 13a Failure to show cause why decree should not be executed — Effect              |
| 5 Effect of omission to give notice                | 14 Court executing the decree   |
| 6 Notice to wrong person                           | 15 Revivor of decree by notice to one judgment debtor — <i>vide</i> under Note 18 |
| 7 Irregular service of notice                      | 16 Sub rule (2)   |
| 8 Objection as to notice, when may be taken        | 17 Appeal   |
| 9 More than one notice if contemplated by the Rule |   |

### *Other Topics (miscellaneous)*

#### **1 Legislative changes —**

1 The words of any decree passed on appeal from the decree sought to be executed or which occurred in the proviso to the old Section 248 have been omitted as being unnecessary because the decree to be executed in such cases will be the appellate decree as held in the undermentioned cases<sup>1</sup>

2 The Explanation contained in the old Section has also been omitted in view of the definition of Court given in Section 37<sup>2</sup>

3 Sub rule (2) is new *Vide* Note 16 *infra*

**2 Scope and object of the Rule.** — The object of the notice required to be given under this rule is not only to furnish an opportunity to the person concerned to urge any objection he may have to the maintainability of the execution application,

Order III Rule III — Note 1

1 (72) 14 Moo Ind App 465 (483-484) (P C)

(89) 11 All 267 (974) (F B)

2 The Report of the Special Committee.

**O 21 R 22** but also to prevent his being taken by surprise and to enable him to satisfy the decree  
**Notes 2-2a** before execution is issued against him<sup>1</sup> The rule is imperative and notice *shall* be issued —

(1) where the application is made *one year after* the date of the decree<sup>2</sup> or

(2) where it is made against the *legal representatives* of a party to the decree<sup>3</sup>

An amendment after one year of an application for execution made within one year does not render the application one made after one year for the purposes of this rule<sup>4</sup> The necessity for notice in an application for execution against the legal representatives of the judgment debtor is not confined to cases where execution is taken out against them in the *first instance* it equally applies to cases where execution had been previously taken against the judgment debtor himself and on his death the execution is sought to be taken out against the legal representatives<sup>5</sup>

A notice under this rule may be issued by the Court *executing* a transferred decree while a notice under O 21 R 16 should be given only by the Court which *passed* the decree<sup>6</sup>

The issue of a notice under this rule to the guardian of a minor judgment debtor raises no presumption that he has been appointed guardian by implication by the Court<sup>7</sup>

The rule does not apply to summary proceedings like those contained in Section 111 of the Madras Estates Land Act<sup>8</sup>

**2a Legal representative** — For definition of the expression legal representative see Section 2 clause (11) See also Note 10 to O 22 R 3 According to that definition a legal representative is a person who represents the estate of a *deceased* person Hence on the adjudication of a person as an insolvent the Official Receiver cannot be said to be his legal representative<sup>1</sup> But under the amendment of the rule by the Madras High Court notice is required to be given to the Official Receiver where the judgment debtor has been declared an insolvent<sup>2</sup> In the undermentioned decision<sup>3</sup> of the Calcutta High Court it was assumed that the Official Receiver is a legal representative of an insolvent judgment debtor to whom notice must issue under this rule It is submitted that the assumption is not correct It may be noted in this connexion that the decision of the Privy Council in *Raghunath Das v Sundar*

#### Note 2

1 (37) 21 Bom 424 (432) (F B)

(33) AIR 1933 Lah 826 (827) (But he is not bound at that stage to object to the mode of execution)

3 (21) AIR 1931 Nag 126 (126 127)  
 (14) AIR 1914 P C 193 (131) 42 Cal 72 41 Ind  
 App 251 (P C)

4 See Rule 17 sub-rule 2 *ante*

5 (32) AIR 1932 Pat 199 (200 201) 11 Pat 411  
 (36) AIR 1936 Mad 905 (211 212) 59 Mad 401  
 (F B)

See also Section 50 Note 12

6 (35) AIR 19 5 Oudh 449 (450) 28 Oudh Cls  
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(38) (Sub

rule 2a

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*Das*<sup>1</sup> in which it was held that a notice to the Official Receiver was necessary was a decision under the Code of 1882 which did not contain a definition of 'legal representative' " **O.21 R. 22 Notes 2a-5**

**3. "Shall issue notice"** — The provisions of this rule are mandatory<sup>1</sup> and the issue of the notice is a condition precedent to the validity of the execution proceedings<sup>2</sup> It is the duty of the Court to issue the notice whether the decree holder has asked for it or not<sup>3</sup> and the failure to do so will render the proceedings null and void<sup>4</sup> See Note 5 below

The rule is, however, sufficiently complied with if notice has been given to all persons interested, and the fact that some of them were minors for whom guardians had not been appointed will not invalidate the execution proceedings if the others sufficiently represented them<sup>5</sup> Where the Court executing the decree is also the Court which passed the decree there is nothing in this rule to prohibit the issue of a combined notice under this rule and Rule 16 ante<sup>6</sup>

A minor who attained majority pending execution proceedings is not entitled, on that ground, to a fresh notice under this rule<sup>7</sup>

A notice under the rule should be to specifically show cause why the decree should not be executed<sup>8</sup>

**4. Proof of notice.** — Where an execution is impeached on the ground of want of notice under this rule, the onus of proving the want of notice will be on the party setting it up<sup>1</sup> The reason is that the issue of a notice under the rule being the duty of Court it will be presumed that the Court has done all that it was legally bound to do In this connection an entry on the order sheet<sup>2</sup> or a report of the Nazir<sup>3</sup> to the effect that notice has been served will be *prima facie* evidence of the service of notice

**5. Effect of omission to give notice.** — Before the date of the Privy Council decision in *Malkarjun v Narhari*<sup>1</sup> it was held by the High Courts of Allahabad and Calcutta that a sale in execution without giving the notice required by this rule was absolutely void and without jurisdiction<sup>2</sup> The High Court of Madras on the other hand held that the absence of notice was only a material irregularity and that the

4 (14) AIR 1914 P O 129 (181) 42 Cal 72 41 Ind App 251 (PC)

5 (80) AIR 1936 Mad 205 (907) 59 Mad 461 (TB)

**Note 3**

1 { 17) AIR 1917 Cal 728 (791) 44 Cal 954

2 (93) 21 Cal 19 (22 23)

{ 70) 13 Suth W R 400 (401)

(81) 3 All 424 (406)

(81) 6 Cal 103 (105)

7 (25) AIR 1925 Mad 153 (159)

8 (32) AIR 1932 Pat 199 (201 203) 11 Pat 241 (A notice calling upon the legal representative to show cause why his name should not be substituted in the place of the judgment debtor is not enough)

**Note 4**

1 (02) 99 Cal 580 (589)

{ 74) 22 Suth W R 5 (6)

{See (34) AIR 1934 Pat 911 (911) (Order sheet stating issue of notice and service thereof — Judgment debtor can show that provisions of Code were not complied with)}

2 (17) AIR 1917 Cal 81 (86)

(32) AIR 1932 Cal 627 (628)

3 (71) 15 Suth W R 903 (904)

{See also (14) AIR 1914 Mad 153 (154)}

(73) 13 Suth W R 102 (103)}

**Note 5**

1 (01) 25 Bom 337 (348) 27 Ind App 216 (PC)

2 (81) 3 All 424 (426)

(93) 90 Cal 570 (3.3)

Q 21 R. 22  
Note 5

sale was only *voidable*, and not *void*.<sup>3</sup> In this state of conflict of authorities the Privy Council decided the case of *Malharjun v Narhar*.<sup>4</sup> There a judgment debtor having died the decree was executed against his estate. A notice under the rule was issued and served on a person as the legal representative of the judgment debtor. He appeared and objected that he was not the legal representative. The Court, however, decided that he was the legal representative and proceeded with the execution. The properties of the judgment debtor were sold in court auction. It was ultimately found that the person to whom the notice was sent was not the proper legal representative. The question before the Privy Council was whether the sale was under the circumstances *void for want of jurisdiction* or only *voidable on the ground of material irregularity*. Their Lordships decided that the Court had jurisdiction to decide whether a person was a legal representative of a party or not, that having decided it in a particular manner, the decision could not be said to be without *jurisdiction*, that the case was only one of material irregularity in the *exercise* of jurisdiction and that the sale was therefore not void.

Notwithstanding the above points of distinction the decision came to be regarded in India as one equally applying to a *total omission to issue notice* and as laying down the law that even in the absence altogether of any notice there was only a *material irregularity* and not a *want of jurisdiction* and that the sale was *voidable* and not *void*. Accordingly the Calcutta High Court<sup>5</sup> changed its original view and held that an omission to give notice under the rule was only a *material irregularity* rendering the execution sale *voidable*. The Allahabad and Madras High Courts also began to hold the same view.<sup>6</sup> This view held the field till the Privy Council had occasion to clarify the whole position in *Raghunath Das v Sundar Das*.<sup>7</sup> In that case, the judgment debtor having become insolvent his properties had vested in the Official Assignee. When the decree holder took out execution a notice was issued to the Official Assignee to show cause why he should not be substituted for the debtor but there was no notice to show cause *why the decree should not be executed*. It was, therefore a case of omission to issue notice under the rule. The execution proceeded and the properties of the debtor were sold in court auction. The question before the Privy Council was whether the sale was *void* or only *voidable*. Their Lordships of the Privy Council held that a *notice under the rule was necessary in order that the Court should obtain jurisdiction to sell the property* that the notice to show cause against substitution was not enough and that the sale was therefore *void* and the purchaser obtained no title. Their Lordships pointed out —

- (1) that in *Malharjun's case* a notice having been issued and served though on a wrong person the Court had acquired jurisdiction to deal with the matter
- (2) that the Court in deciding upon a wrong person as the legal representative nevertheless acted with jurisdiction

(30) 6 Cal 103 (103, 106)

3 (99) 15 Mad 399 (400)

[But see (83) 6 Mad 180 (181)]

4 (01) 25 Bom 337 (347, 348) 27 Ind App 216

(PC)

[See also (10) 8 Ind Cas 22 (24) (Cal) (If an

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(3) that in so deciding erroneously, the Court acted only with *material irregularity* and not without jurisdiction

O. 21 R. 22  
Note 8

Since the said decision in *Raghunath Das's case*, all the High Courts<sup>8</sup> except the Madras High Court veered round to their old view, *i.e.*, that the sale was without jurisdiction and therefore void. The Madras High Court,<sup>9</sup> however, still continued to hold that the sale was only voidable and not void distinguishing *Raghunath Das's case* on the ground that it was a case under the old Code which contained no provision similar to that contained in the present sub-rule (2), and that in view of the recognition in the present sub-rule (2) of the Court's discretion in the matter of issuing notice there was no longer any question of want of jurisdiction.<sup>10</sup> The matter came up before a Full Bench of the same High Court which finally laid down that a sale held under the circumstances mentioned above was *void for want of jurisdiction* and *not merely voidable*.<sup>11</sup> This view was affirmed by another Full Bench of the same High Court in *Kanchamalai v. Shahaaj Raja*<sup>12</sup> in which it was held that even if the judgment-debtor died after the property had been attached and ordered to be sold, the absence of notice to the legal representative under this rule would render the sale void.

Thus, it may now be taken as well settled that in cases of a *total omission to issue a notice* under the rule the sale is *absolutely void* and not *merely voidable*. It is immaterial whether the property sold is immovable or moveable.<sup>13</sup> Nor is it material whether the purchaser is the decree-holder himself<sup>14</sup> or a stranger.<sup>15</sup> The Nagpur High Court has, however, held in the undermentioned case<sup>16</sup> that the failure to

in insolvent — Execution proceedings become nullity after adjudication—Purchaser gets no interest unless Official Assignee made party to execution )]

8. ('28) AIR 1928 All 74 (76) 49 All 830.

('32) AIR 1932 Cal 351 (351)

('38) AIR 1938 Pesh 41 (43)

('83) AIR 1933 Pesh 71 (72)

('15) AIR 1915 Cal 268 (270)

('18) AIR 1918 Cal 913 (915)

[See also ('17) AIR 1917 Mad 42(43) (Sale vitiated

any such process )

('32) AIR 1932 Pat 199 (201) 11 Pat 241 (A notice upon legal representative of a deceased

O. 21 R. 22  
Notes 5-6

bring the legal representative of the judgment debtor on the record does not necessarily make the proceedings in execution a nullity. It is submitted that the decision is not correct.

However, the only object of the rule is to give the person concerned an opportunity to show cause against execution. Consequently, if though no notice is served, he appears and contests the application<sup>17</sup> or if he was served with a notice under Rule 66 and was thus aware of the application pending against him,<sup>18</sup> the object of the rule is achieved and the proceedings are valid. It has been held by the Judicial Commissioner's Court of Oudh<sup>19</sup> that the omission to issue notice under this rule does not render the sale in execution of a mortgage decree void, inasmuch as the jurisdiction to sell the property is derived from the decree itself and not by reason of the notice. See also the undermentioned cases:<sup>20</sup>

**6. Notice to wrong person.** — In *Mallaryun v Narhari*,<sup>1</sup> their Lordships of the Privy Council held that if a notice is as a fact, issued but served on a wrong person and on the objection of the latter the Court decides that he is the right legal representative it acts only in the exercise of jurisdiction and the sale is only voidable. In such cases the proper legal representatives are equally bound by the execution proceedings though they were not parties thereto.<sup>2</sup> Similarly, where owing to the fact that both the decree holder and the Court are not aware of the true age of the judgment debtor a notice is issued to a major judgment debtor as if he were a minor, the issue of such notice only amounts to an irregularity and no question of jurisdiction arises.<sup>3</sup> But if the decree holder was aware of the proper legal representatives and deliberately gets notice served on a wrong person and there is no adjudication by

17 (31) AIR 1931 Cal 476 (478)

(20) AIR 1929 I at 79 (80) 7 Pat 790

(69) 11 Buth W R 329 (329)

(30) AIR 1936 Mad 99 (100) (AIR 1931 Cal 476, Followed)

[See also (32) AIR 1932 Pat 244 (245 246)]

(Del. app. of the

under O. 21 R. 66 and judgment debtor appearing and contesting execution proceedings — Failure to give notice under O. 21 R. 22 and omission to record reasons dispensing with notice is mere irregularity and does not vitiate proceedings.)

(See also (25) AIR 1925 Mad 158 (159)

(33) AIR 1933 Rang 55 (53 54) 11 Rang 79]

19 (18) AIR 1918 Oudh 379 (388)

(1931) 470 1939 N 909 (1930) (17 1930 1931)

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#### Note II

1 (01) 25 Dom 837 (347 352) 27 Ind App 216 (PC)  
[See also (38) AIR 1933 Mad 945 (946) (Dunlop

becomes his legal representative to whom notice should be given under this rule but it is held that failure to give such notice does not render

3 (39) AIR 1939 Mad 11 (F)

the Court as to who is the legal representative, the sale will be void <sup>4</sup>

O. 21 R. 22  
Notes 6-9

**7. Irregular service of notice.** — The notice issued under this rule must be in accordance with law and must satisfy the requirements laid down in sub rule (1) <sup>1</sup> Thus, a day must be specified for the appearance of the person to whom the notice is issued<sup>2</sup> allowing sufficient time to enable him to come and oppose the application,<sup>3</sup> and the notice must be signed by the Judge or other officer <sup>4</sup>

But an irregularity in the service of notice is quite different from an omission to issue notice, and will not make the subsequent proceedings void <sup>5</sup> The judgment debtor or the legal representative will not be precluded from setting up his defence of objections at a later stage<sup>6</sup> The irregularity may also furnish a ground for avoiding a sale under Rule 90 <sup>7</sup>

As regards the *mode* in which service should be effected it is a matter for the Court to determine in every case whether there has been sufficient service and it is not every departure from the prescribed mode of service that will invalidate the service <sup>8</sup>

**8. Objection as to notice, when may be taken** — Since the question of the issue of notice is one affecting the jurisdiction of the Court an objection that no notice was issued is entertainable at any time, even in appeal<sup>1</sup> but not if it is likely to take the other side by surprise <sup>2</sup>

But an *irregular or insufficient service* of such notice is only an irregularity and an objection based on the ground of non service or insufficient service should be taken at the earliest possible opportunity <sup>3</sup>

**9. More than one notice, if contemplated by the Rule.** — The provisions of the rule as to *notice* are not confined to the *first* execution application They apply to every subsequent application also <sup>1</sup> The only exception in the latter case is that contained in the proviso <sup>2</sup> viz

(1) If on a prior execution application an order has been passed against the judgment debtor (or his legal representative) no notice will be necessary on a

4 (21) AIR 1921 Bom 885 (887) 45 Bom 1186 (88) AIR 1938 Pat 162 (164) (Objection can be

#### Note 7

1 (16) AIR 1916 Cal 511 (519) 518

2 (89) 5 Ind Cas 400 (410) 37 Cal 122

3 (28) AIR 1928 Mad 1052 (1054)

4 (85) 7 All 506 (508) 509

(86) 11 All 293 (294) (Signature was in initials—

Though it is proper that the person signing

2

point not having been taken at any stage of the suit and no opportunity having been given of showing that the surviving judgment-debtor was entitled to represent the estate of the deceased it was impossible to say that the sale was a nullity)

3 (74) 21 Satb W R 148 (148)

(See also (20) AIR 1920 Cal 530 (530))

#### Note 9

1 (95) AIR 1925 Pat 474 (476)

(See however (29) AIR 1929 Mad 275 (279) 280)

2 (24) AIR 1925 Pat 474 (476) 5 Pat 1 (F B)

(Overruling AIR 1924 Pat 111)

#### Note 8

1 (11) 9 Ind Cas 584 (585) (Cal)

(34) AIR 1934 Pat 274 (78) 279) 13 Pat 467

11 (10) 8 Ind Cas 27 (95) (Cal)

(11) 9 Ind Cas 213 (214) (Cal)

(11) 11 Ind Cas 216 (214) (Cal)

7 (30) AIR 1930 Pat 153 (154)

8 (36) AIR 1936 Pat 593 (594)





cause if any, against the execution. A notice should therefore be insisted on only to the extent necessary for that purpose. Therefore in cases falling under clause (a) of sub rule (1), no notice need be issued to a judgment debtor who has no interest in the property against which execution is sought.<sup>1</sup> And in cases falling under clause (b) of sub rule (1) it is enough if notice has gone to an adult legal representative capable of representing the estate. Notice to the other legal representatives is not essential.<sup>2</sup> Nor is any notice essential where the legal representative is already a party on the record though in another capacity.<sup>3</sup>

O. 21 R. 22  
Notes 12-13

**13 Notice and limitation.**—By virtue of clause (5) column 3 Article 182 of the Limitation Act of 1908 a notice issued under this rule will be a step in aid of execution in the case of decrees of Courts other than Chartered High Courts.<sup>1</sup> For this purpose it is not necessary that the application on which the notice was issued should be a *bona fide* application.<sup>2</sup> Nor is it material that the application was defective or irregular<sup>3</sup> or that it was not actually served.<sup>4</sup> But it is necessary that the notice should have been issued on an application which was not time barred.<sup>5</sup> On the question as to the date from which the period of three years is to be computed there was a conflict of views under the Limitation Act of 1877 the High Courts of Allahabad<sup>6</sup> and Bombay<sup>7</sup> holding that time should be computed from the date when the Court ordered the notice to issue the Calcutta and Madras High Courts holding that it should be computed only from the date when the notice was actually issued.<sup>8</sup> The word

#### Note 12

- 1 (96) AIR 1920 Cal 88 (90 87)  
2 (29) AIR 1922 Mad 275 (282)  
3 (25) AIR 1925 Cal 1227 (1228)  
4 (04) 14 Mad L Jour 342 (343)  
[See also (30) AIR 1936 Pat 253 (254) (Decree

- (05) 2 Cal L Jour 544 (545)  
(08) 35 Cal 1047 (1019)  
(09) 2 Ind Cas 941 (942) (Cal)  
(11) 10 Ind Cas 411 (412) (Cal)  
(22) AIR 1922 Cal 44 (46)  
(27) AIR 1927 Lah 100 (104)  
(94) 17 Mad 76 (77)  
(08) 31 Mad 63 (70)  
(08) 18 Mad L Jour 14 (15)  
(09) 2 Ind Cas 433 (434) (Mad)  
(14) AIR 1914 Mad 435 (435) 15 Ind Cas 738  
(789) 37 Mad 231

#### Note 13

- (74) 20 Suth W R 484 (484)  
(74) 22 Suth W R 512 (517) (F B)  
(75) 23 Suth W R 927 (328)

The following cases cannot be considered to be good law

- (67) 8 Suth W R 306 (307)  
(1865) 4 Suth W R Misc 6 (6)  
(96) 6 Suth W R Misc 9 (97)  
(96) 6 Suth W R Misc 98 (101)  
(67) 8 Suth W R 268 (268)  
(68) 9 Suth W R 330 (331)  
(99) 9 Suth W R 443 (444)  
(2) 18 Suth W R 193 (194)  
(3) 19 Suth W R 107 (103)

notice cannot cure the invalidity of the execution application.]

- 4 (03) 27 Bom 672 (625)  
(17) AIR 1917 Mad 363 (364)  
[But see (16) AIR 1916 Oudh 2 8 (279) 18 Oudh Cas 374]  
5 (05) 2 All L Jour 67 (68)  
(78) 3 Cal 518 (521)  
(78) 2 Mad 1 (3 5)  
6 (81) 1881 All W N 120 (120)  
(90) 1890 All W N 244 (245)  
(09) 30 All 536 (537)  
7 (03) 27 Bom 620 (625)  
(01) 25 Bom 416 (420)  
8 (02) 6 Cal W N 636 (657)  
(06) 4 Cal L Jour 530 (531)  
(07) 30 Mad 30 (37)

See also the following cases under the Act of 1871 (75) 23 Suth W R 195 (195)

**O.21 R.22**  
**Note 13**

"issuing" which occurred in clause (6) of Article 179 of the Limitation Act of 1877 corresponding to Article 182 clause (6) was changed into the word "issue" in the Act of 1908 and it was held by the High Court of Bombay<sup>9</sup> that the effect of the change was to give effect to the Calcutta and Madras view. Under the Act of 1908, it was held by all the High Courts except the High Court of Allahabad and by the Chief Court of Oudh that it is the date of the issue of the notice that is the starting point of limitation<sup>11</sup>. The Allahabad High Court, and following it the Oudh Chief Court were, however, of opinion that the new Act did not make any change in the law. They therefore held the same view as that of the Allahabad High Court before the Act of 1908<sup>12</sup>.

Article 182 of the Limitation Act of 1908 has now been amended by Act IX of 1927 by which clauses (5) and (6) of the Article have been amended and substituted as follows

Clause 5 (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution; or to take some step in aid of execution of the decree or order, or

Clause 6 (in respect of any amount recovered by execution of the decree or order, which the decree holder has been directed to refund by a decree passed in a suit for such refund) the date of the last mentioned decree or in the case of an appeal therefrom, the date of the final decree of the Appellate Court or of the withdrawal of the appeal, or

Under the present Act, as amended, therefore, the time is to be computed from the date of the final order passed on such an application. Where no notice has been issued at all, a mere order for issuing notice will not, however, be a step in aid of execution<sup>13</sup>.

In respect of decrees of Chartered High Courts the limitation for execution is prescribed in Article 183 of the Limitation Act. The said Article makes no specific mention of a notice under this rule, but it contains a provision that such decrees may be executed within 12 years from the date when they have been "revived." The term "revivor" has nowhere been defined. It was introduced on the basis of the English Common Law Practice (which prevailed in the Supreme Courts of India) under which, if a writ of execution was not served out within a year and a day, it was necessary to revive the decree by a process known as *scire facias*. Till then the decree would be in a "dormant" condition. It will have to be "revived" so as to be made executable. The "revivor," therefore, consists in getting a declaration recorded that execution is intended to be enforced under the decree.

The question, therefore, is whether a notice under this rule will operate as a "revivor." In this connection it has been held that an order for execution made after the issue of a notice under this rule will operate as a revivor<sup>13</sup>. It is important to note that to constitute a revivor the following three conditions must be satisfied, viz —

(75) 24 Sath W R 227 (227)  
(76) 25 Sath W R 249 (249)  
(76) 25 Sath W R 546 (547)

[But see (10) 8 Ind Cas 377 (378) 18 Oudh Cas 203 (Date of issue of notice was held to be starting point of limitation)]

12. (99) 23 Bom 85 (28)  
(10) 6 Ind Cas 746 (748) 18 Oudh Cas 90  
(16) AIR 1916 Oudh 278 (279) · 18 Oudh Cas 374.

13 (04) 26 All 361 (364)  
(81) 6 Cal 504 (511)

(1) There must be an application for execution. An application for transmission of decree is not enough.<sup>11</sup>

(2) There must be an order for execution passed on the application. The mere fact that an application has been made and notice has been issued to the judgment debtor is not enough.<sup>12</sup>

(3) The said order for execution should have been passed after the issue of a notice under this rule.<sup>13</sup> If there were several judgment debtors and notice under this rule was issued to only one or some of them there will be a revivor only against them and not against the other judgment debtors.<sup>17</sup>

See also Note 10 to Art 183 in the Authors' Commentaries on the Limitation Act

**13a Failure to show cause why decrees should not be executed — Effect.**  
— See Note 23 to Section 11 *ante* and the undermentioned cases.<sup>1</sup>

**14 Court executing the decree** — The rule provides that the notice shall be issued by the Court executing the decree. The expression will include the Court to which the decree has been transferred for execution. In cases therefore where the decree is transferred for execution the transferee Court can and in fact is the only Court competent to issue the notice.<sup>1</sup>

But an application to execute against the legal representatives has to be made to the Court which passed the decree.<sup>2</sup> In such cases therefore the application will be made to the Court which passed the decree but notice under the rule will be issued by the transferee Court.<sup>3</sup>

**15 Revivor of decrees by notice to one judgment-debtor** — *Vis* under Note 13 above

**16 Sub-rule (2)** — The mandatory character of the rule is not in any way abrogated by sub rule (2).<sup>1</sup> The sub rule gives a discretion to the Court to *dispense* with the notice under certain circumstances.<sup>2</sup> If such notice is dispensed with the

(16) AIR 1916 Cal 499 (494) 43 Cal 903  
(84) 7 Mad 540 (542 543)  
(90) 17 Cal 491 (497) (But if such order itself is

objection subsequently as Courts action is without jurisdiction)

#### Note 14

1 (08) 1<sup>o</sup> Cal W N 807 (809)  
(18) AIR 1918 Mad 590 (584 595) 40 Mad 1069 (FB)  
(10) 8 Ind Cas 22 (95) (Cal)  
(22) AIR 1917 Cal 3 (4)  
(25) AIR 1925 Oudh 449 (450) 28 Oudh Cas 830  
2 (93) 18 Bom 224 (226)

Mad 110<sup>o</sup>

(18) AIR 1918 Mad 513 (518) 40 Mad 1197

#### Note 13a

1 (35) AIR 1935 Cal 806 (807) (Failure of judgment debtor to appear on date fixed in notice under R. 27 Court ordering notice

by the legal representatives.)

3 (05) 23 Mad 466 (469) (FB)

#### Note 16

(Do)

2 (33) AIR 1933 Cal 560 (561)

O. 21 R. 22  
Notes 16-17

reasons should be recorded.<sup>3</sup> The Rangoon High Court<sup>4</sup> is of opinion that the omission to record reasons is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction. The Bombay,<sup>5</sup> Calcutta,<sup>6</sup> Madras,<sup>7</sup> Patna<sup>8</sup> and Oudh<sup>9</sup> Courts have, however, held that such omission will be a mere irregularity and that the proceedings will not be totally invalid merely by reason of the omission. The rule as amended by the Lahore High Court expressly provides that a failure to record reasons is only an irregularity not affecting jurisdiction.<sup>10</sup>

**17. Appeal.** — An order on a question of notice under the rule will come under Section 47 and is therefore, appealable as a decree.<sup>1</sup> But an order of arrest without notice is not a *final* order and is not, therefore, appealable.<sup>2</sup> Even in such cases the High Court will interfere in its revisional jurisdiction in extreme cases.<sup>3</sup>

An order allowing or refusing an application to set aside a sale for want of a notice under the rule comes under Section 47 and is, therefore, appealable as a decree.<sup>4</sup>

O. 21 R. 23

**R. 23. [S. 249.]** (1) Where the person to whom notice

*Procedure after issue of notice* is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

[1877, S. 249; 1859, S. 247. See Ss. 38, 47, 51 and Rr. 24 and 57 below.]

### *Synopsis*

1 Scope of the Rule.

2 "The Court shall consider such objection"

3 Appeal

*Other Topics (miscellaneous)*

101 See Note 2  
recorded and  
legal  
26 Oudh Cas

10 (39) AIR 1939 Lah 473 (474)

Note 17

O. 21 R. 23  
Notes 1-3

**1. Scope of the Rule.** — If the person to whom notice is issued under Rule 22 does not appear and show cause against execution, the Court is bound to order execution. Thereupon such person will be concluded and bound by the order and cannot go behind it.<sup>1</sup> If, however, the execution application is subsequently dismissed under Rule 57 of this Order, the dismissal has been held to have the effect of vacating the previous order for execution.<sup>2</sup>

If, on the day fixed, neither party appears, the application can be dismissed.<sup>3</sup>

**2. "The Court shall consider such objection."** — If the person to whom the notice is issued appears and offers objections, the Court is equally bound to consider those objections.<sup>4</sup> There is no particular form in which the objections are to be presented and, if in writing, they need not be verified.<sup>5</sup>

Such objections should, however, go to the root of the executability of the decree,<sup>6</sup> and not be merely formal or immaterial ones which do not prevent execution,<sup>7</sup> for, apart from considering whether the decree is executable or not, the executing Court cannot go behind the decree. See Section 38, Note 8.

**3. Appeal.** — An order allowing or refusing execution under this rule is appealable as a decree.<sup>8</sup>

## PROCESS FOR EXECUTION

**R. 24.** [Ss. 250, 251, para. 1.] (1) When the preliminary measures (if any) required by the foregoing

O. 21 R. 24

*Process for execution.*

rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

### Order 21 Rule 23 — Note 1

1. ('75) 23 South W R 910 (311)

('95) 22 Cal 558 (561) (Even though the legal representative objects to the power of transferee Court to issue such notice)

2. ('67) 8 South W R 200 (200).

3. ('86) 8 All 377 (380).

4. ('97) 21 Bom 314 (317) (Or that a judgment-debtor had died after hearing but before judgment)

proceeding it was open to the judgment debtor

2. ('16) AIR 1916 Mad 886 (886)

3. ('95) 20 Bom 541 (542)

### Note 2

1. ('10) 5 Ind Cas 546 (547) (All)

('67) 8 South W R 200 (200)

('70) 11 South W R 155 (155).

1. ('11) 9 Ind Cas 760 (760) (Mad)

'88) 11 Mad 130 (132)

('11) 9 Ind Cas 823 (823) (Lah) (But order of a Court that no warrant of attachment should issue before a certain date is not appealable = no order in execution had been made)

O. 21 R. 24  
Note 1

(3) In every such process a day shall be specified on or before which it shall be executed

[1877, Ss 250, 251 (1), 343; 1859, Ss 221, 222. Cf. R S C, O. 42 Rr 14 and 16 See S 51.]

### Local Amendments

#### ALLAHABAD

After the words at the end of sub rule (3) 'be executed' add the words 'and a day shall be specified on or before which it shall be returned to Court'

#### BOMBAY

Add the following proviso to sub rule (2)

Provided that a First Class Subordinate Judge may, in his special jurisdiction send a process to another subordinate Court in the same district for execution by the proper officer in that Court

#### CALCUTTA

Add the following to sub rule (3)

and a day shall also be specified on or before which it shall be returned to the Court

#### MADRAS

Delete the full stop at the end of sub rule (3) and add the following words

and a day shall be specified on or before which it shall be returned to Court

#### NAGPUR

In sub rule (3) for the word 'executed,' substitute the words 'returned to the Court'

#### ODDH

In sub rule (3) after the words at the end of the sub rule 'be executed', add the words 'and a day shall be specified on or before which it shall be returned to Court'

#### RANGOON

In sub rule (3) add the following

and a day shall also be specified on or before which it shall be returned to the Court

#### SIND

Add the following proviso to sub rule (2)

'Provided that First Class Subordinate Judge may in his special jurisdiction send a process to another Subordinate Court in the same district for execution by the proper officer in that Court'

### Synopsis

1 "Shall issue process."

2 "Shall be sealed"

3 Delegation of authority to execute, if can be made

4 Arrest or attachment without warrant

5 "Shall be signed"

6 "A day shall be specified on or before which it shall be executed"

7. Application of the Rule to Revenue Courts.

### Other Topics (miscellaneous)

Presumption as to authority to sign and onus 'Unless it sees cause to the contrary See Note 5 Note 1

1. "Shall issue process." — If the preliminary measures prescribed by the previous rules have been taken, the Court is bound to issue process and cannot refuse

to do so unless 'it sees cause to the contrary' such as the judgment debtor being entitled to a right to set off or the applicant asking for simultaneous execution<sup>1</sup>

In the absence of any such cause the Court cannot refuse issue of process<sup>2</sup> The fact that a previous execution application proved infructuous will not justify such a refusal<sup>3</sup>

**2 "Shall be sealed"** — Every process issued under this rule *shall* be sealed The provision is mandatory and without the seal the process will be invalid and its execution illegal<sup>1</sup> Resistance to the execution of such a process will therefore constitute no offence<sup>2</sup>

**3 Delegation of authority to execute, if can be made** — The rule only says that the process shall be *delivered* to the proper officer *to be executed* It is not necessary that the proper officer should himself execute the process<sup>1</sup> and there is nothing to prevent his delegating a subordinate of his to execute the process<sup>2</sup> But a process issued to a buliff cannot be executed by a nazir<sup>3</sup>

**4 Arrest or attachment without warrant** — An officer effecting an arrest or attachment should have the warrant in his possession otherwise the arrest<sup>1</sup> or attachment<sup>2</sup> will be illegal

**5 "Shall be signed"** — A process issued under this rule which is not signed by the Judge is illegal<sup>1</sup> If however any other officer of the Court is specially authorized in this behalf it is enough if it is signed by him<sup>2</sup> Such authority should be in writing and kept in the Court<sup>3</sup> If however such process is signed by a sheristadar by order the presumption will be that he was authorized in this behalf<sup>4</sup> and the onus of showing that he had no such authority will be on the party who denies the authority<sup>5</sup>

**6 "A day shall be specified on or before which it shall be executed"** — A warrant which does not specify the date on or before which it is to be executed is invalid and its execution is illegal<sup>1</sup>

If such date is specified the process should be executed on or before that date its execution later is illegal<sup>2</sup>

#### Order 21 Rule 24 — Note 1

1 (84) 10 Cal 817 (819)

2 (97) 1897 Pun Re No 57 p 252

3 (71) 17 Suth W R 165 (166)

#### Note 2

1 (19) AIR 1919 Pat 404 (405) 3 Pat L Jour 636

(95) AIR 1935 All 214 (215) 57 All 600

2 (26) AIR 1926 Pat 237 (238 239) 5 Pat 216

#### Note 3

1 (95) 22 Cal 596 (604 605)

2 (84) 11 All 385 (388)

(37) AIR 1932 All 227 (227)

(95) 22 Cal 596 (609)

(35) 22 Cal 799 (761)

(10) 5 Ind Cas 409 (410) 37 Cal 122 (But a can

3 1 1 1 Jour

#### Note 4

1 (83) 5 All 318 (321)

2 (05) 27 All 258 (259)

#### Note 5

1 (85) 7 All 506 (509 510) (PC) (Execution

sale was set aside)

(85) AIR 1935 All 214 (215) 57 All 600 (Process signed by amin but not bearing seal of Court— Attachment is illegal — Hence removal of such property is not offence)

2 (02) 6 Cal W N 645 (846 847)

(86) 8 All 293 (294) (The signature may be confined to the initials)

(20) AIR 1920 All 51 (52) (Signature by peshkar who was not authorized)

3 (87) 1887 All W N 42 (42)

4 (23) AIR 1923 Cal 584 (585)

5 (19) AIR 1919 Pat 404 (405) 3 Pat L Jour 636

#### Note 6

1 (10) 5 Ind Cas 409 (410) 37 Cal 122

(16) AIR 1916 Pat 222 (223) 1 Pat L Jour 550

(34) AIR 1934 All 1016 (1017) (Resistance to execution of warrant in such case is not an offence)

2 (84) 10 Cal 18 (19)



O. 21 R. 24  
Notes 6-7

If the time has been extended, the extended date should be specified, otherwise the execution of the process will be illegal.<sup>3</sup>

Under the rule as amended by the High Court of Allahabad a date has to be fixed also for the return of the process. When it is so fixed the process cannot be executed after that date.<sup>4</sup>

**7. Application of the Rule to Revenue Courts.**—The provisions of this rule have been held to apply to warrants issued under Section 131 of the Central Provinces Land Revenue Act.<sup>1</sup>

O. 21 R. 25

**R. 25.** [Ss. 343 and 251, last para.] (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

[1877, S. 251, last para.; 1859, S. 222, last para.]

#### Local Amendments

##### ALLAHABAD

*Substitute the following for paragraph (2)·*

“(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.”

##### MADRAS

*(1) Substitute the following in the place of the present sub rule (2)*

“(2) Where in the case of a decree for the payment of money the process is not executed owing to the decree having been satisfied, such officer shall also obtain an endorsement on the process to that effect signed by the decree-holder and attested by two respectable witnesses who can identify the decree holder.”

*(2). Add the following as sub-rule (3)*

“(3) Where the endorsement of such officer is to the effect that he is unable

direction to execute it at a date earlier than that fixed by the Court and executed by the poon between the two dates is executed rightly)

3. (10) 5 Ind Cas 409 (410) 37 Cal 122

4. (33) AIR 1933 All 46 (47) · 55 All 119.

#### Note 7

1. (24) AIR 1924 Nag 68 (69) 10 Nag L R 183.  
(Where the date fixed for the return had already expired on the day the process server went to execute it he was not acting in the execution of his duty)

to execute the process the Court shall examine him or cause him to be examined by any other Court touching his alleged inability and may if it thinks fit summon and examine witnesses as to such inability and shall record the result

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause

Where the inability to execute the process is stated to be due to the satisfaction of the decree and such satisfaction has been endorsed on the process as mentioned in sub rule (9) above the Court shall issue notice to the decree holder to show cause on a day to be fixed by the Court why such satisfaction should not be recorded as certified and if after service of such notice the decree holder fails to show cause why the satisfaction should not be recorded as certified the Court shall record the same accordingly

A record of satisfaction under the provisions of this sub rule shall have the same effect as one under the provisions of Order 21 Rule 2 sub rule (2)

**OUDH**

For the existing sub rule (2) substitute the following

(2) Where the endorsement is to the effect that such officer is unable to execute the process the Court may examine him personally or upon affidavit touching his alleged inability and may if it thinks fit summon and examine witnesses as to such inability and shall record the result

### Synopsis

- 1 Officer entrusted with the execution \*
- 2 Delegation of process See Note 3 Rule 24
- 3 Proof of execution

1 "Officer entrusted with the execution" — The Officer entrusted with execution is the person who himself executed the process and not the Nazir<sup>1</sup>

2 Delegation of process — See Note 3 Rule 24

3 Proof of execution — The report of the Nazir regarding execution of process is by itself not evidence It must be proved like any other documentary evidence<sup>1</sup>

### STAY OF EXECUTION

**R. 26.** [Ss 239, 240] (1) The Court to which a decree

O 21 R 26

When Court may  
stay execution

has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order

Order 21 Rule 25 — Note 1

1 (18) 19 Ind Cas 706 (1907) 40 Cal 849

Note 3

1 (81) 7 Cal 34 (1888)

(1885) 3 Suth W R Misc 11 (15)

(1864) 1864 Suth W R (Gap) Misc 9 (9)

(1865) 4 Suth W R Misc 4 (5)

(66) 6 Suth W R Act N 9<sup>o</sup> (93)

(68) 10 Suth W R 3 (4)

(69) 12 Suth W R 365 (366)

(72) 16 Suth W R 197 (197)

**O. 21 R. 26** relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto

(2) Where the property or person of the judgment debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit

**Power to require security from or impose conditions upon judgment debtor**

[1877, Ss 239, 240, 1859, Ss 290, 291 *Of R S C*, O 42 R 17 cl (b) See Ss 42 and 47 ]

#### Local Amendments

##### ALLAHABAD

*For the words the Court may read the words the Court shall unless good cause to the contrary is shown in sub rule (3)*

##### CALCUTTA

*In sub rule (3) cancel the words the Court may require such security from or impose such conditions upon the judgment debtor as it thinks fit and substitute there for the following words*

*the Court shall require security from the judgment debtor unless sufficient cause is shown to the contrary*

##### LAHORE

*For the words the Court may substitute the words the Court shall unless sufficient cause is shown to the contrary in sub rule (3)*

##### NAGPUR

*In sub rule (3) for the word may substitute the words shall unless good cause to the contrary is shown*

##### N W F P

*In sub rule (3) for the words the Court may substitute the words the Court shall unless good cause to the contrary is shown*

##### ODDH

*In sub rule (3) for the words the Court may read the words the Court shall unless good cause to the contrary is shown*

##### FATNA

*In sub rule (3) substitute the words shall unless sufficient cause is shown to the contrary for the word may*

##### RANGOON

*In sub rule (3) for the word may the words shall unless sufficient cause is shown to the contrary shall be substituted*

## Synopsis

O. 21 R. 26  
Notes 1-2

### 1. Scope of the Rule.

### 2. Appeal.

### Other Topics (miscellaneous)

Powers of transferee Court See Note 1      Sub rule (3) See Note 1

**1. Scope of the Rule.** — Under Section 42 *ante* the Court executing a decree sent to it has the same powers in *executing* such a decree as if the decree had been passed by itself. But such Court cannot question the legality of the order under which the decree was sent to it for execution, nor can it decide the question whether the decree was barred by limitation on the date of the order. See Section 42, Note 1, *ante*.

Such question can properly be dealt with only by the Court which passed the decree and, therefore, to enable the judgment debtor to apply to such Court for an order in respect of the decree which is sought to be executed, the Court to which a decree is sent for execution may order stay of execution under this rule.<sup>1</sup>

Thus, the executing Court may order stay of execution —

- (i) to enable the judgment debtor to get the decree amended,<sup>2</sup>
- (ii) to enable him to show that the decree is satisfied,<sup>3</sup> or is not existing,<sup>4</sup>
- (iii) to enable him to get the decree passed *ex parte* against him set aside,<sup>5</sup>
- (iv) to enable him to get the decree passed against him set aside on the ground that it was obtained by fraud,<sup>6</sup>
- (v) for deciding if the decree is barred.<sup>7</sup>

An order for stay of execution under this rule can only be passed on the application of the *judgment debtor* and no stay can be granted on the application of *third parties* or of the *decree holder*.<sup>8</sup>

Under sub-rule (3) of this rule the Court may impose conditions or require security, as it thinks fit, before directing stay of execution.<sup>9</sup>

A Court to which a decree has been sent for execution has no power to refuse to execute the decree even for a short period except in the circumstances set out in this rule.<sup>10</sup>

Under Section 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908), the provisions of the Code relating to stay of execution apply to proceedings referred to in that Section.

**2. Appeal.** — An order directing security under sub rule (3) is not an order determining the *rights of parties* and is not therefore appealable as a decree under Sections 47 and 96.<sup>1</sup> See also Note 44 to Section 47, *ante*.

#### Order III Rule 26 — Note 1

1. ('80) 8 Cal 736 (737)  
(75) 23 Suth W II 154 (155)

6. ('82) 4 Mad 324 (325)

7. ('86) 111 Cal 257 (261)

(62) 8 Cal 916 (918)

[See also ('36) AIR 1936 Rang 271 (278) : 14 Rang 550]

8. ('31) AIR 1931 Lah 690 (691)

('86) 12 Cal 515 (519)

9. ('25) AIR 1925 Lah 552 (554)

10. ('36) AIR 1936 Rang 184 (187) (Suit in Court to which execution has been transferred, by judgment debtor for declaration that decree is void as having been obtained by fraud—Such Court cannot stay execution)

#### Note 2

1. ('14) AIR 1914 Cal 149 (149) 20 Ind Cas 111 (72, 73) 41 Cal 160

2. (Judgment contained a provision for payment of the amount due by instalment but the decree was silent)

3. ('68) 9 Suth W II 861 (361)

4. ('27) AIR 1927 Rang 104 (105) 4 Rang 562

5. ('67) 8 Suth W R 202 (203)

O. 21 R. 27

**R. 27. [S. 241.]** No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

[1877, S. 241; 1859, S. 293. See S. 58, sub-s. (2) and O. 21 R. 40 sub-rule (4) ]

**1. Scope of the Rule.** — Under Section 58, sub section (2) *supra*, a judgment-debtor released from detention under *that Section* is not liable to be re-arrested in execution of the same decree<sup>1</sup> But an order of discharge of the judgment debtor consequent on the stay of execution *under Rule 26* above will not prevent the judgment debtor from being re-arrested in execution of the decree<sup>2</sup>

O. 21 R. 28

Order of Court which passed decree or of appellate Court to be binding upon Court applied to

**R. 28. [S. 242]** Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

[1877, S. 242; 1859, S. 292. See S. 42 and O. 21 R. 26.]

**1. Scope of the Rule.** — This rule states that any order of the Court which passed the decree in relation to execution of such decree shall be binding on the Court executing the decree<sup>1</sup> In the absence of any such order it is the duty of the Court executing the decree to enforce the decree in the same manner and to exercise the same powers as if the decree had been passed by itself<sup>2</sup>

See also Section 42 Notes 1 and 3 and the undermentioned case<sup>3</sup>

O. 21 R. 29

**R. 29. [S. 243.]** Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such

Stay of execution pending suit between decree-holder and judgment debtor.

**Order 21 Rule 27 — Note 1**

1. ( 66 ) 12 Cal 652 (657)

( 93 ) 20 Cal 574 (578)

2. ( See ( 80 ) 12 Cal 652 (657) ]

[ See also ( 02 ) 25 Bom 652 (659) ]

**Order 21 Rule 28 — Note 1**

1. ( 30 ) AIR 1930 Oudh 305 (308)

( 15 ) AIR 1915 Oudh 142 (143)

( 28 ) AIR 1936 Pesh 97 (100)

See also E. 42, Note 3

2. ( 15 ) AIR 1915 Oudh 142 (143) [Objection against right of decree-holder to proceed against property not charged in decree can be determined by Court executing decree]

3. ( 39 ) AIR 1930 All 97 (101) ILR (1930) All 181 (FB) [Allahabad Court sending decree for execution to Court in Calcutta — Former Court receiving stay order under the U P Luncumbered Estates Act should recall decree from Calcutta Court]

terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

0.21 R. 29  
Note 1

[1877, S. 243; 1859, S. 209.]

### Local Amendment

#### ALLAHABAD

*Add* "or any person whose interests are affected by the decree, or by any order made in execution thereof" after the words "was passed" and before the words "the Court may "

### Synopsis

- |  |   |
|--|---|
| <p>1. Scope of the Rule<br/>1a. "Holder of a decree."<br/>2. "Such Court."<br/>3. "Until the pending suit has been decided "</p> | <p>4. Execution of award, if can be stayed under this Rule.<br/>5. Inherent power to stay execution. See Note 8<br/>6. Appeal</p> |
|--|---|

**1. Scope of the Rule.** — If a suit by a judgment-debtor is pending in a Court against the holder of a decree of that Court, the execution of the decree may, under this rule, be stayed until the disposal of the suit<sup>1</sup> The object of this rule is twofold —

(i) to enable the judgment-debtor, and the decree-holder to adjust their claims against each other, and

(ii) to prevent a multiplicity of execution proceedings<sup>2</sup>

But the execution Court has no power, under this rule, to stay execution of the decree if at that time, no suit is pending against the holder of the decree<sup>3</sup> or if the suit is against the decree holder, but filed by *third parties*<sup>4</sup>

If the execution of the decree has been carried out and the decree holder has obtained possession of the property, the Court has no power under this rule to order *restitution* of such property<sup>5</sup>

The power to stay execution under this rule is purely a discretionary one<sup>6</sup>

The mere pendency of a suit in which the decree holder is a party is not a ground for stay of execution such stay can be granted only on sufficient grounds being made out<sup>7</sup> Thus, the pendency of a suit for administration of the estate of the mortgagor is no ground for the stay of execution of the mortgage decree<sup>8</sup> It has been held by the High Court of Calcutta that if the suit against the decree holder is for a declaration that the decree is satisfied by an uncertified adjustment out of Court, no stay of execution of the decree can be granted under this rule<sup>9</sup> But, it has been held by the High Court of Madras that this rule embraces every kind of suit which is maintainable Thus, according to the Madras High Court a suit by the judgment debtor for damages for breach of an agreement whereby the defendant had agreed to receive in satisfaction of his decree certain bonds and to get satisfaction entered up, is a suit to which this rule will apply<sup>10</sup>

O. 21 R. 29  
Notes 1-3

This rule must be read with O 21 R 92. Hence, after a sale in execution has taken place the Court cannot stay the confirmation of the sale.<sup>11</sup>

This rule has no application to the granting of injunctions and no security can be demanded in such applications on principles analogous to this rule.<sup>12</sup>

The distinction between a temporary injunction restraining the execution of a decree and a stay order is that the former is not directed to a Court but to an individual. Proceedings taken in contravention of a temporary injunction are not a nullity as being without jurisdiction and the effect of non compliance with a temporary injunction is only to make the offender liable to punishment. But proceedings in contravention of a stay order are a nullity.<sup>13</sup> See also the undermentioned case.<sup>14</sup>

1a. "Holder of a decree." — This term will include an assignee of a decree in a suit by the judgment debtor against such assignee as within this rule.<sup>1</sup>

2 "Such Court." — The Court in which the suit is pending has power to stay execution of the decree under this rule only if the decree is a decree of that Court.<sup>1</sup> Such power can be exercised by it even if the decree has been transferred for execution to another Court. But if the judgment debtor's suit is pending before the transferee Court the transferee Court has no power under this rule to stay execution of the decree.<sup>2</sup> But the contrary view has been held in the undermentioned decisions.<sup>4</sup>

The words "decree of such Court" include also the decree passed on appeal from the decree of that Court. See Section 37 ante.

The words "such Court" refer only to the Court and not to the Judge presiding over the Court. Where there are two Judges attached to the Court, and the suit is pending before one Judge and the decree is sought to be executed before the other, the Judge before whom the suit is pending has power under this rule to stay execution of the decree.<sup>6</sup>

3 "Until the pending suit has been decided." — The Calcutta High Court has held in the undermentioned case<sup>1</sup> that these words should be interpreted to mean until the claim in the pending suit has been finally decided after an exhaustion of all rights of appeal and not merely after a decree has been passed by the Court in which the suit is pending. The Rangoon High Court has also held a similar view.<sup>2</sup> But this view has been dissented from in the undermentioned Calcutta case<sup>3</sup> approving of an earlier view of the Punjab Chief Court<sup>4</sup> wherein it was held that the Court may stay execution, pending appeal under its inherent powers though not under this rule.

11. (35) AIR 1935 Rang 151 (152) 13 Rang 351

12. (33) AIR 1933 Nag 163 (155)

13. (38) AIR 1939 Lah 220 (221)

14. (36) AIR 1936 Cal 239 (240) 63 Cal 57

(Temporary injunction restraining execution—Pending suit to set aside decree—Court passing order that attachment is to subsist till decision of suit and that application for execution is to stand dismissed for time being—Order is not warranted by law—It is merely suspensory order keeping execution case pending)

Note 1a

1 (36) AIR 1936 Mad 102 (103)

Note 2

1. (67) 6 South W R 392 (393)

(30) AIR 1930 Lah 961 (969)

(04) 1304 Pun Re No 41, page 127

2. (31) AIR 1931 Bom 247 (248, 249)

3 (30) AIR 1930 All 121 (121)

(36) AIR 1936 Rang 184 (186)

[See also (7) 6 South W R 392 (393)]

4 (48) 10 All 339 (333, 394) (Outer)

(74) 11 W P H C R 181 (183)

(93) 1903 Pun Re No 130, page 533

(34) AIR 1934 Cal 4 (5) 60 Cal 1119 (On transfer of decree Court passing decree ceases to have jurisdiction to execute it and so transferee Court becomes under Sec 37 Court which passed the decree)

5 (83) 10 All 389 (393, 394)

6 (31) AIR 1931 Bom 247 (248, 249)

Note 3

1 (28) AIR 1928 Cal 292 (294) 55 Cal 512

2 (35) AIR 1935 Rang 389 (390) (Stay can be given even after a suit has been dismissed provided that an appeal is pending)

3 (32) AIR 1932 Cal 19 (20) 58 Cal 1113

4 (10) 7 Ind Cas 1017 (1018) 1910 Pun Re No 62

O. 21 R 29  
Notes 4-6

**4. Execution of award, if can be stayed under this Rule.** — An award filed into Court under Section 11 of the Arbitration Act of 1899 is *enforceable* as a decree of the Court under Section 15 of that Act. But Section 15 does not enact that the award, when filed, is to be *deemed* to be a decree of the Court.<sup>1</sup> Nor does it give any "power to turn such an award into a judgment."<sup>2</sup> Therefore, it has been held by the High Court of Bombay<sup>3</sup> that the provisions of this rule cannot apply to *stay* execution of an award. The Calcutta High Court has held that the words "*enforceable* as a decree" mean that *all* the provisions relating to execution of decrees such as O 21 R 16 (transfer of decrees)<sup>4</sup> and O 21 R 50 (execution by or against firms)<sup>5</sup> are applicable to the execution of awards as well.

**5. Inherent power to stay execution.** — See Note 3 above

**6. Appeal.** — An order directing security to be given is not appealable as it does not determine conclusively the rights of the parties, but the High Court may, if the discretion is not judiciously exercised, interfere in revision.<sup>1</sup> See also Note 44 to Section 47, *supra*

### Local Amendment

N.-W.F.P.

After Rule 29 the following Rule shall be *added*

"29A. When a suit under Rule 63 of this Order is pending, the Court in which such suit is filed, may, if it considers that execution of the former decree should be stayed intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided

O. 21 R. 29A.  
(N.-W.F.P.)

### MODE OF EXECUTION

**R. 30. [S. 254.]** Every decree for the payment of money,

O. 21 R. 30-

Decree for payment of money including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both

[ 1887, S. 254; 1859, Ss. 201, 232. ]

### Synopsis

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Decree for the payment of money"</li> <li>3. As an alternative to some other relief<br/>See Notes to O 20 R 10</li> <li>4. Option as to mode of execution.</li> </ol> | <ol style="list-style-type: none"> <li>5. Detention of surety in civil prison.<br/>See Note 14 to S 145</li> <li>6. Attachment and sale.</li> <li>7. Rule not exhaustive of modes of execution</li> <li>8. Notice to judgment-debtor.</li> </ol> |
|---|--|

**1. Scope of the Rule.** — The words "every decree for the payment of money" have been substituted for the words "every decree or order directing a party to pay money" which occurred in Section 254 of the old Code. It was held under the old Code that an order directing a party to refund money wrongly drawn out by him is

#### Note 4

1. (22) AIR 1922 PC 374 (377) 49 Ind App 366  
50 Cal 1 (PC)
2. [See (1907) 1 K. B. 478 at 482, *In re a Bankruptcy Notice* (Per F. Moulton, L. J.)]

#### 3. (1907) 1 K. B. 478 at 482, *In re a Bankruptcy Notice*

4. —
5. —
1. (22) AIR 1922 Sind 110 (111)



O 21 R 20  
Notes 1-6

land acquisition proceedings could be enforced under that Section<sup>1</sup> The same procedure will apply under this Code in view of the provisions of Section 36 *ante*

Under clauses (4) and (5) of Section 36 of the Presidency Towns Insolvency Act (III of 1909) the Insolvency Court is authorized to order payment of money or delivery of property by strangers to the Official Assignee where their liability to the insolvent is established on enquiry Clause (6) of Section 36 of that Act enacts that such orders shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Civil Procedure Code

**2 "Decree for the payment of money"**—A decree under which maintenance is payable periodically at a certain rate is a decree for the payment of money<sup>1</sup>

See also Note 6 to Section 73

**3 As an alternative to some other relief** — See Notes to O 20 R 10

**4 Option as to mode of execution** — It is for the *decree holder* to decide how he should execute his decree for the payment of money whether by the arrest of the judgment debtor or by attachment and sale of his property While the Court has discretion to refuse execution against the person and property simultaneously under Rule 21 *supra* it cannot compel the decree holder to adopt any particular mode of execution<sup>1</sup> A decree for rent under the Bengal Tenancy Act is a decree for the payment of money and the decree holder has the right to ask for personal execution against the judgment debtor notwithstanding that he has also the right to sell the tenure in arrears<sup>2</sup>

**5 Detention of surety in civil prison** — See Note 14 to Section 145

**6 Attachment and sale** — The words attachment and sale in this rule must be taken together and not distributively Therefore an attachment is a necessary preliminary to a sale<sup>1</sup> As to what property can be attached see Section 60 and as to whether absence of attachment is a material irregularity or not see Notes to Rule 90 *infra*

This rule applies only to cases of decrees for money which do not affect any specific immovable property Thus where a consent decree provided that if a certain

**Order 21 Rule 30 — Note 1**  
1 (05) 3<sup>rd</sup> Cal 921 (928)

Decree holder can proceed against any one of them)

**Note 2**  
1 (71) 15 South W R 123 (1909)  
(20) AIR 1920 Pat 686 (639)

**Note 4**

stance)

accept payment in instalments)  
(34) AIR 1934 Nag 140 (141)  
(39) AIR 1933 Pat 350 (381) 180 Ind Cas 767  
(768 769) 18 Pat 666  
(See also (35) AIR 1935 All 179 (180) {Application for execution of money decree by attachment and sale—Part of property hypothecated to decree holder as security bond—Object on by judgment debtor that suit on bond should be instituted first is not maintainable}  
(33) AIR 1933 Lah 831 (832) {Choice to proceed against two properties given by decree—

**But see** (82) 4 All 497 (498) {Where execution against hypothecated property was refused on the ground of fraud—Not law under this Code}

2 (04) 8 Cal W N 575 (5 7)  
(88) 15 Cal 432 (496)  
(83) 17 Cal 301 (303)

**Note 6**

1 (67) 8 South W R 415 (419)

sum of money is not paid by a certain date some specific immovable property should be sold no attachment is necessary under this rule<sup>2</sup>

O 21 R 30  
Notes 6-8

The holder of a decree for arrears of rent is not bound to proceed in the first instance against the property in respect of which the arrears are due but may proceed against other property of the judgment debtor<sup>3</sup> See also Note 4 to Section 51

**7 Rule not exhaustive of modes of execution** — The words *may* be executed in this rule show that it does not purport to be exhaustive of the modes of execution of money decrees See also O 21 R 11 Therefore rateable distribution of assets is a mode of execution of a decree for the payment of money<sup>1</sup> Though Section 51 prescribes the appointment of a receiver as one of the modes of execution nothing is mentioned about it in this rule since the subject is dealt with in Order 40 *infra*<sup>2</sup> Execution of a money decree by ejectment of a tenant is a method provided by Section 61 of the Oudh Rent Act in addition to the modes prescribed by this Code<sup>3</sup>

**8 Notice to judgment-debtor** — The Court has ample jurisdiction to issue a warrant of arrest under this Section without previously serving a notice on the judgment debtor<sup>1</sup>

## R. 31. [S 259] (1) Where the decree is for any specific

O. 21 R. 31

Decree for specific  
moveable property

moverable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moverable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment debtor, or by the attachment of his property, or by both

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold, and out of the proceeds

found out by Court and properties directed to be sold — Attachment held revived — Order is proper ]]

and that judgment debtor will not be entitled to alienate it — Attachment before sale is not necessary ]]

3 (35) AIR 1935 Cal 544 (544)

Note 7

gauge decrees direct on for sale in the decree is the authority to sell and therefore no attach

decree for payment of money by means of appointment of receiver under O 40 R 1)

3 (13) 19 Ind Cas 33 (39) 15 Oudh Cas 331

Note 8

1 (32) AIR 1932 Cal 847 (849)

execution without attachment)

(36) AIR 1936 Lah 573 (573) (Decree directing property to be considered as under mortgage

**O.21 R.31** the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[1877, Ss. 259, 260; 1859, S. 200.]

#### Local Amendments

##### ALLAHABAD

For the words wherever they occur in each sub-rule, "six months", read the words 'three months or such extended time as the Court may for good cause direct'

##### CALCUTTA

In sub rules (2) and (3), *substitute* the words "three months" for the words "six months"

##### LAHORE

(1) In sub rule (2) for the word "six" *substitute* the word "three"

(2) *Add* the following proviso after sub-rule (2):

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months, but it shall in no case exceed six months in all"

(3). In sub-rule (3), for the words "six months" *substitute* the following words "three months or such other period as may have been prescribed by the Court"

##### MADRAS

In sub rules (2) and (3), for the words "six months", *substitute* the words "three months", and *add* the following as sub-rule (4)

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit"

##### NAGPUR

In sub-rules (2) and (3), for the words "six months" wherever they occur, *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct."

##### N.-W F.P.

In sub rules (2) and (3), for the words "six months", *substitute* the words "three months", and *add* the following as sub rule (4)

"(4) The Court may, on application, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in all as it may think fit"

##### OUDDH

In sub rules (2) and (3), for the words "six months" *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct"

## PATNA

In sub rules (2) and (3) for the words "six months" substitute "three months", and add the following as sub-rule (4)

O. 21 R. 31  
Notes 1-5

"(4) The Court may, for sufficient cause, extend the period of three months mentioned in sub rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit"

## RANGOON

In sub rules (2) and (3), for the words "six months" the words "three months" shall be substituted. The following shall be added as sub rule (4) of Rule 31

"(4) The Court may, on application, extend the period of three months mentioned in sub rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit"

## Synopsis

1. Legislative changes

2. Scope of the Rule

3. Decree for specific moveable property.

4. Seizure of property not in the possession of the judgment debtor

5. Alternative damages—Sub rule (2).

6. "In other cases such compensation as it thinks fit"

**1. Legislative changes.**—The words "or for the recovery of a wife" which occurred in Section 259 of the old Code after the words "share in a specific moveable" have been omitted in this rule. The reason is that the wife is not a chattel and cannot, therefore be delivered to her husband. See Notes to Rule 33, *infra*

**2. Scope of the Rule.**—This rule does not apply to a case where the property sought to be seized is not in the possession of the judgment debtor, but in the custody of a third party<sup>1</sup>. The words "specific moveable" in this rule do not include money and therefore a decree for money cannot be executed under the provisions of this rule<sup>2</sup>

In order to enable a person to obtain delivery of specific moveable property by suit and to enforce the decree by the stringent methods prescribed in this rule, the plaintiff must allege and prove facts which give him a right to compel the delivery of the specific moveables under Section 11 of the Specific Relief Act (I of 1877)<sup>3</sup>

An order under Section 36, clause (5) of the Presidency Towns Insolvency Act (III of 1909) for delivery of any property can be executed in the manner specified in this rule

**3. Decree for specific moveable property.**—A decree for possession of three fourths of a person's estate consisting of moveable and immovable property is a decree that can be executed under this rule so far as the moveable property is concerned<sup>4</sup>

**4. Seizure of property not in the possession of the judgment-debtor.**—It has been held in the undermentioned case<sup>1</sup> that Rule 58 *infra* is applicable not only to attachments in execution of money decrees, but also to seizures under this rule

**5. Alternative damages—Sub-rule (2).**—O 20 R 10 provides that the decree in a suit for moveable property should state a certain amount of money as an

Order 21 Rule 31—Note 2

1 (97) 1 Cal W N 170 (172)

2. (14) AIR 1914 Mad 573 (573) 14 Ind Cas 251 (255) 37 Mad 381

(38) AIR 1938 Cal 471 (474)

3 (16) AIR 1916 Mad 314 (317) 39 Mad 1 (FB)

(38) AIR 1938 Cal 471 (474)

Note 3

1. (50) 1908 Pun W R No 60

Note 4

1 (94) 7 C P L R 10, (109, 110)

**0.21 R.31** the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[1877, Ss 259, 260; 1859, S. 200.]

#### Local Amendments

##### ALLAHABAD

For the words wherever they occur in each sub rule, "six months", read the words "three months or such extended time as the Court may for good cause direct"

##### CALCUTTA

In sub rules (2) and (3), *substitute* the words "three months" for the words "six months"

##### LAHORE

(1) In sub rule (2) for the word "six" *substitute* the word "three"

(2) *Add* the following proviso after sub rule (2).

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months, but it shall in no case exceed six months in all"

(3) In sub rule (3), for the words "six months" *substitute* the following words "three months or such other period as may have been prescribed by the Court"

##### MADRAS

In sub rules (2) and (3), for the words "six months", *substitute* the words "three months", and *add* the following as sub rule (4)

"(4) The Court may on application extend the period of three months mentioned in sub rules (2) and (3) to such period not exceeding six months on the whole as it may think fit"

##### NAGPUR

In sub rules (2) and (3), for the words "six months" wherever they occur, *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct"

##### N-W.F.P.

In sub rules (2) and (3), for the words "six months", *substitute* the words "three months", and *add* the following as sub rule (4)

"(4) The Court may, on application, extend the period of three months mentioned in sub rules (2) and (3) to such period, not exceeding six months in all as it may think fit"

##### ODDH

In sub rules (2) and (3), for the words "six months" *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct"

## PATNA

O. 21 R. 31  
Notes 1-5

In sub rules (2) and (3) for the words "six months" substitute "three months", and add the following as sub rule (4)

"(4) The Court may, for sufficient cause, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit"

## RANGOON

In sub rules (2) and (3), for the words "six months" the words "three months" shall be substituted. The following shall be added as sub rule (4) of Rule 31

"(4) The Court may, on application, extend the period of three months mentioned in sub rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit"

## Synopsis

## 1 Legislative changes

## 2. Scope of the Rule

## 3. Decree for specific moveable property.

## 4 Seizure of property not in the possession of the judgment-debtor

## 5 Alternative damages—Sub rule (2)

## 6. "In other cases such compensation as it thinks fit"

**1. Legislative changes.**—The words "or for the recovery of a wife" which occurred in Section 259 of the old Code after the words "share in a specific moveable" have been omitted in this rule. The reason is that the wife is not a chattel and cannot, therefore, be delivered to her husband. See Notes to Rule 33, *infra*

**2. Scope of the Rule.**—This rule does not apply to a case where the property sought to be seized is not in the possession of the judgment debtor, but in the custody of a third party<sup>1</sup>. The words "specific moveable" in this rule do not include money and therefore a decree for money cannot be executed under the provisions of this rule<sup>2</sup>

In order to enable a person to obtain delivery of specific moveable property by suit and to enforce the decree by the stringent methods prescribed in this rule, the plaintiff must allege and prove facts which give him a right to compel the delivery of the specific moveables under Section 11 of the Specific Relief Act (I of 1877)<sup>3</sup>

An order under Section 36 clause (5) of the Presidency Towns Insolvency Act (III of 1909) for delivery of any property can be executed in the manner specified in this rule

**3. Decree for specific moveable property.**—A decree for possession of three fourths of a person's estate consisting of moveable and immovable property is a decree that can be executed under this rule so far as the *moveable* property is concerned<sup>1</sup>

**4. Seizure of property not in the possession of the judgment-debtor.**—It has been held in the undermentioned case<sup>1</sup> that Rule 58 *infra* is applicable not only to attachments in execution of money decrees, but also to seizures under this rule

**5. Alternative damages—Sub-rule (2).**—O 20 R 10 provides that the decree in a suit for moveable property should state a certain amount of money as an

Order 21 Rule 31—Note 2

1 (97) 1 Cal W N 170 (172)

2. (14) AIR 1914 Mad 572 (573) 14 Ind Cas 251 (255) 37 Mad 381

(35) AIR 1933 Cal 471 (474)

3 (16) AIR 1916 Mad 314 (317) 32 Mad 1 (FD) (39) AIR 1933 Cal 471 (474)

Note 3

1. (08) 1908 P W R 60

Note 4

2. (94) 7 C P L R 100 (109 110)

O 21 R.31  
Notes 5-6

alternative if delivery of the chattel in dispute cannot be had. This rule provides that if the goods are capable of delivery, they must be delivered and that if they are not, then the assessed damages should be paid.<sup>1</sup> Where a decree is passed as provided by O 20 R 10 the decree holder cannot execute the money portion of the decree alone without following the procedure prescribed by this rule: *i.e.*, without applying for delivery of the moveable property.<sup>2</sup>

6 "In other cases, such compensation as it thinks fit" — A decree for the delivery of a specific moveable need not necessarily in all cases be in the alternative form and an enquiry as to damages in such cases may more profitably be held in execution.<sup>1</sup> Such damages need not be assessed only on the footing of wilful neglect or devastation.<sup>2</sup>

O.21 R.32

### R. 32. [S. 260] (1) Where the party against whom a

Decree for specific performance for restitution of conjugal rights or for an injunction

decree<sup>3</sup> for the specific performance of a contract,<sup>3</sup> or for restitution of conjugal rights,<sup>4</sup> or for an injunction,<sup>5</sup> has been passed, has had an opportunity of obeying the decree<sup>7</sup> and has wilfully failed to obey it, the decree may be enforced "in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction<sup>1</sup> by his detention in the civil prison, or by the attachment of his property, or by both

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold,<sup>8</sup> such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and  
paid any, or

1 (71  
(90) 1

(See also (13) 19 South W R 82 (88) ]  
2 (27) AIR 1927 Cal 652 (653) 55 Cal 26

1 (35) AIR 1935 Cal 39 (63) 61 Cal 711  
2 (35) AIR 1935 Cal 39 (63) 61 Cal 711

where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

O. 21 R. 32

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed,<sup>9</sup> the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

#### Illustration

*A*, a person of little substance erects a building which renders uninhabitable a family mansion belonging to *B*. *A*, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of *A*'s property would adequately compensate *B* for the depreciation in the value of his mansion. *B* may apply to the Court to remove the building and may recover the costs of such removal from *A* in the execution proceedings.

a. Inserted by the Code of Civil Procedure (Amendment) Act, 1923 Section 2

[1877, Ss. 259, 260; 1859, S. 200, *Cf.* R. S. C., O. 42 Rr. 7 and 30.]

#### Local Amendments

##### ALLAHABAD

For the words "one year," in sub rule (3), *read* the words "three months," and *after* the words at the end of the sub rule, "on his application," *add* the words "the Court may for good cause extend the time."

##### CALCUTTA

In sub rule (3), *substitute* the words "three months" for the words "one year."

##### LAHORE

(1) In sub rule (3), for the words "one year," *substitute* the words "three months."

(2) *Add* the following proviso to sub rule (3)

"Provided that the Court may, for sufficient reasons, on the application of the judgment debtor, extend the period beyond three months, but it shall in no case exceed one year in all."

(3) In sub rule (4), for the words "one year", *substitute* the words "three months or such other period as may have been prescribed by the Court."

##### MADRAS

(1) In sub rule (3)

(i) for the words "one year" *substitute* the words "three months".

(ii) after the word "application", *insert* the words "the Court may on application extend the period of three months mentioned herein to such period not exceeding one year on the whole as it may think fit."

(2) In sub rule (4), for the words "one year", *substitute* the words "three



O. 21 R. 32  
Note 1

months", and after the words "the date of the attachment" add "or of such extended period which the Court may order under sub rule (3)"

## NAGPUR

(1) In sub rule (3)

(a) for the words "one year" substitute the words "three months",

(ii) after the word "application", insert the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year", and

(2) In sub rule (4), for the words "one year", substitute the words "three months, or such further time as may have been fixed by the Court under sub rule (3)"

## N.W.F.P.

In sub rule (3), for the words "for one year," substitute the words "for three months or such further period not exceeding one year in the whole as may be fixed by the Court"

## ODDH

(1) In sub rule (3), for the words "one year," substitute the words "three months and at the end of the sub rule, add the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year"

(2) In sub rule (4) for the words "one year," substitute the words "three months, or such further time as may have been fixed by the Court under the previous sub-rule

## PATNA

In sub rule (3) for the words "for one year" substitute the words "for three months or for such further period, not exceeding one year in the whole, as may, on sufficient cause shown, be fixed by the Court"

## RANGOON

In sub rule (3), for the words "for one year," the words "for three months or for such further period, not exceeding one year in the whole, as may be fixed by the Court on the application of the judgment debtor" shall be substituted

## Synopsis

- |   |   |
|---|---|
| 1 Legislative changes.                              | 7. "Opportunity of obeying the decree."                         |
| 2 Scope of the Rule.                                | 8 Sale of property — Sub-rule (3)                               |
| 3 Decree for specific performance                   | 9. Disobedience of order for injunction or specific performance |
| 4 Restitution of conjugal rights                    | 9a Disobedience of decree for restitution of conjugal rights    |
| 5 Form of decree for restitution of conjugal rights | 10 Effect of procedure under this Rule.                         |
| 6 Decree for injunction                             | 11 Limitation   |
1. Legislative changes. —
  - 1 The words "or for an injunction" have been substituted for the words "or for the performance of or abstention from any other particular act"
  - 2 Sub rules (2) and (5) are new
  - 3 In sub rule (3), the word "shall" has been substituted for the word "may"
  - 4 The words "or if made has been refused" are new

## Amendment after 1908 —

The words "in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for specific performance of a

contract or for an injunction" have been newly inserted by Act XXIX of 1923 See Note 4 below

O.21 R.32  
Notes 1-5

**2. Scope of the Rule.**— A decree which does not contain any direction to the defendant to do or to refrain from doing any act, but is merely a *declaratory* one, cannot be executed under this rule<sup>1</sup>

**3. Decree for specific performance.**— As to the cases in which specific performance can be decreed, see Sections 12 to 30 of the Specific Relief Act (I of 1877) See also the undermentioned cases<sup>1</sup> A decree for specific performance of a contract for sale of immovable property does not by itself pass title<sup>2</sup> It has been held by the High Court of Patna<sup>3</sup> that the Court executing a decree for specific performance of a contract of sale is competent to grant possession of the property to the decree holder, even though no relief for possession was either asked for in the plaint or awarded by the decree See also Order II Rule II Note 16, *supra*

A decree for specific performance operates in favour of both parties The defendant is as much entitled to enforce it as the plaintiff A decree that an agreement ought to be specifically performed is a decree against the plaintiff as well as against the defendant, and in favour of the defendant as well as in favour of the plaintiff The defendant is equally a decree holder in such cases<sup>4</sup>

**5. Restitution of conjugal rights.**— A decree for the restitution of conjugal rights passed under the Parsi Marriage and Divorce Act (XV of 1865) is not executable under this rule, since Section 36 of that Act provides a remedy in substitution of the remedy under this rule<sup>1</sup> But such a decree between Hindus or Mahomedans can be enforced under this rule<sup>2</sup>

A wife is not a chattel and cannot, therefore, be delivered as such in execution under the previous rule or this rule<sup>3</sup> A suit for recovery of a wife must, therefore, be treated as a suit for the restitution of conjugal rights<sup>4</sup> It was held in the undermentioned cases<sup>5</sup> that where a wife disobeyed a decree for the restitution of conjugal rights passed against her, the decree could be enforced by her imprisonment or by the attachment of her property or by both But, since the amendment of this rule by Act XXIX of 1923 referred to in Note 1 above, such a decree can be enforced only by the attachment of the defendant's property See also Notes to Rule 33, *infra*

**5. Form of decree for restitution of conjugal rights.**— In a suit for the restitution of conjugal rights against the wife and other defendants who prevent her

<p>Order 21 Rule 32 — Note 2 1. (O4) 1 All L Jour 541 (542) Note 3</p>	<p>not entitled to possession) (See however (81) 5 Bom 554 (560) (Decision</p>
<p>wife returns) (33) AIR 1933 Cal 580 (580) (Decree for specific performance conditional on payment of amount in Court within certain time—Court has jurisdiction to extend time for payment of such amount</p>	<p>3 (31) AIR 1931 Pat 179 (180, 181) 4 (32) AIR 1932 Cal 579 (582 583) 59 Cal 501 [See also (33) AIR 1933 Mad 386 (387, 388) 82 Mad 796] Note 4 1. (72) 9 Bom H C R 290 (303 304) 2 (75) 1 Bom 164 (167) 3 (75) 1 Bom 164 (167)</p>

O. 21 R. 32  
Notes 5-7

from going to her husband, the decree should declare the husband's right and direct that the other defendants do refrain from preventing the plaintiff's wife from returning to him<sup>1</sup> Where they do not obey the decree, execution can proceed against them under this rule<sup>2</sup>

Where, in a decree for the restitution of conjugal rights, the plaintiff's mother-in-law who was impleaded as a defendant in the suit, was directed to refrain from preventing the plaintiff's wife from returning to him, it was held that her action in merely permitting her daughter, who was of age, to reside in her home after decree, did not justify the attachment of her property under this rule<sup>3</sup>

**6. Decree for injunction.** — This rule applies to cases where a party is directed to do some act, as well as to cases where he is directed to abstain from doing an act<sup>1</sup> The High Court of Madras has expressed an *obiter dictum* in the undermentioned case<sup>2</sup> that an interim injunction may be enforced under this rule read with Section 36, *ante*

As to whether a decree for injunction can be executed against vendees from the defendant and against the legal representatives of a deceased defendant, see Note 18 to Section 50 *ante*

Under the old Code it was held that disobedience to an order directing the defendant to render accounts within a particular time was disobedience to an order "requiring the performance of a particular act" within the meaning of Section 260 and consequently was punishable under that Section<sup>3</sup> But under the present rule those words have been omitted and an order requiring the defendant to furnish accounts is not an injunction within the meaning of this rule and therefore the disobedience of that order cannot be dealt with under this rule<sup>4</sup>

**7. "Opportunity of obeying the decree."** — Before allowing execution under this rule against a judgment debtor, the Court should see if he has had an opportunity of obeying the decree and whether he has wilfully failed to obey it<sup>1</sup> If he has had such an opportunity, then execution may issue against him without giving him a further opportunity to obey the decree and the Court is not bound to issue notice calling upon him to obey the decree<sup>2</sup>

Where an application for enforcing a decree under this rule has been dismissed on the ground that the judgment debtor had no opportunity of obeying the decree,

(67) 8 South W R 3 (13) (PC) (*Quare*)

(76) 1876 Pun Re No 15 page 20

(71) 1871 Pun Re No 2

[But see (75) 23 South W R 179 (180)]

Note 5

1 (20) AIR 1920 Pat 793 (793)

(67) 2 Agra 111 (112)

(70) 2 N W P H O R 314 (314)

(73) 20 South W R 92 (92)

[See (73) 20 South W R 50 (50)]

(67) 8 South W R 467 (467)]

2. (14) AIR 1914 Mad 219 (221)

(80) 1930 Mad W N 809 (810)

(13) 21 Ind Cas 789 (802) (Mad) (Mandatory injunction directing a guardian to hand over custody of a minor)

(10) 6 Ind Cas 289 (289) (Mad)

at L Jour  
ind 7 Cal

Note 7

improper]]

3. (18) 1 All 501 (503)

Note 6

1. (19) AIR 1919 Cal 674 (675) 46 Cal 103 (Per Richardson, J)

ask Court to issue notice or order embodying

■ second application after such opportunity has been given is not barred<sup>3</sup>

**8. Sale of property—Sub-rule (3).**—This rule is a highly penal one and must be construed strictly. When a sale is ordered under sub rule (3), the following three conditions must exist—

(a) ■ valid original attachment,

(b) application, *within* one year of the attachment, by the decree holder, and

(c) lapse of one year from date of attachment<sup>1</sup>

Thus, where an order of attachment was made on 27-6-1908 and was carried out on 20-7-1908 and no application for sale was made before 20-7-1909, it was held that the attachment ceased to exist and the order for sale was therefore, set aside<sup>2</sup>. A sale held under sub rule (3) cannot be set aside under O 21 R 89, sub rule (1) even where the execution of the decree under which the sale took place is restrained by an injunction granted subsequent to the sale in a separate suit<sup>3</sup>.

Where a *decree* is attached under this rule, the fact that this rule prohibits the sale of the attached property before the expiry of one year from the date of the attachment is no bar to the attached decree being executed by the holder thereof under O 21 R 53, sub rule (2) before the expiry of one year<sup>4</sup>.

In the undermentioned case,<sup>5</sup> a decree for injunction was passed against ■ defendant prohibiting him from holding a certain fair. He disobeyed the injunction by holding the fair. Thereupon, his property was attached and after the prescribed period it was sought to be sold. The judgment-debtor objected on the ground that the property could be sold under sub rule (3) only if *after* the attachment he has disobeyed the injunction again. It was held that where the injunction requires the defendant to *do* ■ certain act, and upon his failure to do the act his property is attached but subsequently within the period specified in the rule he carried out the directions in the decree his property cannot be sold. But, where the injunction is one restraining the defendant from doing a certain act and he has disobeyed the decree by doing the act, he has, by his own act made it impossible for himself to obey the decree (so that there can be no question of a second disobedience), and in such a case, the judgment-debtor cannot escape the liability to have the attached property sold after the lapse of the prescribed period and have compensation paid to the decree holder out of the sale proceeds.

**9. Disobedience of order for injunction or specific performance.**—Where ■ defendant has wilfully failed to obey a decree for injunction or for specific performance passed against him, the decree may be enforced by his detention in the civil prison or by the attachment of his property or by both<sup>1</sup>. But the Court has no

injunction and have it served on defendants —  
O 21 R 32 does not provide for such notice or order.)]

3. (94) 21 Cal 784 (788) 21 Ind App 89 (P O)

Note 8

1. (1900) 21 Bom 45 (49)

satisfaction of decree against her )

5. (35) AIR 1935 All 480 (480, 481) 57 All 859

Note 9

1. (1900) 21 Bom 45 (49)

(94) 21 Cal 784 (788, 789) 21 Ind App 89 (P O).

(81) 6 Cal 415 (416) (He cannot be prosecuted under S 188 I P C for disobedience of injunction of Civil Court.)

(81) 8 Cal L Rep 497 (498)

(73) 111 South W R 252 (2-3)

**O. 21 R. 32**  
**Note 9**

power to order the defendant to execute a security bond for obeying the decree<sup>2</sup>

Where a decree requires the plaintiff to do certain acts necessary for the enjoyment of his property and restrains the defendant from interfering with it, the defendant is bound to give the plaintiff reasonable facilities for doing it and the refusal to do so can be punished under this rule<sup>3</sup>

Under the old Code, a Court, in executing a decree which directed a defendant to do a particular act, had no power to have the thing done by an officer of the Court when the defendant failed to obey the decree, inasmuch as it was not one of the modes of execution prescribed by Section 260<sup>4</sup>. But now under sub rule (5) of this rule the Court has got the power to direct the act to be done so far as practicable by the decree holder or by some other person appointed by the Court at the expense of the judgment debtor<sup>5</sup>. The Court is, however, not justified in ordering the police to interfere in the matter, or in appointing a commissioner to see that the decree holder performs without obstruction the acts required to be done<sup>6</sup>. Where, after a decree for injunction has been passed, the defendant does not obey it, the plaintiff's remedy is by execution under this rule and not by a separate *suit*<sup>7</sup>. The reason is that a separate suit would be barred by Section 47.

The words 'the act required to be done' in sub rule (5) mean the act that has to be done to enforce the injunction granted by the decree<sup>8</sup>. Thus, where a decree directs a wall to be demolished as being an obstruction to a right of way and is so demolished in execution of the decree, but the judgment debtor erects another wall at a different place obstructing the right of way, the remedy of the decree holder is a fresh *suit for injunction*<sup>9</sup>. The words 'act required to be done' in this sub rule show that this clause applies only to *mandatory* injunctions and not to *prohibitory* injunctions, though the other sub rules apply to all injunctions generally<sup>10</sup>.

Where a decree for injunction has been passed against several persons jointly, restraining them from holding a fair on the plaintiff's land and all of them have been jointly and severally responsible for the disobedience of the decree as well as for the profit which they have made out of the plaintiff's land by holding the fair on such

(182) 8 Cal 174 (176)

(72) 18 Suth W R 292 (263)

O. 21 R. 32  
Notes 9-11

land, the mere fact that one of them is dead will not justify a reduction of the amount which the plaintiff is entitled to get as compensation out of the sale proceeds of the property of the defendants that has been attached and sold under sub rule (3) <sup>11</sup>

**9a. Disobedience of decree for restitution of conjugal rights.**—The only remedy where the judgment debtor in a decree for the restitution of conjugal rights wilfully refuses to obey the decree is to proceed to attach the property of the judgment debtor <sup>1</sup> The Court cannot compel the wife against whom such a decree has been passed, to go and live with her husband <sup>2</sup> It would also be wrong in such cases to pass an order under Section 25 of the Guardians and Wards Act directing that the custody of a minor wife should be given to the husband <sup>3</sup> See also Note 4, *ante*

**10. Effect of procedure under this Rule.**—The provisions of this rule are intended to punish the defendant for disobedience of the decree and are not intended to be a satisfaction of the decree so as to prevent the decree holder from taking further steps Thus, where a decree for possession of a certain plot of land and for the demolition of a house situate thereon was passed, and the decree holder had received some compensation under this rule by the attachment and sale of the house on the land, it was held that he could still enforce his right to the possession of the property <sup>1</sup>

**11. Limitation.**—It has been held by the High Court of Allahabad<sup>1</sup> that disobedience to an injunction is a contempt of Court and can therefore be punished at any time and that the provisions of Article 183 of the Limitation Act do not apply to an application to enforce the order under this rule But the High Court of Madras<sup>2</sup> has held that Article 182 cannot apply from the very nature of the provisions therein but that the decree holder may enforce his decree by an application made within three years of each successive breach of the injunction and that the application is governed by Article 181 of the Limitation Act The decree holder, however, is not obliged to take action in regard to every petty infringement on pain of allowing the decree to become inoperative after three years and depriving him of the fruits of his decree, if a serious infringement of it were afterwards made<sup>3</sup> The Chief Court of Lower Burma<sup>4</sup> has, on the other hand, held that the application to enforce the decree under this rule is governed by Article 182 of the Limitation Act The High Court of Lahore has, in the undermentioned case<sup>5</sup> followed the Madras view

O. 21 R. 33

### R. 33. [New.] (1) Notwithstanding anything in rule 32,

Discretion of Court in  
executing decrees for  
restitution of conjugal  
rights

the Court, either at the time of passing a decree *against a husband* for the restitution of conjugal rights or at any time afterwards, may order that the decree *shall be executed in the manner provided in this rule.*

decree and raising the building — Decree-holder 82 (Reversing AIR 1936 All 267)

Note 10

1 (04) 1 All L Jour 431 (432)

Note 11

(135) AIR 1935 All 450 (481) 57 All 858

11. (35) AIR 1935 All 450 (491) 57 All 858

Note 9a

1. (36) AIR 1936 All 657 (638) I L R (1937) All 82

2. (34) 150 Ind Cas 307 (303) (Lah)

3. (36) AIR 1936 All 657 (638) I L R (1937) All

1. (01) 23 All 465 (466)

4

O. 21 R. 33  
Notes 1-2

(2) Where the Court has made an order under sub-rule (1) 'c' = 'd', it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money

a Inserted by the Code of Civil Procedure (Amendment) Act, XXIX of 1923, Section 3

b Substituted by Section 3, *ibid* for 'shall not be executed by detention in prison'

c The words 'and the decree holder is the wife' repealed by Section 3, *ibid*

### Synopsis

#### 1. Amendments after 1908. 2. Scope of the Rule.

**1. Amendments after 1908.** — (1) The words "against a husband" in sub rule (1) after the words "passing a decree" have been newly inserted by Act XXIX of 1923

(3) By the same Amending Act the words "shall be executed in the manner provided in this rule" have been substituted for the words "shall not be executed by detention in prison"

(3) The words "and the decree holder is the wife" after the words "under sub rule (1)" occurring in sub rule (2) have been omitted by Act XXIX of 1923, because the rule as amended applies only to cases of decrees against husbands

**2. Scope of the Rule.** — Before the amendment of this rule by Act XXIX of 1923 it was held that the tendency of modern legislation is against sending women to jail in civil matters and therefore, ordinarily, a Court passing a decree for the restitution of conjugal rights against a wife should direct, in the exercise of its discretion under this rule, that the decree shall not be executed by the detention of the wife in civil prison<sup>1</sup> In view of the amendment of Rule 32 *ante* by Act XXIX of 1923, a

#### Order 21 Rule 33 — Note 2

(24) AIR 1924 Lah 244 (245) (Where wife ...)

1. (24) AIR 1924 All 836 (837) (Condition in decree of trial Court disallowing imprisonment will not be interfered with by High Court in appeal)

unhappy)

(20) AIR 1920 Bom 203 (204) 44 Bom 972 (The fact that wife had been in criminal jail is immaterial)

[See (23) AIR 1923 Lah 50, (596) (But if wife persists in immorality she may be detained in jail in execution if she disobeys)]

decree for the restitution of conjugal rights can no longer be executed by imprisonment whether the decree be against the husband or the wife See Note 1 to Rule 32 *ante*

O 21 R. 33  
Note 2

**R. 34.** [Ss 261, 262 ] (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court

O 21 R. 34

Decree for execution of document or endorsement of negotiable instrument

and deliver the same to the Court

(2) The Court shall thereupon cause the draft to be served on the judgment debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force, and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely —

“C D., Judge of the Court of  
(or as the case may be), for A B, in a suit by E. F. against A B,”  
and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration

[1877, Ss 261, 262, 1859, S 202 ]



O. 21 R. 34  
Notes 1-3*Synopsis*

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Decree for execution of document</li> <li>3. Compromise decree for execution of document.</li> <li>4. Execution by Court on behalf of Hindu father is binding on son.</li> </ol> | <ol style="list-style-type: none"> <li>5. Registration.</li> <li>6. Lis pendens.</li> <li>7. Limitation.</li> <li>8. Appeal</li> </ol> |
|---|--|

**1. Legislative changes. —**

1 The word "document" has been used in this rule instead of the word "conveyance" in the old Code

2 Sub rule (6) is new See Note 5 below

**2. Decree for execution of document. —** A decree directing a defendant to execute a document in favour of the plaintiff is executable in the manner provided by this rule, on the failure of the defendant to obey the directions given in the decree<sup>1</sup>. The decree for the execution of a document need not have been passed in a suit for specific performance of a contract<sup>2</sup>. Thus, where a decree absolute for divorce directs the judgment debtor to secure to his wife a certain amount and to execute a proper instrument securing that payment and the judgment debtor fails to comply with that direction the Court can under this rule, execute a special power of attorney in favour of the wife authorizing her on behalf of the judgment debtor to withdraw the amount decreed out of the provident fund of the judgment debtor in a railway company in which he was employed<sup>3</sup>. Where the judgment-debtor makes any alteration in the draft submitted to the Court, he could not be compelled to execute the document, but the proper procedure is to act under this rule<sup>4</sup>.

The Registrar of a High Court can, if directed by the Court, execute a document, but he cannot enter into any covenant on behalf of the judgment debtor<sup>5</sup>. The title of the decree holder is complete only after the execution of the document, till then there is only an inchoate right capable of being completed.<sup>6</sup>

A British Indian Court cannot, under this rule, direct a party to convey by a document, property which is outside its jurisdiction<sup>7</sup>.

Where a decree directed a defendant to endorse certain promissory notes to the plaintiff and the defendant failed to do so and in the meantime the promissory notes were barred by limitation, it was held that a suit for compensation for failure to carry out the terms of the decree was not maintainable and that the proper remedy of the plaintiff was by way of execution under this rule<sup>8</sup>.

See also the undermentioned case<sup>9</sup>

**3. Compromise decree for execution of document. —** Where a compromise decree directs the plaintiff to execute a document in favour of the defendant in respect

**Order 21 Rule 34 — Note 2**

1. ('18) AIR 1918 Cal 817 (818)

(83) 10 Cal 710 (712)

[See ('23) AIR 1923 Bom 26 (27) 46 Bom 990  
(Defendant also may execute a decree for specific performance)]

[See also (33) AIR 1933 Cal 496 (498)]

2. ('38) AIR 1938 Cal 767 (767, 768)

3. ('38) AIR 1938 Oudh 48 (49) 13 Luck 466  
(Execution of such a special power of attorney does not contravene the provisions of S 3 (1) of the Provident Funds Act)

4. ('02) 5 Oudh Cas 370 (371, 372).

[See also (09) 10 Cal W N 815 (816)]

5. ('89) 16 Cal 830 (844 845)

6. ('98) 3 Cal W N 80 (82)

7. AIR 1917 Cal 1137 (1137)

8

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of properties which are the subject matter of the suit, the defendant can enforce the decree under this rule<sup>1</sup>

O. 21 R. 34  
Notes 3-8

**4. Execution by Court on behalf of Hindu father is binding on son.**— A document executed by the Court under this rule on behalf of a Hindu father, in execution of a decree, is binding on his son<sup>1</sup> The reason is that sub rule (5) provides that such a document shall have the same effect as if it had been executed by the party himself

**5. Registration.**— Even under the old Code the High Court of Allahabad held that where a document required to be registered under the provisions of the Registration Act, it must be registered even though executed by a Court acting under this rule<sup>1</sup> Sub-rule (6) gives legislative recognition to the abovementioned decision

**6. Lis pendens.**— Action taken by the Court in executing a decree under this rule is a proceeding in the suit and, therefore, a transfer of the property in dispute made by the judgment debtor after the date of the decree but before the proceeding under this rule will be affected by the doctrine of *lis pendens*<sup>1</sup>

**7. Limitation.**— An application under this rule is an application for execution of the decree and is, therefore, governed by Article 182 of the Limitation Act, 1908<sup>1</sup>

**8. Appeal.**— Under O 43 R 1 clause (i) an appeal lies against an order passed under this rule, on an objection to the draft of a document or of an endorsement, but a second appeal is prohibited by Section 104<sup>1</sup>

## R. 35. [S. 263.] (1) Where a decree is for the delivery

O. 21 R. 35

Decree for immovable property.

of any immovable property, possession thereof shall be delivered<sup>3</sup> to the party to whom it has been adjudged, or to such person as he may appoint<sup>7</sup> to receive delivery on his behalf, and, if necessary, by removing<sup>9</sup> any person bound by the decree who refuses<sup>11</sup> to vacate the property.

(2) Where a decree is for the joint possession<sup>6</sup> of immovable property, such possession shall be delivered by affixing<sup>8</sup> a copy of the warrant in *some conspicuous place on the property and proclaiming* by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may,

### Note 3

1. ('21) AIR 1921 Cal 227 (229)  
(26) AIR 1926 Cal 975 (975, 976)

### Note 4

1. ('19) AIR 1919 Oudh 335 (337, 338) 22  
Oudh C 18 64

### Note 5

1. ('50) 2 All 392 (393, 394)

### Note 6

1. ('16) AIR 1916 Nag 221 (223, 224) 14 Nag  
L R 176

### Note 7

1. ('56) 10 Bom 91 (93)

### Note 8

1. ('26) AIR 1926 Cal 575 (576)

O 21 R 35  
Notes 1-2

after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open<sup>13</sup> any door or do any other act<sup>10</sup> necessary for putting the decree-holder in possession

[1877, S 263, 1859, Ss 199, 223 Cf R S C, O 42 R 5 and O 88 R 1 See Rr 36 and 95 to 103 See also S 51, cl (v)]

### Synopsis

- |  |   |
|--|---|
| 1 Legislative changes                                | 7 Delivery of possession to agent       |
| 2 Scope of the Rule                                  | 8 Affixture of copy of warrant          |
| 3 Delivery of possession — Symbolical and actual.    | 9 Removal of person bound by decree     |
| 4 Effect of symbolical possession                    | 10 Use of force in giving possession    |
| 5 Symbolical possession and limitation<br>See Note 4 | 11 Resistance to delivery of possession |
| 6 Joint possession—Undivided share                   | 11a Consent of judgment debtor          |
|  | 12 Identification of land               |
|  | 13 Break open—Sub rule (3)              |

### Other Topics (miscellaneous)

Actual possession after symbolical possession See Delivery of land includes delivery of things  
Note 8 of building

Declaratory decree or decrees for possession See  
Note 6

1 Legislative changes — Sub rules (2) and (3) are new

2 Scope of the Rule — This rule and Rule 36 point out the mode of executing decrees for possession of immovable property. Rules 95 and 96 of this Order provide for the mode of delivery of possession to the auction purchaser of the properties purchased by him in a court sale. This rule corresponds with Rule 95 and Rule 96 corresponds with Rule 96. The procedure for delivery of possession is the same in both sets of rules.<sup>1</sup>

Where property is delivered to the decree holder in execution of his decree for possession the decree is satisfied and therefore a second application for possession on the ground that he was *dispossessed* by the judgment debtor is not maintainable.<sup>2</sup> But a subsequent application will lie when the first application has been *ineffectual*.<sup>3</sup> Thus where the decree holder asks for delivery of the immovable property with standing crops but is given delivery of the land only and not of the crops he can apply again for effective possession of the land and of the crops.<sup>4</sup> Similarly where

#### Order 21 Rule 35 — Note 2

(23) AIR 1928 Nag 100 (101 102) (A case of

1 (24) AIR 1924 Lah 801 (802)

2 (82) 4 All 184 (185) (Delivery of possession was formal)

(16) AIR 1916 All 261 (262 '64)

(12) 16 Ind Cas 709 (709) (Cal) (Delivery of possession not effectual in law — Decree holder can again apply for delivery of possession)

(23) AIR 1915 Mad 25 (26 '97)

(16) AIR 1916 Mad 930 (930)

(17) AIR 1917 Mad 207 (203)

(02) 12 Mad L Jour 96 (97)

(27) AIR 1927 Nag 36 (36)

(23) AIR 1923 Nag 237 ('39)

apply for removal of obstruct on within 30 days does not debar application to obtain fresh

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the decree holder obtained possession against the judgment debtor but it was ineffectual against a transferee *pendente lite* from the judgment debtor, it was held that a fresh application for delivery of possession was maintainable against such transferee.<sup>5</sup> Where, however, a decree holder allows his decree to get time barred without executing it, and the defendant continues in possession, a second suit for possession is not maintainable.<sup>6</sup>

A delivery of possession in execution of a decree has not the effect of dispossessing a third person (not a party to the suit), who was previously in possession and was not present when the delivery took place.<sup>7</sup> But it will be operative as an ouster or dispossession of the third person if it takes place in his presence and adversely to his claim.<sup>8</sup>

Where delivery of possession is made under this rule the delivery must be deemed to have been made, not of the land alone, but of all things attached to it.<sup>9</sup>

An order for delivery of possession should not, ordinarily be made *ex parte*.<sup>10</sup>

This rule applies to proceedings under the undermentioned Acts<sup>11</sup> but not to the proceedings noted below.<sup>12</sup>

**3 Delivery of possession — Symbolical and actual.** — This rule provides that where the property is in the occupation of the judgment debtor or some one on his behalf, possession shall be given, if necessary, by removing the judgment debtor or any person bound by the decree and placing the decree holder (or the auction purchaser in cases coming under Rule 95, *infra*) in occupation of the same. But if the property is of such a nature that the judgment debtor cannot be in actual possession of it, as for instance where the property is in the possession of a tenant then delivery should be effected by the officer of the Court by going through the process prescribed in Rule 36, *infra* and proclaiming to the occupant of the property that possession has been given to the decree holder (or auction purchaser in cases coming under Rule 95).<sup>1</sup> The former kind of delivery is called *khas* or *actual* possession while the latter is called *symbolical* or *formal* delivery of possession. Where the property is capable of immediate actual possession, possession must be delivered under sub rule (1) and there

of 1888) Section 25 cl (b) Central Provinces Tenancy Act (Act I of 1920) § 86 cl (6) Presidency Towns Insolvency Act (India Act III of 1909)

12 Proceedings of the Provincial Small Cause Court—S.O. 50 II 1 cl (a) sub clause (2) Proceedings of the Presidency Small Cause Courts in the towns of Calcutta Madras and Bombay

7. (96) 20 Bom 351 (353) (FB)

(01) 27 Mad 262 (270)

8. (04) 27 Mad 262 (270)

9. (05) 3 Low Bur Rul 129 (180) (It was held in this case that growing crops would also be deemed to be delivered — This was a decision under the old Code where 'growing crops' was

10. (23) AIR 1923 Pat 597 (599)

11. —

### Note 3

I. (32) AIR 1932 Pat 145 (147, 148) 11 Pat 165

(96) 18 All 440 (449 450)

(80) 5 Cal 534 (543) (FB)

(37) AIR 1937 Oudh 275 (276) 13 Luck 96 (Symbolical possession — Sub rule (1) contemplates actual possession while sub-rule (2) contemplates symbolical possession — No specification of land with reference to khasra numbers — Symbolical delivery can be given under sub-rule (2) )

**O. 21 R. 35**  
**Notes 3-4**

can be no symbolical possession in such a case as between the parties to the decree.<sup>2</sup> The term 'symbolical possession' is applied where delivery is made under sub rule (2) of this rule and Rules 36 and 96 *infra*.<sup>3</sup>

If the property is zamindari or a tank or mineral rights in direct possession of the judgment debtor, though the delivery of possession will be by ousting the judgment debtor from it the judgment debtor cannot be *physically* removed from it and the decree holder cannot be put in *physical occupation* of the property. What the bailiff who is entrusted with giving possession can do is to go to the property and proclaim in the name of the Court that so and so has been dispossessed and so and so has been put in possession of it. This delivery of possession is not symbolical but actual and is as effective against the judgment debtor as his physical removal from a house.<sup>4</sup>

A decree holder who has been given symbolical possession is entitled to apply again under this rule to be put in actual possession if he is entitled to it,<sup>5</sup> unless he deliberately accepts such symbolical possession and does not repudiate it.<sup>6</sup> In the latter case his remedy is to file a separate suit.

Where the decree holder is put in possession of land, such possession includes the *chandi crops*. The judgment debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated on the land.<sup>7</sup>

**4. Effect of symbolical possession** — The distinction between the effect of the delivery of symbolical possession is between parties to the suit and as against third persons is important with reference to the question of limitation applicable to suits for actual possession by decree holders or auction purchasers who have obtained only symbolical possession.

The effect of delivery of symbolical possession in execution in cases where such possession alone can be delivered is the same as the actual transfer of possession from the judgment debtor to the decree holder,<sup>1</sup> that being the only means by which, *as between the parties* the Court can effectuate and carry out its own decree. Where, therefore subsequent to this delivery the judgment debtor dispossesses the decree holder and remains in possession such possession would be adverse to the decree holder only from the date of the dispossession.<sup>2</sup>

<sup>2</sup> (29) AIR 1928 Nag 287 (238)

(33) AIR 1933 Lah 22 (72)

(69) 11 Smith W R (3 (64)

<sup>3</sup> (13) AIR 1928 Nag 287 (238)

<sup>4</sup> (33) AIR 1939 Pat 151 (158)

(17) AIR 1917 P O 197 (201) (PC) (5 Cal 554, Approved)

(24) AIR 1924 All 844 (845)

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#### Note 4

<sup>1</sup> (39) AIR 1939 Pat 151 (153)

(35) AIR 1935 Lah 612 (613)

<sup>2</sup> (20) 5 Cal 584 (585) (FB) (Overruling 21 Smith W R 418)

years from date of symbolical possession suit will be barred)

(18) 21 Ind Cas 272 (274) (Lah)

(10) 8 Ind Cas 236 (238) (Lah)

## Illustrations

1 *J* obtained a foreclosure decree for possession on 16th May 1864 against the mortgagor and took symbolical possession in execution on 30th January 1873. When attempting to take actual possession *J* was prevented by one *R* who had purchased the property from the mortgagor in 1865. *J* filed a suit for actual possession against *R* within 12 years of the date of formal possession. It was held that the delivery of symbolical possession had the effect of interrupting *R*'s adverse possession inasmuch as he was a person bound by the decree and that his possession after such delivery was a fresh act of trespass giving rise to a new cause of action. *Juggabandhu v. Ram Chunder* I L R 11 5 Calcutta 584 (F B).

2 *M* purchased immovable property belonging to *D* the defendant in court auction in execution of a decree against him on 21st August 1880. Symbolical possession was delivered to *M* on 14th July 1884. *M* filed a suit for possession on 9th May 1890 against *D* who remained in actual possession since the date of the auction purchase. *D* contended that the suit was barred by limitation inasmuch as he was in possession for more than 12 years prior to suit. It was held that a fresh period of limitation must be computed from the date of delivery of symbolical possession and that therefore the suit was in time. *Maigh Prasad v. Debi Dutt* I L R 19 Allahabad 490.

But where symbolical possession was not delivered in the manner required by law, it will not furnish a fresh starting point of limitation.<sup>3</sup> Again the delivery of symbolical possession has no such operation as against third persons who are not parties to the decree.<sup>4</sup>

A suit might be brought and a decree obtained, by a person who has neither title nor possession against another person who has neither title nor possession and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner who had been in actual possession for many years and who was no party to the suit it would operate most unjustly.<sup>5</sup>

## Illustrations

*S* mortgaged his property to *L* who obtained a decree on his mortgage in 1883 and in execution of that decree purchased *S*'s rights on 6th August 1884 and obtained formal possession on 4th May 1886. *V* purchased the same property on 21st April 1884 in execution

(Criminal Procedure Code) ]

3 (33) AIR 1933 Lah 427 (423)

(36) AIR 1936 Lah 749 (750)

4 (12) 15 Ind Cas 10 (12) (All)

(90) 21 All 269 (271)

(95) 19 Bom 670 (675)

(88) 10 Cal 993 (995)

(07) 6 Cal L Jour 472 (493) 431

(18) AIR 1916 Cal 253 (255)

(18) AIR 1918 Cal 933 (934)

(18) AIR 1918 Cal 639 (659)

(17) AIR 1917 Cal 199 (201)

(91) 11 Cal 570 (525)

(87) 11 Cal L Rep 395 (393)

(16) AIR 1916 Cal 745 (746)

(14) AIR 1914 Cal 577 (573)

(14) AIR 1914 Cal 630 (631)

(16) AIR 1916 Cal 403 (409)

(13) 21 Ind Cas 771 (767) (Mad)

(11) 9 Ind Cas 771 (772) (Mad)

(17) AIR 1917 Oudh 135 (137)

(97) 1 Cal W N 313 (314)

(3) AIR 1913 Cal 89 (91)

(20) AIR 1926 Mad 42 (44)

(15) AIR 1915 Mad 145 (149) 150)

(23) AIR 1928 Oudh 8 (8) 9) 3 Luck 130

(23) AIR 1928 Oudh 201 (254) 256) 3 Luck 506 (F B) (Auction purchaser of undivided share being put in constructive possession by deed of drum)

(21) AIR 1921 Pat 344 (349)

(29) AIR 1909 Nag 298 (301) (Possession of judgment-debtor after symbolical delivery deemed fresh act of trespass)

(73) 19 Suth W R 101 (107) (FC) (Symbolical possession puts an end to limitation in respect of parties under Order 21 Rule 96)

(30) AIR 1906 All 85 (85)

(33) AIR 1933 Cal 474 (475)

(36) AIR 1936 Pesh 7 (8)

[See (13) 18 Ind Cas 751 (752) (Cal)]

[See also (95) 18 Mad 403 (407) (Formal possession amounts to dispossession on judgment debtor)]

[But see (10) AIR 1916 Mad 440 (440) 39 Mad 543 (Symbolical possession (without prejudice) not actual possession for purposes of S 115

O 21 R 35  
Notes 4-6

of a money decree held by him against S and obtained actual possession in January 188 and was in possession since then. F brought a suit on 27th April 1897 for possession again. A week before the expiry of twelve years from the date of delivery to him. It was held that the suit was barred by limitation. *Narain Das v. Lalla Prasad* 11 L R 21 Allahabad 963

Now suppose that symbolical possession is given in circumstances in which actual possession ought to have been delivered. What is its effect upon limitation? There is a conflict of opinion on this question. On the one hand it has been held by the High Courts of Calcutta<sup>6</sup> Lahore<sup>7</sup> Madras<sup>8</sup> and Patna<sup>9</sup> the Chief Court of Lower Burma<sup>10</sup> and the Judicial Commissioner's Court of Nagpur<sup>11</sup> that the delivery of such possession amounts to delivery of actual possession so far as the judgment debtor and his representatives are concerned and that if after that date the judgment debtor continues in possession his possession becomes that of a trespasser giving rise to a fresh cause of action. They proceed on the view that though actual possession might have been taken still as it was obtained through Court and by process of law and as the judgment debtor must be deemed to have been present at the proceedings relating to the taking of possession it is not open to him to say that the whole proceeding should be taken as a nullity and that the plaintiff should be treated as one who never obtained possession at all. The High Courts of Allahabad<sup>12</sup> and Bombay<sup>13</sup> have on the other hand held that where the judgment debtor is in possession and the decree holder or the auction purchaser is entitled to actual possession he cannot get anything less than that and if he does not get actual possession he cannot rely upon symbolical possession for the law does not allow a person who is entitled to actual possession to get only symbolical possession.

5 Symbolical possession and limitation — See Note 4 above

6 Joint possession — Undivided share — Sub rule (2) does not confer on Courts a new power of granting decrees for joint possession. Such decrees were given before this Code was enacted and sub rule (2) merely defines the manner in which such decrees are to be executed<sup>1</sup>. A person who is entitled to possession of immovable property jointly with others is not merely entitled to a decree declaring his rights in the land but also to a decree for joint possession and it is immaterial whether he was originally in possession and was subsequently dispossessed or whether he had never been in possession at all<sup>2</sup>. But the Court has a discretion in granting such a decree

- (97) 24 Cal 715 (719)  
(23) AIR 1923 Cal 183 (140 141)  
(81) 7 Cal 418 (419 420)  
(94) 8 Cal W N 49 (51)  
(84) 11 Cal 93 (98 102)  
(79) 4 Cal 870 (876)

[But see (80) 5 Cal 331 (333)]

- 7 (26) AIR 1926 Lah 85 (87) (General principles of estoppel amlar to res judicata will apply)

- (91) AIR 1921 All 9 (10 11) 48 All 520 (FB)  
[But see (96) 28 All 722 (723) (No longer law in view of AIR 1921 All 9 (FB))]  
13 (92) AIR 1922 Bom 31 (3) 46 Bom 982  
(19) AIR 1919 Bom 44 (44 45) 43 Bom 559  
(12) 14 Ind Cas 447 (449) 36 Bom 373 (FD)  
(Overruling 25 Bom 275 a 1 25 Bom 3 8 a d following 16 Bom 723)  
(92) 16 Bom 722 (723)  
(94) 18 Bom 37 (40)

Note ■

- 1 (28) AIR 1928 All 472 (474) 51 All 303 (FB)  
(11) 11 Ind Cas 87 (88) (All)

- 9 (23) AIR 1923 Pat 76 (82)  
10 (10) 8 Ind Cas 463 (464) (Low Bar)  
11 (14) AIR 1914 Nag 14 (14) 10 Nag L R 60

and the discretion must be exercised in accordance with the principles of justice, equity and good conscience<sup>3</sup>

Under the old Code it was held that a decree for joint possession may be executed by putting the plaintiff in actual possession of a portion of the property<sup>4</sup>. The difficulty which arose in giving such delivery of joint possession has now been removed by the enactment of sub rule (2), prescribing the mode in which such delivery should be made<sup>5</sup>. The delivery of joint possession under this rule is merely a symbolical transaction<sup>6</sup>.

Whenever it is a question of giving effective possession of an undivided share in immovable property to an auction purchaser under a decree the provisions of Rule 95, *infra*, may be read with sub rule (2) of this rule<sup>7</sup>.

**7. Delivery of possession to agent.** — Delivery of possession can be made to a person who is orally authorized by the decree holder<sup>1</sup>.

**8. Affixture of copy of warrant.** — The provisions of this rule and of Rules 36 and 96 *infra*, imperatively require that a copy of the warrant for delivery of possession should be affixed in some conspicuous place on the property, the object of the provision being that co sharers and tenants may know that possession has been transferred to the decree holder or the auction purchaser as the case may be. Therefore the failure to comply with the procedure laid down in those rules is fatal to the delivery which is no delivery at all in the eye of the law, and cannot be the basis for a fresh suit for possession<sup>2</sup>. But where the parties concerned had actually come to know of the proceedings taken to give symbolical possession it must be presumed that there had been a substantial compliance with the requirements of the rules<sup>3</sup>.

It must also be assumed that a process recorded as served through Court was served with all the formalities required by law and the burden of proof lies on the

(88) 10 Cal 244 (246)

[See also (96) 20 Bom 467 (468)]

3 (25) AIR 1928 All 472 (474) 51 All 803 (FB)

See the undermentioned cases in which joint possession was refused

(90) 18 Cal 10 (21 22) 17 Ind App 110 (P O)

(15) AIR 1915 Mad 80 (51) (Per Napier J.—Must

(12) 14 Ind Cas 447 (449) 36 Bom 373 (F B)

(39) 1939 All L Jour 875 (376) (Decree for joint possession does not entitle decree holder to actual possession by ousting person in possession—His remedy for getting actual possession is by bringing suit for partition)

7 (14) AIR 1914 All 511 (511) 36 All 181

(28) AIR 1928 Oudh 251 (236) 3 Luck 506 (Per Misra J)

#### Note 7

1 (17) AIR 1917 Nag 231 (232) 13 Nag L R 87, (Even without a power of attorney)

#### Note 8

1. (23) AIR 1923 Lah 693 (693)

(20) AIR 1920 Lah 473 (474)

(17) AIR 1917 Lah 336 (337)

(17) AIR 1917 Lah 361 (365) 1917 Pan Re No 20

(29) AIR 1919 Lah 545 (545 546)

(71) 15 South W R 99 (99)

[See also (25) AIR 1915 Lah 261 (265)

(36) AIR 1936 Lah 749 (750)]

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subsequently—Possession is effective and valid against him)



**O. 21 R. 35** person asserting the contrary to prove that the formalities, such as the fixing of copy  
**Notes 8-12** of the warrant, had not been complied with<sup>3</sup>

**9. Removal of person bound by decree.** — The words “any person bound by the decree” in this rule include the judgment debtor as well as any person who may be held under law as bound by the decree<sup>1</sup> Therefore, if the property for which a decree for possession has been made is in the occupancy of a person claiming under a title created by the defendant subsequent to the institution of the suit, actual possession under sub rule (1) must be given to the decree-holder<sup>2</sup> by removing, if necessary, the person bound by the decree and refusing to vacate the property<sup>3</sup> As to cases in which a party is bound by the decree according to principles of *lis pendens*, see Section 52, Transfer of Property Act, and the undermentioned cases<sup>4</sup>

**10. Use of force in giving possession.** — Where a person bound by a decree for possession of immovable property refuses to vacate or deliver possession of the property a reasonable degree of force may be used in removing such person<sup>5</sup> But the removal by force of a person other than the one bound by the decree is an offence punishable under Section 323 of the Penal Code<sup>6</sup>

**11. Resistance to delivery of possession.** — Resistance to a warrant for delivery of actual possession by a person in possession who is not a party to the decree and who is not bound by it is not an offence under Section 186 of the Penal Code<sup>7</sup>

See also Notes to Order 21 Rule 98

**11a. Consent of judgment-debtor.** — The consent of the judgment debtor is not essential for the execution of a warrant for the delivery of possession under sub rule (1), and it is not obligatory upon the decree holder or the executing official to apprise the judgment debtor of the fact that the possession had been delivered to the decree holder, all that is necessary is to deliver possession to the decree holder, and if any resistance by a person bound by the decree is offered, to remove him from the possession thereof<sup>8</sup>

**12. Identification of land.** — If in the course of the proceedings in execution of a decree for possession of land, it appears that the boundaries described in the plaint are no longer in existence, the Court can make an enquiry to ascertain the land decreed<sup>1</sup> Where the plaintiff, who has obtained a decree for possession of land, describes the land as having a particular area and as lying within certain boundaries,

3. ('30) 132 Ind. Cas 181 (182) (Lah.)  
 (23) AIR 1928 Lah 910 (910-911)

Note 9

1. (32) AIR 1932 Cal 241 (241, 242) 59 Cal 739  
 (Decree for landlord for possession against lessee  
 can be executed against sub lessee)

[See (37) AIR 1937 Cal 301 (303)] (The person  
 sought to be removed must be bound by the  
 decree for possession — Mortgage decree for sale  
 against executors under will in representative  
 capacity — Property sold — Proceedings for  
 delivery of property — Beneficiaries under will  
 are not persons bound by the decree for pos-  
 session but by the decree for sale)]

2. ('25) AIR 1925 Cal 1243 (1244)  
 (87) 15 Cal 91 (99)

(73) 20 South W R 201 (201, 205, 206)

(69) 11 South W R 444 (444)

(74) 11 Bom JJ CR 24 (31)

3. (72) 18 South W R 526 (523) (Delivery of land

not involving delivery of buildings thereon)

4. ('98) 20 All 349 (351)

(95) 1 Cal W N 62 (64)

(13) 18 Ind Cas 177 (179, 181) (Cal)

(74) 21 South W R 349 (351)

(67) 7 South W R 225 (226)

(18f2) 1 Hyde 160 (167, 168)

(30) AIR 1930 Cal 15 (16) 56 Cal 1130

Note 10

1. (15) AIR 1915 Cal 538 (560) 42 Cal 313

2. ('30) AIR 1930 Cal 720 (720)

Note 11

1. ('25) AIR 1925 Mad 613 (614)

Note 11a

1. ('33) AIR 1933 Lah 22 (23)

(33) AIR 1935 All 933 (939)

Note 12

1. ('72) 15 South W R 379 (3-0)

(71) 16 South W R 171 (172)

[But see ('63) 12 South W R 99 (99, 100)]

the boundaries must prevail even if the land exceeds the area stated in the plaint<sup>2</sup>

See also Note 3 to Order 7 Rule 8 and Order 21 Rule 94

O 21 R. 35  
Notes 12-13

**13. Break open — Sub-rule (3)** — Though in the old Code there was no provision corresponding to this sub rule it was held that where the building or enclosure to be given possession of was locked by the judgment debtor or some person claiming under him and bound by the decree the officer of the Court had the power to break open the lock, and place the decree holder in possession<sup>1</sup>

**R. 36.** [S 264] Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property

Decree for delivery of immoveable property when in occupancy of tenant

such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property

[1877, S 264; 1859, S 224 Cf O. 21 R 96]

*Synopsis*

- |  |  |
|--|--|
| 1 Scope and applicability of the Rule                  | 3 Possession without the intervention of the Court |
| 2 Formal or symbolical possession See Notes to Rule 85 | 4 Effect of delivery on criminal proceedings       |

*Other Topics (miscellaneous)*

Other persons See Note 1

Tenant See Note 1

**1. Scope and applicability of the Rule.** — This rule applies only to a case where the property is in the exclusive possession of a person who is not bound by the decree and who is entitled to remain in possession it does not apply to a case of joint holding which is covered by Rule 35 *ante*<sup>1</sup> Where the property which is the subject matter of a suit for possession is in the possession of a tenant<sup>2</sup> or of a usufructuary mortgagee whose term has not expired<sup>3</sup> or in the possession of a person having a right of residence,<sup>4</sup> delivery of the property in execution should be made under this rule provided, of course such person is not bound by the decree But where a third person claims to enter on the land under certain contractual rights and has not derived title

2 (72) 18 Suth W R 25 (25)

Note 13

1 (73) 22 Suth W R 233 (284)

Order 21 Rule 36 — Note 1

Mad 294 (Revenue sale against jennmi in Malabar — Sale binds only jennmi and kanoondar and not tenants under kanoondar — Purchaser at revenue sale can therefore get only symbolical possession)

[See also (72) 17 Suth W R 236 (236) (In executing a decree under this rule Court should

O. 21 R. 36  
Notes 1-4

from the defendant in the suit, he cannot be regarded as a tenant against whom an order under this rule can be made<sup>5</sup>

Delivery of symbolical possession under this rule does not pass the right to the crops on the land, where a third person not bound by the decree is in possession<sup>6</sup>

**2. Formal or symbolical possession.** — See Notes to Rule 35, *ante*

**3. Possession without the intervention of the Court.** — A person who has obtained a decree for possession of immovable property may take possession of such property otherwise than in execution and may rely, for the support of his possession, on the title vested in him under the decree<sup>1</sup>. Where, after having obtained possession without the aid of the Court, he is subsequently dispossessed, he can maintain an action against the persons who have dispossessed him, although he has not taken out execution of his decree<sup>2</sup>

**4. Effect of delivery on criminal proceedings.** — Where a short time before the institution of proceedings under Section 145 of the Criminal Procedure Code, a party has been put in possession of the disputed land by the Civil Court in execution of a decree, it is the duty of the Magistrate to find possession with that party in accordance with the Civil Court's order, even though he might have got only symbolical possession<sup>3</sup>

## ARREST AND DETENTION IN THE CIVIL PRISON

O. 21 R. 37

**R. 37. [S. 245B.]** (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in

Discretionary power to permit judgment-debtor to show cause against detention in prison

pursuance of the application, the Court *shall*, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison :

*Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.*

(2) Where appearance is not made in obedience to the notice,

5. ('23) AIR 1923 Mad 25 (27)

■ ('03) 3 Low Bur Rul 129 (130)

Note 3

1. ('01) 15 Bom 239 (241)

('67) 2 Agra 230 (236)

('74) 22 South W R 406 (407)

('81) 5 Bom 387 (391, 392) (If in taking such possession he uses violence he can be prosecuted)

2. ('16) AIR 1916 All 163 (163, 164) 39 All 509

(Twelve years after such dispossession suit will be barred)

(74) 6 N W P H C R 137 (139)

('16) AIR 1916 Mad 1069 (1090) {Execution is not the remedy}

(22) AIR 1922 Lah 459 (460)

Note 4

543 (Symbolical possession without prejudice to persons in actual possession — Not actual possession for purposes of S. 145, Cr P C))

Mad

the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

O. 21 R. 37  
Notes 1-2

- Substituted by the Code of Civil Procedure (Amendment) Act XXI of 1936, S 3, for "may"  
b Inserted by *ibid*, Section 3

### Synopsis

1. Notice to show cause. | 2. Privilege from arrest. See Section 135

### Other Topics (miscellaneous)

"For the payment of money" — See Note 1

Judgment debtor residing outside jurisdiction — Whether notice could be issued — See Note 1

**1. Notice to show cause.** — Under Rules 16 and 23 of this Order, a Court is bound to issue notice to the judgment debtor, preliminary to ordering the execution of the decree, in three classes of applications for execution, *viz* —

- (1) those made by transferees of decrees
- (2) those made more than one year after the decree, and
- (3) those made against the legal representatives of a party to a decree

Where, after such preliminary notice the party does not show cause against execution, the Court is bound, under Rule 24, to issue *process* for the execution of the decree. But, where an application is made for the execution of a money decree by the imprisonment of the judgment debtor, the Court is bound under this rule to issue, in the first instance a notice to the judgment debtor to appear and show cause why he should not be committed to the civil prison in execution of the decree. The Court cannot issue a notice and a warrant of arrest at the same time with directions for arrest in case the judgment debtor intimates he does not propose to appeal.<sup>1</sup>

Under the rule as it stood before it was amended by Act XXI of 1936 the Court had a discretionary power to issue a notice to the judgment debtor to show cause against his detention in prison. This discretionary power was provided only in respect of the execution of money decrees by the arrest and imprisonment of the judgment debtor. The classes of cases in which the discretion to issue notice could be exercised were indicated in the provisions of Rule 40, *infra*. It was held that it would be a proper exercise of discretion to order notice where the Court had reason to believe that the judgment debtor was too ill for imprisonment.<sup>2</sup>

Though a judgment debtor cannot be arrested because he is outside the jurisdiction of the Court at the time of the arrest, a notice under this rule may nevertheless be issued.<sup>3</sup>

See also Note 1a to Rule 40 *infra*

**2. Privilege from arrest.** — See Section 135, *ante*

**R. 38. [S. 337.]** Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the

O. 21 R. 38

Warrant for arrest to direct judgment debtor to be brought up

Order 21 Rule 37 — Note 1  
1. (32) AIR 1932 Pat 815 (816) 11 Pat 743  
(32) AIR 1932 All 692 (693) 55 All 109 (The warrant is illegal.)

2. (11) 9 Ind Cas 746 (747) 14 Oudh Cas 36  
3. (26) AIR 1926 Sind 61 (53)  
[See also (18) AIR 1918 Pat 427 (428) 3 Pat L Jour 95]

- O. 21 R. 33** amount which he has been ordered to pay, together with the  
**Nota 1** interest thereon and the costs (if any) to which he is liable, he  
 sooner paid.

[1877, Ss. 251, 343; 1859, S. 222.]

#### Local Amendment

#### MADRAS

*Substitute a comma for the full stop after the word "paid" and add the following*

"or unless satisfaction of the decree be endorsed by the decree holder on the warrant in the manner provided in Rule 25 (2) above"

1. "With all convenient speed." — Detention, without authority, beyond such time as is reasonably necessary to bring the judgment debtor to Court after arrest, is illegal<sup>1</sup>

The date for the return of the warrant should also be specified in the warrant<sup>2</sup>

#### Local Amendment

#### RANGOON

*Add the following as Rule 38A*

**O. 21 R. 38A**  
**(Rangoon)**

Costs of conveyance of civil prisoner, to be borne by Court

' 38A The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be and shall not be charged to the judgment creditor "

**O. 21 R. 39**

**R. 39.** [Ss. 339, 340.] (1) No judgment-debtor shall be

*Subsistence-allowance.* arrested in execution of a decree unless and until the decree-holder pays into Court such

sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

Order 21 Rule 38 — Note 1

1. (1859) 1859 Bourke 59

2. (19) AIR 1919 Pat 427 (428) 3 Pat L.Jour 93

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

[1877, Ss. 339, 340; 1859, Ss. 276, 279.]

#### Local Amendments

##### ALLAHABAD

*Delete* the words "in the civil prison" in sub-rule (5)

##### CALCUTTA

*Omit* the words "in the civil prison" in sub rule (5)

##### LAHORE

*Delete* the words "in the civil prison" in sub-rule (5)

##### MADRAS

*Delete* the present sub-rules (4) and (5) and *substitute* the following

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and costs of conveyance of the judgment debtor for his journey from the Court-house to the Civil Prison and from the Civil Prison, on his release, to his usual place of residence together with the first of the payments in advance under sub rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment debtor is committed to the Civil Prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the Civil Prison

(5) Sums disbursed under this rule by the decree holder for the subsistence and costs of conveyance (if any) of the judgment debtor shall be deemed to be costs in the suit."

##### NAGPUR

(a) To sub-rule (1) the following words shall be added, namely :

"and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court house"

(b) For sub rules (4) and (5), the following sub-rules shall be substituted, namely

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court house to the Civil Prison and from the Civil Prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the Civil Prison, and the subsequent payments (if any) shall be paid to the officer-in charge of the Civil Prison.

O. 21 R. 39  
Notes 1-2

(5) Sums disbursed under this rule by the decree holder for the subsistence and the cost of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit "

N.-W. F. P.

(1) For sub-rule (4), *substitute* the following

"(4) All payments shall be made to the officer-in charge of the Civil Prison "

(2) In sub rule (5), *omit* the words "in the Civil Prison,"

ODDH

In sub-rule (5), *delete* the words "in the Civil Prison "

PATNA

In sub rule (5) *delete* the words "in the Civil Prison" in the first place where they occur

RANGOON

The following shall be *inserted* as sub-rule (2A) .

"(2A) When a civil prisoner is kept in confinement at the instance of more than one decree holder, he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree holder Each decree holder shall, however pay the full allowance for subsistence, and when the debtor is released, the balance shall be divided rateably among the decree holders, and paid to them

In sub rule (5) the words "in the Civil Prison" shall be deleted

### Synopsis

1. Subsistence money.

2. Arrest before judgment

3. Payment of subsistence money and limitation

**1. Subsistence money.** — This rule is to be strictly followed The subsistence allowances payable to the officer in charge of the civil prison must always be paid for a whole month in advance<sup>1</sup> Thus, the payment for the month of January must be actually made to the officer in-charge of the civil prison *before the 1st of January* <sup>2</sup> Otherwise, the judgment debtor will be released from imprisonment See Section 58, Note 3 and the undermentioned cases <sup>3</sup> The decree holder is bound to pay, however, only the amount due as *subsistence allowance* according to the prescribed scales<sup>4</sup> and not the costs of bedding, clothing, etc., for the prisoner which are governed by the Prison Rules<sup>5</sup>

In case the judgment debtor is not committed to prison, the decree holder is entitled to a refund of any money unspent between the dates of arrest and release from custody<sup>6</sup>

**2. Arrest before judgment.** — The same rules apply equally to cases of arrest before judgment<sup>1</sup>

#### Order 21 Rule 39 — Note 1

1. ( 70 ) 5 Beng L R App 79 (79 80)
- (70) 5 Beng L R App 80 (81) (Unspent amount of previous month may be taken into account )
2. (14) AIR 1914 Mad 24 (24) (Remittance by postal money order, must actually reach officer before the first day of the month )
3. Bourke O C 59  
Bourke O C 109  
Bourke O C 421  
( 68 ) 4 Mad H C R 76 (77)

- 4 Bourke O C 62 (The corresponding Section of the Code of 1859 contained no reference to any scales )
- Bourke O C 59 (Do )
5. ( 93 ) 1893 Pun Pe 43, page 202  
See also Note 2 to Section 59
- 6 (18) 5 Bom 11 O R 84 (85)  
( 79 ) 4 Bom 65 (69, 70) (Time for payment of process fee for arrest under the Code of 1859 was different )

#### Note 2

1. Bourke O C 423

¶ **Payment of subsistence money and limitation** — A payment or remittance of subsistence money by post to the Superintendent of Jail under sub rule (4) is a step in aid of execution within the meaning of Article 182 of the Limitation Act<sup>1</sup>

O 21 R 39  
Note 3

**\*R 40.** (1) *When a judgment debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison*

O 21 R 40

Proceedings on appearance of judgment debtor in obedience to notice or after arrest

*being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison*

(2) *Pending the conclusion of the inquiry under sub rule (1) the Court may, in its discretion, order the judgment debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required*

(3) *Upon the conclusion of the inquiry under sub rule (1) the Court may, subject to the provisions of section 51 and to the other provisions of this Code make an order for the detention of the judgment debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest*

*Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied*

(4) *A judgment debtor released under this rule may be re-arrested*

(5) *When the Court does not make an order of detention under sub rule (3), it shall disallow the application and, if the judgment debtor is under arrest, direct his release*

<sup>a</sup> Sub-ruled Section 4 of the Code of Civil Procedure (Amendment) Act XXI of 1936



O.21 R 40  
Note 1a

NAGPUR

### Local Amendments

insert the following as sub rules (6) (7) and (8)

(6) When a judgment debtor is ordered to be detained in the custody of an officer of the Court under sub rule (2) or the proviso to sub rule (3) above the Court may direct the decree holder to deposit such amount as having regard to the specified or probable length of detention will provide

(a) for the subsistence of the judgment debtor at the rate to which he is entitled under the scales fixed under Section 57

(b) for the payment to the officer of the Court in whose custody the judgment debtor is placed of such fees (including lodging charges) in respect thereof as the Court may by order fix

Provided (i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time and

(ii) that the Court may from time to time require the decree holder to deposit such further sums as it deems necessary

(7) If a decree holder fails to deposit any sum as required under sub rule (6) above the Court may disallow the application and direct the release of the judgment debtor

(8) Sums disbursed by the decree holder under sub rule (6) shall be deemed to be costs in the suit

Provided that the judgment debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed

[ Notification No 7719 dated 29 11 1938 ]

ALLAHABAD MADRAS and OUDH

Under Section 4 of Act XXI of 1936 the amendments to Rule 40 made by the above High Courts have been repealed

### Synopsis

1a Legislative changes

1 Scope of the Rule

2 'Poverty or other sufficient cause' (old Rule)

3 Insolvency

4 Transfer concealment removal or any other act of bad faith — Sub rule (2) clauses (b) and (c) (old Rule)

5 Undue preference—Sub rule (2) clause (c) (old Rule)

6 Refusal or neglect to pay the amount of the decree—Sub rule (2) clause (d) (old Rule)

7 Likelihood of the judgment debtor absconding—Sub rule (2), clause (e) (old Rule)

8 Sub rule (3) (old Rule)

9 Appeal

10 Madras Amendment

### Other Topics (miscellaneous)

Lunacy — Whether sufficient cause for refusing arrest See Note 2

Shall cause the judgment-debtor to be arrested \* See Note 1

Unable to pay See Note 1

1a Legislative changes — The rule in its present form was substituted for the old Rule 40 by Section 4 of Act XXI of 1936 The old Rule 40 ran as follows —

R 40 [S 337A] (1) Where a judgment debtor appears before the Court in obedience to a notice issued under Rule 37 or is brought

Proceedings on appearance of judgment debtor in obedience to notice or after arrest

cause to pay the amount of the decree or if that amount is insufficient —

the amount of any instalment thereof the Court may upon such terms (if any) as it thinks fit make an order disallowing the application for his arrest and detention or

**O. 21 R 40  
Note 1a**

under sub rule (1) the Court may take into account any matter touching any of the following

matters namely —

- (a) the decree being for a sum for which the judgment debtor was bound in any fiduciary capacity to account
- (b) the transfer concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed or the commission by him after that date of any other act of bad faith in relation to his property with the object or effect of obstructing or delaying the decree holder in the execution of the decree
- (c) any undue preference given by the judgment debtor to any of his other creditors
- (d) refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has or since the date of the

holder in the execution of the decree

(3) While any of the matters mentioned in sub rule (2) are being considered the Court may in its discretion order the judgment debtor to be detained in the civil prison or leave him in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required by the Court

(4) A judgment debtor released under this rule may be re-arrested

(5) Where the Court does not make an order under sub rule (1) it shall cause the judgment debtor to be arrested if he has not already been arrested and subject to the other provisions of this Code commit him to the civil prison

The above Act also amended Section 51 and O 21 R 37 of the Code (See Section 51 and O 21 R 37) The effect of all these amendments taken together is as follows —

1 It is now obligatory in every case on the Court to give an opportunity to the judgment debtor to show cause why he should not be imprisoned before ordering his imprisonment in execution of a money decree But before the passing of the above Act the Court had a discretion in the matter (See O 21 R 37)

2 Execution of a money decree by the imprisonment of the judgment debtor cannot now be ordered except in certain special circumstances specified in the proviso to Section 51 But before the passing of the above Act the Court was ordinarily bound to order the imprisonment of the judgment debtor on the application of the decree holder though the Court had a discretion to refuse to order such imprisonment in certain circumstances (old R 40 of O 21) In other words the burden is now thrown on the decree holder to prove the circumstances justifying the imprisonment of the judgment debtor whereas formerly the burden was on the judgment debtor to establish the circumstances justifying the Court in refusing to order his imprisonment<sup>1</sup>

■ The provision in Rule 40 for giving a further opportunity to the judgment debtor to satisfy the decree even after his imprisonment has been ordered by directing

O. 21 R. 40  
Notes 1a-2

that he should be left in the custody of an officer of the Court for a certain period or should be released on his furnishing security is new

See also Note 5A to Section 51 *ante*

**1. Scope of the Rule** — As seen in Note 1a the one great distinction between the law as it was before the amendments made by Act XXI of 1936 and the law as it is now is that previously the Court was ordinarily *bound* to order the imprisonment of the judgment debtor in execution of a money decree on the application of the decree holder, though the Court had a discretion in certain exceptional circumstances to refuse to order the imprisonment of the judgment debtor<sup>1</sup> whereas now the Court has *no power* to order the imprisonment of the judgment debtor in execution of a money decree except in certain specified circumstances. Inability to pay the amount of the decree was recognized under the old rule as a ground for disallowing an application for arrest. But the inability must be a *bona fide* one as implied in sub rule (3). An order releasing the judgment debtor without considering the allegations of the decree holder touching any of the matters referred to in sub rule (3) of the old rule was not proper<sup>2</sup>. The object of the rule was to prevent creditors from unduly harassing indigent debtors<sup>3</sup> but if no sufficient cause was required by the rule existed the Court could not refuse the decree holder the right of arrest and detention<sup>4</sup>. The finding as to inability to pay must be based on evidence<sup>5</sup> and the burden of proof of such inability rested on the judgment debtor<sup>6</sup>. The executing Court had no power to excuse the judgment debtor from liability to arrest until he actually came before the Court<sup>7</sup>.

A judgment debtor committed to the civil prison will be deemed to be in unlawful detention if he is delivered to an officer other than the officer named in the warrant of committal issued under the rule and will be entitled to be released from such custody<sup>8</sup>. Though in the case of a judgment debtor against whom a warrant had been issued sub rule (1) of the old rule in terms was applicable *on his being brought under arrest* he was not precluded from *surrendering* to the Court before arrest and claiming the protection of the rule<sup>9</sup>.

**2 "Poverty or other sufficient cause" (old Rule)** — The Court had a discretion under the old rule to disallow the application for arrest on any one of the grounds specified in the rule<sup>1</sup>. Inability to pay may arise from poverty or other sufficient cause. Where the object of the decree holder was to harass a judgment debtor whose properties had all been sold in execution of decrees and the amount

(See also (38) AIR 1938 Rang 477 (478) (As the normal limit under which a man cannot reasonably be expected to support himself and a family is held at Rs 40 unless there is any thing on the record from which it can be said to have been proved that a judgment debtor earns more than Rs 40 a month and fails to pay the excess to the decree holder the Court should not order arrest of a judgment debtor))

#### Note 1

- 1 (See (36) AIR 1936 Rang 290 (291))
- 2 (29) AIR 1929 Pat 29 (729) (Fraudulent concealment of property since date of suit)
- 3 (18) 21 Ind Cas 993 (997) (Mad)
- 4 (97) 2 Cal W. N 598 (589) (Court is bound to cause the arrest at once)

(2<sup>r</sup>) 94 Ind Cas 270 (279) (Lah)

(See also (33) AIR 1933 Pat 248 (249) (Judgment debtor evading arrest—Court refusing to make further effort to apprehend and dismissing execution case—Order is not proper))

5 (29) AIR 1929 Cal 62 (63) 54 Cal 752 (And not on a statement at the bar)

6 (14) AIR 1914 Low Bur 51 (59) — Low Bur Rul 339

(37 01) 2 Upp Bur Rul 279

7 (33) AIR 1933 Pat 218 (219)

8 (85) 11 Cal 527 (530)

9 (29) AIR 1929 S. N 110 (111)

#### Note 2

- 1 (35) AIR 1935 Ouh 87 (88) 10 Luck 509

could be realized from solvent co judgment debtors,<sup>2</sup> or where the assets of a judgment-debtor could not be readily called in, for no fault of his,<sup>3</sup> the Court might, in its discretion, refuse arrest or detention and, in the latter instance, grant him a reasonable time to pay the amount

Insolvency of the judgment-debtor was held to be a sufficient cause under the old rule for refusing arrest or detention<sup>4</sup>

**3. Insolvency.** — In the absence of a *protection order* from the Insolvency Court, the insolvency of a judgment debtor was not necessarily a ground for release under the old rule<sup>1</sup> The Court was, however, bound to consider, under that rule, the question of his inability to pay, if pleaded, notwithstanding the want of a protection order<sup>2</sup>

Prior to any enquiry under this rule the Court must, under Section 55, sub section (3), inform the judgment debtor that he may apply to be declared an insolvent<sup>3</sup> and the judgment debtor must express his intention to do so also before the proceedings under this rule are terminated<sup>4</sup>

**4. Transfer, concealment, removal or any other act of bad faith — Sub-rule (2), clauses (b) and (c) (old Rule).** — The acts of bad faith contemplated by clauses (b) and (c) of sub rule (2), of the old rule were akin to those dealt with in Section 53 of the Transfer of Property Act, Sections 55 to 57 of the Presidency Towns Insolvency Act, and Sections 53 and 54 of the Provincial Insolvency Act of 1920 Under clause (b) however, the alleged act must be subsequent to the suit in question and intended to defeat or delay the decree holder in particular<sup>1</sup>

One test of good faith is whether the transaction complained of is genuine or colourable<sup>2</sup>

**5. Undue preference — Sub-rule (2), clause (c) (old Rule).** — It was held that the Court might be guided by the relevant provisions of the Insolvency Acts in dealing with the question of undue preference under clause (c) of sub rule (2) of the old rule<sup>1</sup> See also the undermentioned cases<sup>2</sup>

**6. Refusal or neglect to pay the amount of the decree — Sub-rule (2), clause (d) (old Rule).** — The word 'thereof' in clause (d) of sub rule (2) referred to the

2. (22) AIR 1922 Lah 259 (200)

3 (11) 11 Ind Cas 848 (840) (Lah) (Decree debt

order produced—Judgment debtor immune from arrest)

2 (31) AIR 1931 Lah 121 (122) (Insolvency application — Property in the hands of *ad interim* receiver—Sufficient cause)

[See also (35) AIR 1935 Rang 415 (416) 13 Rang 623 (It does not follow, because the Insolvency

**Note 3**

1 See Note 1<sup>st</sup> to Section 55 ante

(07) 9 Bom L R 898 (900)

(30) AIR 1930 Lah 1070 (1071, 1072) (Protection

**Note 4**

1 [See (85) 7 All 445 (446)

(95) 17 All 218 (221)]

2. [See (05) 29 Bom 428 (434)]

**Note 5**

1 (85) 11 Cal 451 (461)

2. (93) 16 Mad 499 (503, 505) (Preference must be voluntary and devoid of consideration)

(81) 3 All 530 (532, 533) (Do)

O. 21 R. 40  
Notes 6-10

decree amount generally, whether payable in instalments or otherwise<sup>1</sup>

**7. Likelihood of the judgment-debtor absconding—Sub-rule (2) clause (e) (old Rule).** — See the undermentioned case<sup>1</sup>

**8. Sub-rule (3) (old Rule).** — This sub rule was intended to give facility for the enquiry contemplated in the preceding sub rule<sup>1</sup> The security to be furnished under the sub rule must be a substantial one and not a personal security of the judgment debtor himself<sup>2</sup> A security bond given under the sub-rule would be in force until the execution proceedings were terminated by a final order<sup>3</sup> Where a judgment debtor had not been arrested, but had been given notice to show cause why he should not be arrested, the Court had no jurisdiction to order, under sub rule (3), the release of the judgment debtor and take a bond for his appearance<sup>4</sup>

**9. Appeal.** — By the operation of Sections 2 (3) and 47 of this Code, an appeal lies from an order disallowing an application for the arrest and imprisonment of the judgment debtor<sup>1</sup> as well as from an order refusing him exemption from arrest<sup>2</sup>

**10. Madras Amendment.** — Act XXI of 1936 repealed the amendments to the old R 10 made under Section 122 of the Civil Procedure Code Before the above Act under the rule as amended by the Madras High Court, it was provided that a judgment-debtor who had been ordered to be detained in the civil prison might be ordered to be left in the custody of an officer of the Court for a specified period not exceeding ten days in order to enable the judgment debtor to satisfy the debt It was held that the order for leaving the judgment debtor in the custody of an officer of the Court under this proviso need not be in writing<sup>1</sup>

### ATTACHMENT OF PROPERTY

O. 21 R. 41

**R. 41. [S. 267.]** Where a decree is for the payment of money the decree-holder may apply to the Court for an order that —

Examination of judgment-debtor as to his property.

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing

(88) 12 Bom 425 (426)

Note 6

1. (14) AIR 1914 Low Bur 51 (53) 7 Low Bur  
Rul 339

Note 7

1. (93) 20 Cal 771 (787)

Note 8

1. (14) AIR 1914 Low Bur 51 (53) 7 Low Bur  
Rul 339

2

3

4. (34) AIR 1934 Lah 217 (218) (The security bond cannot be enforced)

Note 11

1 (19) AIR 1919 Lah 15 (16) 1 Lah 77

(38) AIR 1933 Pat 348 (249)

(22) AIR 1923 Lah 250 (250)

(98) 21 Mad 20 (30)

(95) 1895 Pan Re No 69 page 338

(17) AIR 1917 Mad 187 (187)

2 (29) AIR 1929 Lah 141 (141)

(37) AIR 1937 Lah 70\* (707)

Note 10

1. (33) AIR 1933 Mad 278 (279) (Fearing from such custody is an offence under § 225 B of the Penal Code)

continues)

to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents

[1877, S. 267; 1859, S. 219.]

### Synopsis

- |                                   |                                   |
|-----------------------------------|-----------------------------------|
| 1. Legislative changes            | 3 "Any other person "             |
| 2. Scope and object of the Rule.  | 4 "Any and what other property "  |
| 2a "Decree for payment of money " | 5 Production of books of account. |

**1. Legislative changes.** — "Order 21 R 41 is an amplification of Section 219 of Act VIII of 1859, modified by Section 267 of Act X of 1877" <sup>1</sup> Under the former Codes the Court was also expressly empowered to act *suo motu*

**2. Scope and object of the Rule.** — The object of the rule is to obtain discovery for purposes of execution in cases where there is any difficulty or cause for delay in obtaining particulars of the judgment debtor's property <sup>1</sup> An application under this rule can be made at any stage, though it should not be allowed, if it is calculated to harass any person by personal examination when an order for examination or production is made *ex parte* It is open to the Court to hear the objections of the respondent without an application by him <sup>2</sup> The provisions of this rule come into effect only after a decree has been passed and cannot be invoked in the suit stage <sup>3</sup> The power of the Court under this rule is discretionary <sup>4</sup>

**2a. "Decree for payment of money."** — A decree directing an enquiry as to damages is a decree for payment of money and a person who has obtained such a decree is entitled to invoke the aid of this rule in order to enable him to effect an attachment in pursuance of the right given to him under O 21 R 42, before the amount due from the judgment debtor has been ascertained <sup>1</sup>

**3. "Any other person."** — The Court may order the examination of any person who is alleged to be a mortgagee in possession of the property of the judgment-debtor and if it finds such person not to be in possession, it may order the attachment of the property <sup>1</sup>

It has been held by the Judicial Commissioner's Court of Sind<sup>2</sup> that permission should not be granted to a judgment debtor to examine a garnishee on the affidavit filed by him denying his liability to the judgment debtor It has also been held by the Madras High Court<sup>3</sup> that the discretionary power under this rule to examine a garnishee must ordinarily be limited to cases where the garnishee *admits* the debt In such cases, the executing Court may find out the exact extent of the debt before ordering execution

#### Order III Rule 41 — Note 1

1 (16) AIR 1916 Cal 273 (229) 43 Cal 285

#### Note 2

1  
2  
3

#### Note 2a

1. (39) AIR 1939 Mad 699 (699, 701)

#### Note 3

1  
2  
3

O. 21 R. 40  
Notes 6-10

decree amount generally, whether payable in instalments or otherwise<sup>1</sup>

**7. Likelihood of the judgment-debtor absconding—Sub-rule (2) clause (a) (old Rule).** — See the undermentioned case<sup>1</sup>

**8. Sub-rule (3) (old Rule).** — This sub rule was intended to give facility for the enquiry contemplated in the preceding sub rule<sup>1</sup> The security to be furnished under the sub rule must be a substantial one and not a personal security of the judgment debtor himself<sup>2</sup> A security bond given under the sub rule would be in force until the execution proceedings were terminated by a final order<sup>3</sup> Where a judgment debtor had not been arrested, but had been given notice to show cause why he should not be arrested, the Court had no jurisdiction to order, under sub rule (3), the release of the judgment debtor and take a bond for his appearance<sup>4</sup>

**9 Appeal** — By the operation of Sections 2 (2) and 47 of this Code an appeal lies from an order disallowing an application for the arrest and imprisonment of the judgment debtor<sup>1</sup> as well as from an order refusing him exemption from arrest<sup>2</sup>

**10 Madras Amendment.** — Act XXI of 1936 repealed the amendments to the old R. 40 made under Section 122 of the Civil Procedure Code. Before the above Act under the rule as amended by the Madras High Court it was provided that a judgment debtor who had been ordered to be detained in the civil prison might be ordered to be left in the custody of an officer of the Court for a specified period not exceeding ten days in order to enable the judgment debtor to satisfy the debt. It was held that the order for leaving the judgment debtor in the custody of an officer of the Court under this proviso need not be in writing<sup>1</sup>

## ATTACHMENT OF PROPERTY

O 21 R 41

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be orally examined as to whether any or what debts are owing

(85) 12 Bom 425 (426)

Note 6

1 (14) AIR 1914 Low Bur 51 (53) 7 Low Bur Rul 839

Note 7

1. (93) 20 Cal 771 (787)

Note 8

1 (14) AIR 1914 Low Bur 51 (53) 7 Low Bur Rul 839

2 (28) AIR 1928 Cal 62 (63) 54 Cal 789

3 (29) AIR 1929 Lah 776 (777) (Surety bond—Execution proceedings consigned to record room on judgment-debtor applying for being declared insolvent — Fresh execution application on dismissal of insolvency petition—Surety's liability continues)

4 (34) AIR 1934 Lah 217 (218) (The security bond cannot be enforced)

Note 9

1 (19) AIR 1919 Lah 15 (16) 1 Lah 77

(33) AIR 1933 Pat 248 (249)

(29) AIR 1922 Lah 250 (259)

(98) 21 Mad 29 (30)

(95) 1895 Pun Re No 69 page 338

(17) AIR 1917 Mal 187 (187)

2 (29) AIR 1929 Lah 141 (141)

(37) AIR 1937 Lah 707 (707)

Note 10

1 (33) AIR 1933 Mad 278 (279) (Fearing from such custody as an offence under S 225 B of the Penal Code)

to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents

[1877, S. 267; 1859, § 219.]

### Synopsis

- |                                  |                                  |
|----------------------------------|----------------------------------|
| 1 Legislative changes            | 3 "Any other person"             |
| 2 Scope and object of the Rule   | 4 "Any and what other property"  |
| 2a "Decree for payment of money" | 5 Production of books of account |

**1. Legislative changes** — Order 31 R 41 is an amplification of Section 219 of Act VIII of 1859 modified by Section 267 of Act X of 1877.<sup>1</sup> Under the former Codes the Court was also expressly empowered to act *suo motu*

**2. Scope and object of the Rule.** — The object of the rule is to obtain discovery for purposes of execution in cases where there is any difficulty or cause for delay in obtaining particulars of the judgment debtor's property.<sup>1</sup> An application under this rule can be made at any stage, though it should not be allowed, if it is calculated to harass any person by personal examination when an order for examination or production is made *ex parte*. It is open to the Court to hear the objections of the respondent without an application by him.<sup>2</sup> The provisions of this rule come into effect only after a decree has been passed and cannot be invoked in the suit stage.<sup>3</sup> The power of the Court under this rule is discretionary.<sup>4</sup>

**2a. "Decree for payment of money."** — A decree directing an enquiry as to damages is a decree for payment of money and a person who has obtained such a decree is entitled to invoke the aid of this rule in order to enable him to effect an attachment in pursuance of the right given to him under O 21 R 42, before the amount due from the judgment debtor has been ascertained.<sup>1</sup>

**3. "Any other person."** — The Court may order the examination of any person who is alleged to be a mortgagee in possession of the property of the judgment-debtor and if it finds such person not to be in possession it may order the attachment of the property.<sup>1</sup>

It has been held by the Judicial Commissioner's Court of Sind<sup>2</sup> that permission should not be granted to a judgment debtor to examine a garnishee on the affidavit filed by him denying his liability to the judgment debtor. It has also been held by the Madras High Court<sup>3</sup> that the discretionary power under this rule to examine a garnishee must ordinarily be limited to cases where the garnishee *admits* the debt. In such cases the executing Court may find out the exact extent of the debt before ordering execution.

#### Order III Rule 41 — Note 1

1 (16) AIR 1916 Cal 278 (229) 43 Cal 285

#### Note 2

1 "o" "o" "o" "o" "o"

" " " " " "

" " " " " "

#### Note 2a

1 (39) AIR 1939 Mad 699 (699, 701)

#### Note 3

1 (93) 17 Bom 514 (518-519)

2 (33) AIR 1933 S md 350 (351)

3 (39) AIR 1939 Mad 771 (773-774) (But examination may be allowed to prevent fraud or collusion — Object is to find out if debt is pro



O. 21 R. 41  
Notes 4-5

4. "Any and what other property." — The rule applies to every description of property of the judgment debtor legally liable to be proceeded against in satisfaction of the decree<sup>1</sup>

5. Production of books of account. — To prevent the judgment debtor from defeating the decree holder's rights the Court may require the former to produce his books of account and leave them in court custody<sup>1</sup> A garnishee may also be directed to produce his books of account or other documents for finding out whether there are any dealings between him and the judgment debtor making the existence of a debt probable<sup>2</sup>

O. 21 R. 42

**R. 42.** [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

[1877, S. 255 See O. 21 Rr. 12, 15 and 16.]

### Synopsis

1 Scope of the Rule

2 Attachment under a preliminary decree.

3 Enquiry into state of account in suit under Section 92 of this Code.

1. Scope of the Rule. — This rule is analogous to the provision in the Code relating to attachment before judgment and its object is to secure to the decree holder the fruits of his decree. Although, unlike O. 38 R. 5, this rule makes no specific provision for voiding attachment by furnishing security, it has been held that the Court will be justified in requiring security before acting under this rule<sup>1</sup> This rule treats the attachment as a proceeding in execution and the application for attachment may, therefore be treated as one for execution. And as soon as the amount is ascertained, the application for attachment becomes one for the execution of the decree for the realization of the ascertained sum of money and the applicant will also be entitled to share in a rateable distribution of assets under Section 78 *ante*<sup>2</sup>

2. Attachment under a preliminary decree. — An attachment of the property of a judgment debtor under a preliminary decree fixing his liability can be validly made under this rule pending enquiry as to the amount due<sup>1</sup> But where the preliminary decree does not fix the liability but directs enquiry in order to ascertain

ought not to be subjected to any examination or cross examination for the purpose of determining whether the liability subsists or not.)

### Order 21 Rule 42 — Note 1

1 ('12) 16 Ind Cas 703 (710) (Cal)

('17) AIR 1917 All 153 (154)

2. ('34) AIR 1934 Mad 604 (605) 53 Mad 233

### Note 2

1 ('67) 2 Suth W R 9 (10) (E.g., A preliminary decree for mesne profits directing enquiry into the account)

('17) AIR 1917 All 153 (154)

ings for the attachment of such debt }

### Note 4

1. [See ('93) 17 Bom 514 (518, 519) (E.g., Equity of redemption)]

### Note 5

1. ('71) 3 N W P H R 334 (385)

2. ('89) AIR 1938 Mad 771 (774) (But garnishee

the liability, this rule does not apply.<sup>2</sup> "An operative decree obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced."<sup>3</sup> To such a case the present rule can have no application.

**O. 21 R. 42**  
**Notes 2-3**

### 3. Enquiry into state of account in suits under Section 92 of this Code.

— This rule applies also to the case of trustees against whom a decree has been passed in a suit under Section 92 of this Code, with a direction to take accounts of the trust moneys.<sup>1</sup>

## **R. 43. [S. 269.] Where the property to be attached is**

**O. 21 R. 43**

Attachment of moveable property other than agricultural produce, in possession of judgment-debtor.

moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the

property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once

[1877, S. 269; 1859, S. 233 See Ss 2, 13 and 145.]

### **Local Amendments**

#### **CALCUTTA**

*Read Rule 43 as follows*

'Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure, and, save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof

Provided that, when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value, or is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once"

#### **LAHORE**

*Re number the rule as sub rule (1) and add the following further proviso and sub rules (2) and (3)*

"and provided also that, when the property attached consists of live stock, agricultural implements or other articles which cannot conveniently be removed and

<sup>2</sup> "of accounts")  
(29) AIR 1929 Mad 641 (649) 52 Mad 563 (Do  
—Per Thiruvengatsachariar, J.)

(37) AIR 1937 Cal 4 (7) (Words 'any other matter' in O. 21 R. 42 cannot include a preliminary decree directing the taking of accounts in a partnership suit.)

<sup>3</sup> (91) 13 All 63 (63) 17 Ind App 150 (PC)  
Note 3

1 (17) AIR 1917 All 153 (154)

**0.21 R. 43** the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance, or

(c) in the charge of a village *lambardar* or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No 15B of Appendix E with one or more sureties for its production

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rules 55, 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment

(3) When property is made over to a custodian under sub clauses (a) or (c), of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by —

(a) the custodian and his sureties,

(b) the officer of the Court who made the attachment,

(c) the person whose property is attached and made over,

(d) two respectable witnesses

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered one copy will be made over to the person whose property is attached and one copy will be made over to the custodian

**MADRAS**

*Substitute the following Rule for Rule 43*

"43 (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

Provided also that, when the property attached consists of live stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or Rule 60 of this Order the Court may order the restitution of the attached property to the person in whose possession it was before attachment

**NAGPUR**

*Substitute the following for Rule 43*

43 (1) Where the property to be attached is moveable property other than agricultural produce in the possession of the judgment debtor the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of any of his subordinates and shall be responsible for the due custody thereof

Provided that when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value the attaching officer may sell it at once and

Provided also that when the property attached consists of live stock agricultural implements or other articles which cannot be conveniently removed and the attaching officer does not act under the first proviso to this rule he may at the instance of the judgment debtor or of the decree holder or any person claiming to be interested in such property leave it in the village or at the place where it has been attached —

(a) in the charge of the judgment debtor or of the station pound keeper if any or

(b) in the charge of the decree holder or of the person claiming to be interested in such property or of such respectable person as will undertake to keep such property on his entering into a bond with one or more sureties in an amount not less than the value of the property that he will take proper care of such property and produce it when called for

(2) The attaching officer shall make a list of the property attached and shall obtain thereto the acknowledgment of the person in whose custody the property is left and if possible of the parties to the suit and of at least one respectable person in attestation of the correctness of the list. If the property attached includes both live stock and other articles a separate list of the live stock shall similarly be prepared and attested

**N W F P**

*Add the following further proviso*

Provided further that when the attached property consists of live stock or articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule he may leave it in the village or place where it has been attached in the charge of a village lambardar or such other respectable person as will undertake to keep the property subject to the orders of the Court if such person enters into a written bond for its production

Any person who has so undertaken to keep attached property may be proceeded against as a surety under Section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him

**PATNA**

*Substitute the following for Rule 43*

43 Where the property to be attached is moveable property other than

**0.21 R. 43**  
**Notes 1-5**

agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure, and the attaching officer shall be responsible for the due custody thereof

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once "

### Synopsis

**1. Scope of the Rule.**

**2. "Moveable property."** See Notes on S 2 (13) and (16)

**3. "Actual seizure."**

**4. Effect of wrongful attachment.** See Note 23 to Section 60

**5. "Shall be responsible for the due custody thereof."**

**6. Security bond to produce attached property.**

**1. Scope of the Rule.** — This rule deals with the mode of attachment of all moveable property except (a) agricultural produce and (b) property not in the possession of the judgment-debtor, for both of which provision is made in Rules 44 to 46, *infra*

The attachment is legally effected only by actual seizure<sup>1</sup> As to the procedure for the custody and maintenance of such property as live stock, see the rules framed under this Code by the various High Courts and the undermentioned cases<sup>2</sup>

**2. "Moveable property."** — See Notes under Section 2 (13) and (16)

**3. "Actual seizure."** — Unlike a prohibit by actual seizure involves a change of possession Court<sup>1</sup> But *actual seizure* does not always imply bring the property into physical contact with the person attaching<sup>2</sup> Any overt act short of direct physical apprehension, sufficient to pass possession to the Court, amounts to actual seizure, as for example, the affixing of the Court seal to the outer door of a warehouse containing the property to be attached,<sup>3</sup> or in the case of an attachment of cattle already tied and secured, the announcement on the spot by the attaching officer of his intention to attach<sup>4</sup> The seizure by a peon of the attaching officer is valid if done in the presence and under the instructions of such officer<sup>5</sup> Continuance of attachment necessarily involves continuance of court custody<sup>6</sup> If such custody is once lost, there can be no further attachment without a fresh seizure<sup>7</sup>

**4. Effect of wrongful attachment.** — See Note 23 to Section 60, *ante*

**5. "Shall be responsible for the due custody thereof."** — The attaching officer is primarily responsible for the safe custody of moveable property attached by him<sup>1</sup> This rule deals only with the liability of the attaching officer so far as the Court

**Order 21 Rule 43 — Note 1**

1. (80) AIR 1939 Cal 316 (319) (The goods have to be actually seized by the officer of the Court

2. (30) AIR 1930 Mad 670 (671)

(87) 11 Bom 448 (454)

3. (04) 27 Mad 346 (347)

4. (30) AIR 1930 Mad 670 (671)

5. (29) AIR 1929 Mad 188 (189)

6. (30) AIR 1930 B. — 118 (193) 2 BIR 431.

revived )

**Note 5**

1. (34) AIR 1934 All 357 (358)

(89) AIR 1939 Cal 316 (319)

[See also (36) AIR 1936 Rang 12 (14)]

**Note 3**

1. (14) AIR 1914 Mad 126 (127) 38 Mad 972 (FB)

is concerned. It does not affect in any way the liability of a surety who expressly takes charge of the attached property either to the Court or to the decree holder.<sup>2</sup>

O 21 R 43  
Notes 5-6

Attaching officers have been authorized by rules to leave the attached property in the custody of the judgment debtor or other person. See rules by the various High Courts. Rule 93 of the Calcutta High Court General Rules and Circular Orders (Civil) and also Rule 122 of this Order passed by the Allahabad High Court.

See also Note 4 to Section 145.

¶ **Security bond to produce attached property** — On the question whether liability under such a security bond is enforceable in execution or by a separate suit see Note 4 to Section 145 *ante*.

### Local Amendments

#### LAHORE

*Insert the following as Rules 43A, 43B, 43C and 43D*

43A (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

O 21 R 43A  
(Lahore)

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the court house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to Rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian, he shall be granted a receipt for the same.

43B (1) Whenever attached property kept in the village or place where it is attached is live stock, the person at whose instance it is retained shall provide for its maintenance, and if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the court house.

O 21 R 43B  
(Lahore)

Nothing in this rule shall prevent the judgment debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him if not duly deposited or paid be recovered from the proceeds of property if sold or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43C When an application is made for the attachment of live stock or other moveable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court on receiving a report thereof from the proper officer may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

O 21 R 43C  
(Lahore)

2 (21) AIR 191 All 220 (220, 221)

(26) AIR 1906 All 406 (407) 48 All 510 (Attaching officer entrusting the attached property to a

third person without the permission of Court — Loss of the property — Court can order the attaching officer to make good the loss.]

**O. 21 R. 43D  
(Lahore)**

43D (1) Any person who has undertaken to keep attached property under Rule 43 (1) (c) shall be liable to be proceeded against as a surety under Section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him.

**MADRAS**

*Insert the following as Rules 43A and 43B*

'43A (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the court house and delivered to the proper officer of the Court

**O. 21 R. 43B  
(Madras)**

43B (1) Whenever attached property kept in the village or place where it is attached is live stock the person at whose instance it is so retained shall provide for its maintenance and if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the court house

Nothing in this rule shall prevent the judgment debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings

**NAGPUR**

*Insert the following as Rule 43A*

'43A (1) When an application is made for the attachment of live stock the Court may demand an advance in cash at rates to be fixed half yearly or oftener, if necessary by the Courts with the sanction of the District Court the amount requisite for the maintenance of the live stock from the probable time of attachment to the probable time of sale or may at its discretion, make successive demands for portions of such period. The rates shall include costs of feeding, tending and conveyance and all other charges requisite for the maintenance and custody of the live stock

(2) If the live stock be entrusted to any person other than the judgment debtor the amount paid by the decree holder for the maintenance of the cattle or the part thereof may, at the discretion of the Court be paid to the custodian of the live stock for their maintenance. The produce such as milk eggs etc., if any may either be sold, as promptly as possible for the benefit of the judgment debtor, or may at the discretion of the Court be set off against the cost of maintenance of the live stock

**PATNA**

*Insert the following as Rule 43A*

"43A (1) The attaching officer shall in suitable cases, keep the attached property in the village or locality either —

(a) in his own custody in any suitable place provided by the judgment debtor, or in his absence by any adult member of his family who is present, on his own premises or elsewhere,

(b) in the case of live stock and provided the decree holder furnishes the

**O. 21 R. 43A  
(Patna)**

necessary funds, in the local pound, if a pound has been established in or near the village, in which case the pound keeper will be responsible for the property to the attaching officer, and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon,

(c) in the custody of a respectable surety, provided the decree holder furnishes the cost of maintenance and other costs, if any

(2) If in the opinion of the attaching officer the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of the decree holder to provide necessary funds, or for any other reason, the attaching officer shall remove the property to the Court at the decree holder's expenses. In the event of the decree holder failing to provide the necessary funds, the attachment shall be withdrawn

(3) Whenever attached property is kept in the village or locality as aforesaid the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by Rule 66

(4) If the debtor shall give his consent in writing to the sale of the property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the same and forward it without delay to the Court for its orders

(5) When property is removed to the Court it shall be kept by the nazir on his own sole responsibility in such place as may be approved by the Court. If the property cannot, from its nature or bulk be conveniently kept on the court premises, or in the personal custody of the nazir, he may, subject to approval by the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical, and the Court may fix the remuneration to be allowed to the persons, not being officers of the Court, in whose custody the property is kept

(6) When property remains in the village or locality where it is attached and any person other than the judgment debtor shall claim the same, or any part of it, the attaching officer shall nevertheless, unless the decree holder desires to withdraw the attachment of the property so claimed, maintain the attachment, and shall direct the claimant to prefer his claim to the Court

(7) (a) If the decree holder shall withdraw an attachment or it shall be withdrawn under sub rule (2) or sub rule (9) the attaching officer shall inform the debtor, or in his absence, any adult member of his family, that the property is at his disposal

(b) In the absence of any person to take charge of it, or in case the officer shall have had notice of claim by a person other than the judgment debtor, the officer shall, if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure

(8) Whenever live stock is kept in the village or locality where it has been attached, the judgment debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer, but the latter shall, if required by the decree holder, and on his paying for the same at the rate to be fixed by the District Judge, and subject to the orders of the Court under whose orders the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it

(9) In the event of the judgment debtor failing to feed the attached live stock



**O. 21 R. 43A**  
(Patna)

in accordance with sub rule (8), the officer shall call upon the decree holder to pay forthwith, for feeding the same. In the event of his failure to do so, the officer shall proceed as provided in sub rule (2) and shall report the matter to the Court without delay.

(10) When attached live stock is brought to Court, the nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues.

(11) If a pound has been established in or near the place where the Court is held, the nazir shall be at liberty to place in it such attached live stock as can be properly kept there, in which case the pound keeper will be responsible for the property to the nazir and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon.

(12) If there be no pound available, or if, in the opinion of the Court, it be inconvenient to lodge the attached live stock in the pound, the nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court. The nazir will in all cases remain responsible for the custody of the property.

(13) Each Court shall from time to time fix the rates to be allowed for the custody and maintenance of the various descriptions of live stock with reference to seasons and local circumstances. The District Judge may make any alteration he deems fit in the rates prescribed by Courts subordinate to him. Where there are two or more Courts in the same place, the rates shall be the same for each Court.

**O. 21 R. 44**

**R. 44.** [New.] Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment, —

- (a) where such produce is a growing crop, on the land on which such crop has grown, or
  - (b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,
- and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

[See S. 2 (13).]

**1. Attachment of agricultural produce.** — Agricultural produce, whether standing crop<sup>1</sup> or severed from the soil, is moveable property. Unlike other moveable property agricultural produce of either description cannot be attached by *actual seizure* as provided in Rule 43. *The custodia legis* in the case of agricultural produce on attachment is only symbolical and is not validly created unless the rules of affixture herein provided are strictly complied with.<sup>2</sup> The reason is that no property can be declared to be attached unless first, the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been done.<sup>3</sup> But, when it is proved that an attachment has been made it must be presumed, until the contrary is shown, that all the necessary formalities were duly observed.<sup>4</sup>

**O. 21 R. 44**  
**Note 1**

This rule like the preceding one, applies only when the property is in the possession of the judgment debtor and not of a third party.<sup>5</sup>

As regards the mode of attachment of growing crops, standing timber or other products of the earth, under the Madras Estates Land Act V of 1908, see Section 192 (i) thereof.

### Local Amendment

#### BOMBAY

The following shall be inserted, namely

"44A Where the property to be attached is agricultural produce a copy of the warrant or order of attachment shall be sent by post to the office of the Collector of the district in which the land is situate."

**O. 21 R. 44A**  
**(Bombay)**

**R. 45. [New.]** (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

**O. 21 R. 45**

Provisions as to agricultural produce under attachment

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and

#### Order 21 Rule 44 — Note 1

- <sup>1</sup> Section 2 (19) — Decisions *contra* under old Code no longer law  
( 92) 14 All 80 (84)  
( 82) 11 Bom 592 (593)  
( 70) 13 Suth W R 275 (275, 276)  
( 88) 11 Mad 193 (190)

**O.21 R.45** store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

#### Local Amendments

##### BOMBAY

The following words shall be *added* to sub rule (1), after *substituting* a semi-colon for the full stop

"and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time"

##### CALCUTTA

*Add* the following to sub rule (1)

"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time"

##### LAHORE

*Add* the following to sub rule (1) of Rule 45

"and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court"

##### MADRAS

*Substitute* a semi-colon for the full stop at the end of sub rule (1), and *add* the following words

"and the applicant shall deposit in Court within a date to be fixed by Court, such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time"

## PATNA

O 21 R 10  
Note 1

Add to sub rule (1) after deleting the full stop at the end of the sub rule and the applicant shall pay into Court such sums as he may from time to time be required by the Court to pay in order to defray the cost of such arrangements

1. "Shall specify the time at which it is likely to be fit to be cut and gathered" — The attachment of agricultural produce does not prevent the judgment debtor from doing or continuing all necessary acts of husbandry with respect to the crop or produce. In fact the Court is bound under this rule to make proper arrangements for the custody tending cutting gathering storing maturing and preservation of the produce either at the instance of the judgment debtor or if he neglects to perform the acts of preservation at the instance of the decree holder or otherwise. The attached property continues to be in the possession of the Court during the process of husbandry.

To enable the Court to make the necessary arrangements an application for attachment must state the time at which the crop is likely to be ready for harvest. If the application is made a considerable time before the harvest the Court may postpone attachment and prohibit the present removal of the produce.

## Local Amendments

## RANGOON

Add Rules 45A and 45B

O 21 R 45A  
(Rangoon)

45A (1) Before issuing a warrant for the attachment of moveable property which it will be necessary to place in charge of one or more peons Deposit disbursement and refund of watching fees for attached moveable property permanent or temporary the Court shall satisfy itself that the attaching decree holder has produced a receipt in Form 15A, Appendix I from the Bailiff that he has paid in cash as process fees under Rule 17 (1) (e) (ii) (2) of the Process Fees Rules not less than Rs 10 for each person whom the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record. The Bailiff shall then endorse on the warrant the name of the process server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property the process server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced.

(3) At the time of granting the receipt in Form 15A for payments made by the decree holder as required by such sub rule (1) the Bailiff shall state in the lower portion of the form the date on which the fees paid will be exhausted, warning the decree holder that the property will not be kept under attachment after that date unless further fees are paid before that date. If the further fees required are not paid the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree holder as costs.

(4) The payment of fees under sub rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15A) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in Rule 15 of the rules regarding process serving.

**O. 21 R. 45A**  
(Rangoon)

establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process fees actually paid under the foregoing sub rules. Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process servers' Fees," XVI A, Law and Justice" — "Courts of Law" — "Court fees realized in cash."

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge. Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case of the unexpended balance of such deposits and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a re payment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub rules (1) and (8) exceeds the total amount that is chargeable for peons including the amount of the last payment, he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund. If a sufficient portion of the amount paid by the decree holder to pay such refund is in the hands of the Bailiff, that officer shall make the refund in the ordinary way prescribed in his Register II for re payments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed Treasury Form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund, the Judge must satisfy himself that the amount is available for refund by entry in Bailiff's Register I and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or sub treasury.

**O. 21 R. 45B**  
(Rangoon)

Charges incurred in connection with custody and conveyance of attached moveable property and feeding and tending of live stock.

45B (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under Rule 45A, the Bailiff shall require the attaching decree holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

*Explanation* — The costs in question might be, for example

- (a) rent of building in which to store attached furniture,
- (b) cost of conveying the attached property from the place of attachment to Court or to a secure place of custody,
- (c) costs of feeding and tending live stock,
- (d) cost of proceeding to the place of attachment to sell perishable property.

**0.21 R.45B**  
**(Rangoon)**

(2) If the attaching decree holder fails to comply with the Bailiff's requisition the warrant shall not be issued

(3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any repayments thereof shall be made according to existing orders. A receipt for such sums shall be granted by the Bailiff in Form 15A, Appendix I

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted

(5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor or in his absence, any adult member of his family who may be present the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court. Where the attached property consists of cattle these may be employed, so far as is consistent with Rule 43 in agricultural operations

(6) If no such suitable place be provided or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when Rule 45 applies. Whenever live stock is placed at the place where it has been attached, the judgment debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer

(7) Whenever property is attached, the officer shall forthwith report to the Court and shall with his report forward an accurate list of the property seized

(8) If the judgment debtor shall give his consent in writing to the sale of property without awaiting the expiry of the terms prescribed in Rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders

(9) When property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the court premises or in the personal custody of the Bailiff he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical

(10) If there be a cattle pound maintained by Government or any local authority in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live stock as can be properly kept there in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it, the officer shall nevertheless, unless the decree holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court

(12) If the decree holder shall withdraw an attachment or if it shall cease under sub rule (2) or sub rule (4), the Bailiff's officer shall inform the debtor or, in his absence, an adult member of his family that the property is at his disposal

(13) If any portion of the deposit made under sub rule (1) or sub rule (4)

**O.21 R.45B**  
(Rangoon)

remains unexpended it shall be refunded to the decree holder in the manner prescribed for such refunds in sub rule (9) of Rule 45A. Any difference between the cost of attachment of moveable property (other than the costs referred to in Rule 45A) and the sums deposited by the attaching decree holder shall unless the difference is due to the fault of the Bailiff, be recovered from the sale proceeds of the attached property, if any, and if there are no sale proceeds from the attaching decree holder on the application of the Bailiff. If there is still a deficiency the amount shall be paid by Government.

**O. 21 R. 46**

Attachment of debt, share  
and other property not in pos-  
session of judgment debtor

**R. 46. [S 268 ] (1)** In the case of —

- (a) a debt<sup>2</sup> not secured by a negotiable instrument,
- (b) a share<sup>11</sup> in the capital of a corporation,
- (c) other moveable property<sup>12</sup> not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;
- (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;
- (iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor

(2) A copy of such order shall be affixed on some conspicuous part of the court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same<sup>13</sup>

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same

[1877, Ss 268, 301; 1859, Ss 236, 239 ]

Local Amendment

RANGOON

Delete sub rule (3)

## Synopsis

O. 21 R. 46  
Note 1

- |   |   |
|---|---|
| <p>1 Attachment of debt share, or other moveable property — General</p> <p>2 "Debt" meaning of</p> <p>3 Salary, whether a debt</p> <p>4 Attachment of mortgage debt</p> <p>5 Attachment of decree See Rule 53</p> <p>6 Attachment of debt already paid by cheque</p> <p>7 Procedure where garnishee denies debt</p> <p>8 Set off by garnishee of cross debt</p> <p>9 Procedure where garnishee resides outside jurisdiction</p> | <p>10 Procedure where garnishee admits liability but does not pay</p> <p>11 Attachment of share</p> <p>12 Attachment of other moveable property</p> <p>13 Service of prohibitory order</p> <p>14 Effect of non compliance with sub-rule (2)</p> <p>15 Notice to debtor</p> <p>16 Effect of attachment</p> <p>16a Payment into Court — Sub rule (3)</p> <p>17 Inherent power of Court to pass prohibitory orders in proper cases</p> |
|---|---|

## Other Topics (miscellaneous)

Clums See Note 1

Insurance policy See Notes 1 and 2

## 1. Attachment of debt, share, or other moveable property — General —

There is a broad distinction between the attachment of moveable property in the possession of the judgment debtor and the attachment of debts (other than negotiable instruments) shares in a corporation or other moveable property *not in the possession* of the judgment debtor in the former case the attachment is effected by *actual seizure* while in the latter case it is done by a *prohibitory order*<sup>1</sup>

A debt in order to be attachable under this rule must be due *solely* to the judgment debtor and should be described with reasonable certainty in the application for attachment<sup>2</sup> The Court cannot on an application under this rule direct the garnishee (judgment debtor's debtor) to pay the amount into Court it can only pass a prohibitory order as mentioned in the rule<sup>4</sup> It is however open to the garnishee to deposit the amount of the debt in Court and thereby obtain a valid discharge<sup>5</sup> But in the case of dispute as to the title to the amount in deposit the Court must decide the question before ordering payment to the decree holder<sup>6</sup> Rules 58 and 63 of this Order are applicable to attachments hereunder<sup>7</sup>

## Order 21 Rule 46—Note 1

- 1 (14) AIR 1914 Mad 106 (127) 38 Mad 972 (FB)  
(82) AIR 193 Pat 279 (280 281) 11 Pat 498  
(Property not in possession of judgment debtor

policy before proof of death according to rules of company not valid))  
[See also (10) 5 Ind Cas 820 (820) (Mad) (Order absolute for injunction to the disburser to pay the judgment debtor's salary into Court is not an order effecting attachment)]

- 5 See sub-rule (3)  
(21) AIR 1971 All 81 (85) 48 All 272 (Motive of depositor not material)  
See also Note 7 *infra*

tral family money lending business cannot be attached)

- (97) I L R (1937) 2 Cal 440 (448)  
[See also (37) AIR 1937 Cal 199 (200) I L R (193 ) 2 Cal 48]

- 3 (18) AIR 1914 Mad 541 (510)  
(91) 16 All 286 (31)

- (11) 9 Ind Cas 240 (241) (Oudh)

- 4 (10) 11 Ind Cas 145 (145) 83 Mad 261  
[See (23) AIR 1973 Mad 347 (349) (Order for payment by garnishee of amount under lha

Court)

- 7 (01) 27 Ind 67 (71)  
(10) 8 Ind Cas 603 (609) (Low Bar)  
(12) 15 Ind Cas 193 (194) (Mad)



**O 21 R.46**  
**Notes 1-4**

Under Section 50 of the Code where a decree is executed against a legal representative he is liable only to the extent of the property of the deceased which has come to his hands. Hence a debt due to the legal representative or moveable property of the deceased which has not yet come into the possession of the legal representative cannot be attached under this rule.<sup>1</sup>

**2 "Debt," meaning of** — See Notes 7, 14 and 22 to Section 60 and also the undermentioned cases.<sup>1</sup>

**3 Salary, whether a debt** — A pay or pension in private service becomes due on the last day of the month even though it is not paid till the first of the next month and can be attached on the last day of the month.<sup>1</sup> So also it has been held that the salary of a member of a Provincial Legislative Assembly is not the salary of a public officer and is not attachable before it becomes payable at the end of the month.<sup>2</sup> See also Notes 15 to 17 to Section 60.

**4 Attachment of mortgage debt** — A mortgage debt due under a simple mortgage is a debt within the meaning of this rule and can be attached by a prohibitory order.<sup>1</sup> Such attachment carries with it the security of the immovable property without any further attachment of the property itself; the purchaser of the mortgage interest in execution is entitled therefore to sue for the sale of the mortgaged property for the debt.<sup>2</sup>

A usufructuary mortgage in which there is a covenant to pay is also a debt which can be attached under this rule.<sup>3</sup> But a purely usufructuary mortgage without any liability to pay the mortgage amount is not a debt at all and cannot be attached under this rule.<sup>4</sup> Such a mortgage should be attached under Rule 54 as immovable

**8** (87) AIR 1937 Rang 274 (274) (Security deposit of deceased judgment debtor in deposit with his employer cannot be attached under this rule)

**Note 2**

**1** (20) AIR 1929 Mad 347 (347 348) (Life policy requiring proof of death before payment—Money payable by company becomes debt only on proof of death)

(34) AIR 1934 All 448 (453) (Unpaid portion of loan by mortgagee is not debt)

(34) AIR 1934 All 954 (956) (Money left with mortgagee is not debt)

(32) AIR 1930 Bom 90 (91) I L R (1930) Bom 109 (Deposit made by member of association which is subject to *forfeiture and lien* and is within absolute control of association is not liable to attachment as it does not constitute debt nor moveable property not in possession of the judgment debtor)

(39) AIR 1939 Bom 811 (813) (A dividend payable to a creditor in insolvency is not debt liable to be attached under O 21 R 46—When no dividend has at all been declared there is nothing to attach)

**Note 3**

**1** (30) AIR 1930 Rang 101 (101)

(39) AIR 1939 Cal 423 (429) I L R (1939) 1 Cal 523

**Note 4**

**1** (93) 15 All 131 (135)

(86) 12 Cal 546 (550)

(51) AIR 1915 Mad 209 (209) 13 Ind Cas 91 (92)

37 Mad 51

(15) AIR 1915 Mad 551 (552)

(01) 14 G P L R 5 (8)

(87) 10 Mad 169 (172)

(19) AIR 1919 Oudh 132 (132) 21 Oudh Cas 400

(24) AIR 1924 All 796 (798) 40 All 917 (It is

moveable property under this rule)

(02) 26 Bom 305 (312) (Do)

(12) 16 Ind Cas 816 (816) (Mad) (Do)

(30) AIR 1930 Oudh 473 (474) (Do)

(09) 1 Ind Cas 450 (451) 1903 Pun Re No 18 (Do)

2 (9) 19 Bom 121 (123)

(09) 26 Bom 305 (310 312)

(24) AIR 1924 All 796 (798) 40 All 917

(01) 14 G P L R 5 (8)

(12) 16 Ind Cas 438 (438) (Mad) (Attachment though under wrong Section passes the mortgagee's rights)

(33) 20 Cal 805 (809 810) (Do)

(87) 10 Mad 169 (1 9) (Do)

(55) 18 Mad 437 (439) (Do)

(96) 18 All 479 (471) (Do)

(19) 18 Ind Cas 318 (318) (Lah)

(34) AIR 1934 All 493 (439)

[See also (87) 9 Mad 5 (8)]

**2** As in the case of a debt, this rule is the only appropriate and effect is procedure)

(31) AIR 1931 Mad 33 (39)

(32) AIR 1932 Mad 731 (231) (Other mortgagee)

(31) AIR 1931 Pat 63 (61)

4 (28) AIR 1923 Mad 618 (651)

(11) 10 Ind Cas 812 (812) 35 Bom 238



**O. 21 R. 46**  
**Notes 7-12**

attached future rents is not thereby entitled to sue the tenants for the amount of the rent due without his being duly appointed a receiver for the purpose<sup>7</sup>

**8. Set-off by garnishee of cross-debt.** — The garnishee is entitled to a set off in respect of any cross debt due to him from the judgment debtor, at the date of the attachment<sup>1</sup> or of the sale<sup>2</sup>

**9. Procedure where garnishee resides outside jurisdiction.** — The executing Court has no jurisdiction to pass any prohibitory order under this rule unless either the debt to be attached is payable or the garnishee is within its jurisdiction<sup>1</sup> "In its essential elements a garnishment proceeding is a proceeding by the defendant in the suit against the garnishee, in the name and for the benefit of the plaintiff. Wherever the garnishee could be sued by the defendant for the payment, he may be charged as garnishee on account of it"<sup>2</sup> If, therefore, the garnishee resides outside the jurisdiction of a Court and the debt is also payable outside its jurisdiction, no prohibitory order can be made against the garnishee<sup>3</sup> unless specifically provided for by the Code<sup>4</sup>

A garnishee submitting in the first instance, to a prohibitory order in ignorance of the want of jurisdiction may however, refuse to abide by it subsequently<sup>5</sup>

As to attachment of property outside jurisdiction, see Note 7 to Section 39

**10. Procedure where garnishee admits liability but does not pay.** — See Note 7 above See also the undermentioned case<sup>1</sup> as regards the procedure to be followed in Rangoon

**11. Attachment of shares.** — An attachment of shares in a corporation made in the form required by clause (ii) of sub rule (1) and by sub rule (2) of this rule<sup>1</sup>

See also Rules 79 and 80, *infra* as to sale of such shares

**12. Attachment of other moveable property.** — A judgment creditor *does not* by virtue of his judgment, get a right to the property of the judgment debtor in

7 (10) 1000 10 1000 10 1000 10 1000 10 1000

claim over which no Court in British India has jurisdiction is invalid )  
(39) AIR 1939 Cal 423 (429) I L R (1939) 1 Cal 523

(20) 1000 10 1000 10 1000 10 1000 10 1000

(18) AIR 1918 Cal 911 (912) (It is not competent to a Court in execution of a decree for money, to attach at the instance of the decree

#### Note 8

- 1 ('14) AIR 1014 Bom 299 (299) 39 Bom 631 (1875) 10 Q B 591 (593) Tapp v Jones (36 Cal 936 AIR 1914 Bom 299 Referred)
- (37) AIR 1937 Mad 818 (849)
- 2 (23) AIR 1923 Lah 261 (269) 9 Lah 414

#### Note 9

- 1 (34) AIR 1934 Nag 167 (168) 30 Nag LR 92 (31) AIR 1934 Sind 135 (135)
- (See also (33) AIR 1933 P C 150 (153) 60 Ind App 211 57 Bom 474 (PC))
2. (11) 11 Ind Cas 417 (421) 39 Cal 101 (116) (Pro per course = by transfer or under S 40 O P G)
- (See also ('18) AIR 1918 Pat 126 (128) 4 Pat L Jour 141)
- (32) AIR 1932 Pat 149 (149) 11 Pat 473
- (15) AIR 1915 Lah 273 (273)
- 3 ('11) 11 Ind Cas 417 (419) 39 Cal 101
- (81) 5 Bom 249 (252) (So also an attachment of

1. ('16) AIR 1916 Low Bur 33 (33) (All that can be done is to warn him that if he fails to pay into Court he may be subjected to a suit)

#### Note 11

1. ('23) AIR 1923 Mad 211 (212) 45 Mad 537

his hands or in the hands of a third party, and his remedy is not by way of suit but by attachment and sale in execution<sup>1</sup> But, where a property in the possession of another is declared to belong to the plaintiff, the proper remedy for its recovery is by a suit and not in execution<sup>2</sup>

Attachment of agricultural produce not in the possession of the judgment debtor is covered by this rule<sup>3</sup> Unpaid purchase money due to the judgment debtor is moveable property attachable under this rule<sup>4</sup> Where money is deposited by a judgment debtor with a railway company as security for the due performance of his duties as a servant of the company, an attachment of such deposit is subject to all the rights of the company on the deposit, though the interest, if any, payable to the judgment debtor on the deposit amount may be made available to the decree holder by virtue of the attachment<sup>5</sup> The attachment of rights under a patent cannot be effected by serving a prohibitory order on the Controller of Patents under this rule, because such rights cannot be said to be in the possession of the Controller<sup>6</sup>

**13. Service of prohibitory order.** — A prohibitory order under this rule must be duly served on the garnishee<sup>1</sup>

**14. Effect of non-compliance with sub-rule (2).** — Want of affixture of the order as required by sub rule (2) is fatal to the validity of the attachment and a *bona fide* assignee from the judgment-debtor after such attachment acquires good title<sup>1</sup>

The mere order to make an attachment does not amount to actual attachment unless it has been effected in the manner prescribed by this rule, i.e., served on the debtor by sending a copy of the order to him<sup>2</sup>

**15. Notice to debtor.** — Under sub rule (2) a copy of the prohibitory order shall be sent to the debtor When it is not so sent, the attachment is ineffectual and the garnishee remains liable to pay the debt to the judgment debtor<sup>1</sup> A notice to the judgment-debtor is, however, not a condition precedent to the validity of the attachment<sup>2</sup>

**16. Effect of attachment.** — An attachment under this rule prohibits the creditor from collecting the debt, but does not prevent him from suing on the debt,<sup>1</sup>

#### Note 12

1. (70) ■ Ind App 241 (248, 251, 252) (PC)

in the possession of some person other than the judgment debtor]]

- 6 (39) AIR 1939 Cal 283 (284, 285) I L R (1938) 2 Cal 618

#### Note 13

#### Note 11

1. ('05) 9 Cal W N 693 (695)  
(11) 12 Ind Cas 869 (870) (Low Bur)  
[See (28) AIR 1928 Rang 285 (295) (Removal of property after such attachment—No offence)]  
2. ('34) AIR 1934 Pat 619 (622)  
(39) AIR 1939 Mad 811 (813)

#### Note 15

1. ('67) 7 Suth W R 10 (11)  
[See ('16) AIR 1916 Mad 434 (436) 39 Mad 389]  
2. ('12) IV Ind Cas 420 (420) 15 Oudh Cas 289.  
(77) 1877 Pun Re No 67, p 173  
[But see (06) 1906 Pun Re No 118, ¶ 453]

#### Note 16

1. ('91) 13 All 76 (78)  
(95) 17 All 198 (210, 211) 22 Ind App 31 (PC)  
(In fact a suit is proper if to save limitation)  
(11) 10 Ind Cas 569 (569) (Cal)  
(14) 1894 Pun Re No 142 ¶ 537  
(19) AIR 1919 Oudh 373 (374)

**O. 21 R. 46**  
**Notes 15-17**

nor is the attachment a bar to a contest of non liability by the garnishee<sup>2</sup>

The attaching decree holder gets no higher rights in the debt than what the judgment debtor could give him at the date of the attachment and any disposition of the debt by the judgment debtor prior to attachment binds the decree holder,<sup>3</sup> nor can a decree holder compel the judgment debtor to create larger rights for him<sup>4</sup> If, on the day of attachment, there was no debt and the attachment was raised, a subsequent accrual of a debt does not by itself revive the attachment<sup>5</sup> But where a debt existed at the time of attachment, the attaching decree holder is not precluded from realising the debt by the fact of the debt having been subsequently paid to judgment debtor by the garnishee<sup>6</sup>

A prohibitory order under this rule is a process in execution and money deposited in Court under sub rule (3) is "assets" within the meaning of Section 73 of the Code<sup>7</sup> When there are attachments of more Courts than one of varying grades, the garnishee acting under sub rule (3) is bound to deposit the money in the Court of the superior grade on the analogy of Section 63<sup>8</sup>

As against an Official Assignee in bankruptcy, the attaching decree holder obtains rights in the property attached only on complete realization by him before vesting<sup>9</sup>

**16a Payment into Court—Sub-rule (3) —** The payment contemplated by sub rule (3) is payment into the attaching Court so as to be available to the attaching decree holder Thus where the rent due by a tenant is attached and the tenant pays such rent to the credit of some other suit against the judgment debtor than the one in which it has been attached, the payment will not discharge the tenant from his liability for the rent<sup>1</sup>

**17. Inherent power of Court to pass prohibitory orders in proper cases. —** Even in cases not strictly governed by Q 21 R 46 a prohibitory order can be passed under the inherent powers of the Court where the ends of justice require it to be done<sup>1</sup>

2 (15) AIR 1915 Lah 137 (188) (Payment to attaching decree holder by garnishee without contest—Liability of garnishee to rightful creditor not absolved)

3 (24) AIR 1924 Cal 1068 (1068 1069) (71) ■ Bom H C R (O C) 169 (178) (1888) 39 Ch D 233 (263) Badeley v Consolidated Bank

ment of the decree obtained thereon is also necessary the two Judges in the case take opposite views)

4 (27) AIR 1907 Bom 365 (366) (Attachment of deposit with association — Article of Association providing for return of deposit only on termination of membership—Decree holder can not compel debtor to resign membership for making deposit payable)

5. (27) AIR 1922 All 391 (395)

■ (26) AIR 1926 Mad 371 (371 372 376) (Debt

1 (36) AIR 1936 Mad 1251 (252) Note 17

1 (30) AIR 1933 Lah 295 (296)

(87) AIR 1937 Cal 199 (201) ILR (1937) 2 Cal 48

## Local Amendments

O. 21 R. 46A  
(Calcutta)

## CALCUTTA

Add the following Rules

"46A The Court may in case of a debt, other than a debt secured by a mortgage or a charge or by a negotiable instrument, which has been attached under Rule 46 or Rule 51 of this Order, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so

Provided that if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge will deal with it in the same manner as if the case had been originally instituted in that Court

Such application shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment debtor

46B Where the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him

O 21 R. 46B  
(Calcutta)

46C Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit and upon the determination of such issue shall make such order or orders upon the parties as may seem just

O 21 R. 46C  
(Calcutta)

46D Where it is suggested or appears to be probable that the debt belongs to some third person or that any third person has a lien or charge on, or other interest in such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same

O. 21 R. 46D  
(Calcutta)

46E After hearing such third person and any other person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien charge or interest if any of such third or other person as may seem fit and proper

O. 21 R. 46E  
(Calcutta)

46F Payment made by the garnishee on a notice under Rule 46A or under any such order as aforesaid shall be valid discharge to him as against the judgment debtor and any other person ordered to appear as aforesaid, for the amount paid or levied although such judgment may be set aside or reversed

O. 21 R. 46F  
(Calcutta)

46G The cost of any application made under Rule 46A and of any proceeding arising therefrom or incidental thereto, shall be in the discretion of the Court

O 21 R. 46G  
(Calcutta)

46H An order made under Rule 46B, 46C or Rule 46E shall be appealable as a decree

O. 21 R. 46H  
(Calcutta)

(Section 51 of the Code contemplates sale without attachment and so even if a share of debt be not attachable under O 21 R 46G or under

any other rule presented, a Court can pass prohibitory orders similar to one under O 21 R 46 under its inherent powers for the ends of justice)

**O.21 R.46A**  
(Sind)

**SIND.** *Add the following as Rules 46A to 46I*

**“46A** The Court may in the case of a debt (other than a debt secured by a mortgage or a charge or by a negotiable instrument) and any moveable property not in the possession of the judgment-debtor which has been attached under Rule 46 or Rule 51 of this Order, upon the application of the attaching creditor, issue notice to any person liable to pay such debt or deliver or account for such moveable property (such person to be hereinafter called “the garnishee”), calling upon him either to pay or deliver into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so

Provided that if the debt or property in respect of which the application aforesaid is made is of value beyond the pecuniary jurisdiction of the Court the execution case shall be sent, if the attaching Court is the Karachi Small Cause Court, to the High Court, if it is any other Court, to the District Court to which the said Court is subordinate and thereupon the High Court or, as the case may be, the District Court or any other competent Court to which such case may be transferred shall deal with it in the same manner as if the case had been originally instituted in that Court

Such application shall be supported by an affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment debtor.

**O.21 R. 46B**  
(Sind)

*Procedure when garnishee does not forthwith pay amount etc*

**46B** Where the garnishee does not forthwith pay or deliver into Court the amount due from or the property deliverable by him to the judgment debtor or so much thereof as is sufficient to satisfy the decree and the cost of execution, or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order being made execution may issue as though such order were a decree against him

**O.21 R. 46C**  
(Sind)

*Procedure when garnishee disputes his liability*

**46C** Where the garnishee disputes his liability, the Court may order that any issue or question necessary for the determination of the liability shall be tried as if it were an issue in a suit and upon the determination of such issue shall make such order as may seem just

**O.21 R. 46D**  
(Sind)

*Procedure when debt or property belongs to a third person*

**46D** Where it is suggested or appears to be probable that the debt or the property attached belongs to some third person or that any third person has a lien or a charge on or an interest in it the Court may order such third person to appear and state the nature and particulars of his claim, if any, to such debt or property and prove the same

**O.21 R. 46E**  
(Sind)

*Order to be made on hearing such person*

**46E** After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided, or make such other order upon such terms, if any, with respect to the lien, charge or interest (if any) of such third or other person as may seem fit and proper

**O.21 R. 46F**  
(Sind)

*Payment or delivery under order to be a valid discharge*

**46F** Payment or delivery made by the garnishee on a notice under Rule 46A or under any such order as aforesaid shall be a valid discharge to him as against the judgment-

debtor and any other person ordered to appear as aforesaid, for the amount paid or levied or, as the case may be, property delivered, although such order may be set aside or reversed

O.21 R.46F<sup>\*</sup>  
(Sind)

46G Debts owing from a firm carrying on business within the jurisdiction may be proceeded against under Rules 46A to 46E of this Order, although one or more members of such firm may be resident outside the jurisdiction. Provided that any person having control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee notice. An appearance by any member pursuant to such notice shall be a sufficient appearance by the firm

O.21 R.46G  
(Sind)

46H The costs of any application made under Rule 46A and of any proceeding arising therefrom or incidental thereto shall be in the discretion of the Court

O.21 R.46H  
(Sind)

46I An order made under Rules 46B, 46C or 46D, shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

O.21 R.46I  
(Sind)

**R. 47. [New.]** Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

O.21 R.47

Attachment of share in moveables

1. Attachment of share in moveable property. — A share or interest in moveable property is incapable of actual seizure,<sup>1</sup> and attachment by a prohibitory order is the only proper course where such share or interest is to be proceeded against.<sup>2</sup>

**R. 48. [S. 268.] (1)** Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of

O.21 R.48

Attachment of salary or allowances of public officer or servant of railway company or local authority.

Order 21 Rule 47 — Note 1

crops is una-certained )

2 ( 37 ) AIR 1932 Cal 408 (408) 59 Cal 803  
(37) AIR 1937 Lah 813 (313) (Attachment of

ops  
br

actual seizure for recovery of fine from member of Hindu coparcenary as the share of offender in



O. 21 R. 48 the order to such officer as *the Central Government or the Provincial Government* may by notification in their Official Gazette appoint in this behalf, —

- (a) where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be,
- (b) where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by *the Central Government or the Provincial Government*, as the case may be, in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment

(5) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind *the Central Government or the Provincial Government* or the railway company or local authority, as the case may be, while the judgment debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and *the Central Government or the Provincial Government* or the railway

company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule. O. 21 R. 48  
Nota 1

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government may, by notification in the Gazette of India or in the Local Official Gazette, as the case may be"

b Substituted by Section 2 of the Code of Civil Procedure (Amendment) Act, XXVI of 1939, for "in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be"

c Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for 'the Government'

ii *ibid*

e *ibid*

### Local Amendment

#### MADRAS

Substitute a comma for the period at the end of the last sentence of sub-rule (1) and add the following clause "such amount or instalment being calculated to the nearest anna by fractions of an anna of six pies and over being considered as one anna and omitting amounts less than six pies"

### Synopsis

- |  |                 |
|--|-----------------|
| 1. Attachment of salary of public officer, etc | 3. Sub-rule (3) |
| 2. Sub-rule (2) and Section 64, Explanation.   | 4. Appeal.      |

1. Attachment of salary of public officer, etc. — Under the old Code the salary of a public officer or of a railway servant or of a servant of a local authority could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree<sup>1</sup> As this led to considerable inconvenience and needless expenso, this rule has been newly enacted to provide for such cases, the salary of this class of judgment-debtors can now be attached under this rule whether they or the disbursing officers reside within such local limits, or not<sup>2</sup> The distinction between this rule and Rule 52, *infra* is that the latter refers specifically to property actually in the hands of public officers, while the former provides for the anticipatory attachment of salaries<sup>3</sup>

This rule has no application to the attachment of salaries of judgment debtors in private service Such salaries are attachable only as debts after they fall due<sup>4</sup> The wages of domestic servants<sup>5</sup> or moneys due to railway contractors<sup>6</sup> are not salary or allowances, within the meaning of this rule This rule does not apply to the attachment of the salary of a member of a Provincial Legislative Assembly as such member is not a "public officer"<sup>7</sup> The attachment of salaries or allowances at the disposal of the

#### Order 21 Rule 48 — Note 1

1. (84) G All 218 (247, 248)  
(88) 12 Bom 44 (45)

2. (12) 39 Cal 104 (110, 112, 113)  
(29) AIR 1929 Lah 645 (646) (Obiter).  
3. See (98) 22 Bom 39 (41)

4. (29) AIR 1929 Nag 333 (331) (Pay of a servant which falls due on the 1st of each month cannot be attached as a debt on an earlier date, as the right to receive pay for a period shorter

6. (28) AIR 1928 Nag 210 (210)  
7. (39) AIR 1939 Cal 428 (429) - ILR (1939) 1 Cal 523.

**O. 21 R. 48**  
**Notes 1-4**

disbursing officer is not invalid by reason merely of the fact that the sanction of the superior authority is necessary before the money is actually disbursed<sup>8</sup>

Attachment under this rule can be made also by the Court to which a decree is transferred for execution<sup>9</sup>

Sub rule (1) of this rule has been amended by Act XXVI of 1939 so as to make it legal for the High Commissioner for India to comply with attachment orders issued by Courts in India in respect of the leave salaries payable in England to officers of the Indian Services<sup>10</sup>

**2. Sub-rule (2) and Section 64, Explanation.** — Salary attached under this rule is 'assets' within the meaning of Section 73 of the Code, and successive attaching decree-holders are entitled to rateable distribution thereof. There is no inconsistency between the Explanation to Section 64 and sub-rule (2) of this rule. The latter provision only lays down what the officer concerned should do<sup>1</sup>. See also Note 13 to Section 64.

**3. Sub-rule (3).** — The effect of this sub rule is that any sum paid by a disbursing officer in contravention of this rule can<sup>2</sup> and should be<sup>3</sup> recovered directly from the Government or the railway company or the local authority, as the case may be. But no order for recovery thereof can be made without bringing the Government<sup>4</sup> or the railway company or the local authority on the record as a party.

**4. Appeal.** — Where a decree holder wants to execute his decree by attachment of the pay of the judgment debtor under this rule, the question whether it is possible to execute the decree in the manner which has been adopted by the executing Court is a question under Section 47 *ante* and the decision of the question is, therefore, appealable as a decree<sup>1</sup>. Where an order directing an attachment under this rule is not appealed against, it becomes final as against the parties to it and a subsequent application contesting the validity of the order of attachment is barred by the general principles of *res judicata*<sup>2</sup>.

**O. 21 R. 49**

**R. 49.** [New.] (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment

8. (14) AIR 1914 Low Bur 215 (216) 8 Low Bur Rul 62

9. (27) AIR 1927 Oudh 112 (112) 1 Luck 46  
10. See Statement of Objects and Reasons, Gazette of India Sept. 2 1939, Part V, Page 149

Note 2

1. (12) 16 Ind Cas 640 (610) (Bom)  
(33) AIR 1939 Cal 485 (495, 496) ILR (1939) 1 Cal 40

Note 3

1. (14) AIR 1914 Low Bur 215 (216) 8 Low Bur

Rul 62

2. (10) 5 Ind Cas 603 (803) 1910 Pan Re No 10 (The Government should settle with the disbursing officer)

3. (12) 14 Ind Cas 787 (737) 1912 Pan Re No 93

Note 4

1. (33) AIR 1933 Bom 165 (166) (No revision therefore lies)

(36) AIR 1936 Lah 761 (762)

2. (30) AIR 1939 Rang 391 (395)

of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree holder by such partner, or as the circumstances of the case may require

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree holder and on the judgment debtor, and on such of the other partners as do not join in the application and as are within British India

(6) Service under sub rule (4) or sub rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served

[Cf R S C, O 46, Rr 1A, 1B]

### Synopsis

- |  |  |
|--|--|
| 1 Attachment of partnership property       | 3 Decree against individual partner    |
| 2 Against the partners in the firm as such | 4 Direct accounts See Note 3           |
|  | 5 Order under this Rule and insolvency |

**1. Attachment of partnership property.** — This rule and the next deal with the mode of execution affecting partnership property. Execution can be taken against any partnership *property* only on a decree passed against the firm or against all the partners thereof as such<sup>1</sup> Where the decree is only against an individual partner the *property* of the partnership cannot be attached but an order creating a *charge on the interest* of the judgment debtor in the partnership can be obtained with or without the appointment of a receiver<sup>2</sup> The prohibition against attachment and sale contained in sub rule (1) is mandatory and therefore a sale in execution contrary to the provision thereof is invalid and inoperative<sup>3</sup> The provisions of this rule are closely modelled on Section 23 of the English Partnership Act (53 & 54 Vict Chap 39)

Order 21 Rule 49 — Note 1

[See (70) 5 Beng L R 386 (386 387)

(19) AIR 1919 Cal 296 (304)]

[But see (93) 20 Cal 693 (696) (Decision under the Code of 1887)]

3 (35) AIR 1935 Cal 275 (276)

(38) AIR 1938 Lah 437 (439)

**O. 21 R. 49**  
**Notes 1-5**

The interest of a partner in partnership business is moveable property, although part of the partnership property may consist of immovable property. The reason is that the share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts.<sup>4</sup>

2. "Against the partners in the firm as such." — These words do not occur in Section 23 of the English Partnership Act. The introduction of these words in this rule makes it clear that a decree against partners as such is on the same footing as a decree against the firm for the purposes of this rule.

3. Decree against individual partner. — The holder of a decree against an individual partner gets no other rights in execution than what a voluntary assignee of a partner of his share in the partnership gets under such assignment. Such an assignment does not as against the other partners, entitle the assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs or to require any accounts of the partnership transactions or to inspect the partnership books but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the amount of profits agreed to by the partners.<sup>1</sup>

In case of dissolution of the partnership whether as respects all the partners or as respects the assigning partner the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners and for the purpose of ascertaining that share, to an account as to the date of the dissolution.<sup>2</sup>

4. "Direct accounts." — See Note 3 above.

5. Order under this Rule and insolvency. — An order under this rule charging the interest of the judgment debtor in partnership property is not a "transaction" protected by Section 57 of the Presidency Towns Insolvency Act or by Section 55 of the Provincial Insolvency Act 1920.<sup>3</sup>

**O. 21 R. 50**

*Execution of decree  
against firm*

**R. 50. [New]** (1) Where a decree has been passed against a firm, execution may be granted —

- (a) against any property of the partnership;
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

<sup>4</sup> (38) AIR 1939 Lah 65 (65) (O 21 R 78 applies to sale of partner's interest—O 21 Rule 50 does not apply)

**Note 3**

1. See S 31 (3), Partnership Act 1900 (53 and 54 Viet Chapter 82)

(92) AIR 1932 Pat 15 (19 20) 10 Pat 732 (Kor can receiver appointed under this rule sue for accounts of a continuing partnership)

(1895) 2 Q B 126 (132) Brown Janson & Hutchinson (Accounts directed only under special cir-

cumstances e.g. with a view to dissolution)

2 See Section 31 (2) English Partnership Act 1900 (53 & 54 Viet Chap 82)

(84) 10 Cal 679 (672 673)

(90) 12 Ind 417 (450)

(78) 3 Cal 193 (193) 4 Ind App 217 (PC) (Oshier)

**Note 5**

1. (1897) 1 Q B 317 (370) Wild v Southwood

(1935) 1 Ch 325 (330, 331) O Shea, Re Courage v O Shea

(c) against any person who has been individually served as a partner with a summons and has failed to appear :

§ 21 R. 50  
Note 1

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer

[ Cf R S C, O 48A, R 8 ]

#### Local Amendment

##### PATNA

In sub rule (2) add the words ' or to the Court to which it is sent for execution ' after the words ' passed the decree ' and before the words ' for leave

#### Synopsis

- |   |   |
|---|---|
| 1 Scope of the Rule   | 5 Execution against persons other than those referred to in sub rule (1)—Sub rule (2) |
| 2 "Where a decree has been passed against a firm" See Order 30 Rule 11 Note 4 | 6 Determination of liability under sub rule (2) operates as a decree                  |
| 3 Award   | 7 Sub rule (4)  |
| 4 Against any person who has appeared   | 8 Minor partner—Proviso to sub rule (1)   |
|   | 9 Insolvency of firm  |

#### Other Topics (miscellaneous)

Appeal See Note 6  
Court which passed the decree See Note 3  
Execution in case of deceased partners See Note 5  
Sub-rule (3) if covers ex parte decree See Note 6

1. Scope of the Rule — This rule should be read with the provisions of Order 30 *infra* the latter deals with the procedure in suits instituted by or against

**O. 21 R. 50**  
**Notes 1-3**

firms, while this rule deals with the mode of execution of decrees which have been obtained against firms in the firm name<sup>1</sup>

As will be seen in Note 1 to O 30 R 1, a decree against a firm in the name of the firm has the same effect as a decree against all the partners. It can therefore be executed against the whole of the partnership property<sup>2</sup> [sub rule (1) clause (a)] It can also be executed against any one or more of the partners personally<sup>3</sup> (a) against their person or their personal property) though before this is done certain conditions have to be satisfied and a certain procedure has to be followed as prescribed by this rule. Thus it can be executed personally against any person coming under clauses (b) and (c) of sub rule (1)<sup>4</sup> inasmuch as in such cases it may safely be presumed that the person proceeded against knows of the suit and that his liability as a partner is in some way established<sup>5</sup>. The decree can also with the leave of the Court be executed personally against any other person as being a partner of the firm [sub rule (2)]<sup>6</sup>

Sub rule (1) of this rule does not require the holder of a decree against a firm to exhaust his remedy under clause (a) and then proceed under the other clauses. Under that rule he has three courses open to him any of which he may pursue regardless of the order in which they are set out.

As regards execution against a dissolved firm see O 30 R 3 Note 2 and the undermentioned case<sup>7</sup>

The provisions of this rule do not apply to a decree obtained against a limited liability company<sup>8</sup>

2 'Where a decree has been passed against a firm' — See Order 30 Rule 1 Note 4

3 Award. — An award can be validly passed against a firm<sup>1</sup> as well as against individuals and when the award against a firm is filed in Court under the provisions of the Arbitration Act 1899 it is enforceable as a decree of the Court and the provisions of O 21 R 50 apply thereto<sup>2</sup>. But though an award when filed in Court is on the same footing as a decree of Court the proceedings before the arbitrators up to the stage of the passing of the award do not constitute a suit for the application of the provisions of Order 30 (See Note 11 to O 30 R 1). Consequently the service of any notice or

**Order 21 Rule 50 — Note 1**

1 (37) AIR 1937 Bom 334 (335)

2 (15) AIR 1915 Mad 1073 (1073) (Leave of Court necessary only for arresting partner not served)

3 (6) AIR 1936 Lah 936 (236)  
[See also (37) AIR 1937 Bom 365 (3 0) I L R (1937) Bom 621]

4 (1) AIR 1936 Sind 51 (50 53)  
(15) AIR 1915 Cal 228 (742) (Case of constructive service as partner under O 30 R 5)

(23) AIR 19 5 Lah 525 (509) (Individual service construed)

(35) AIR 1935 Cal 316 (317 318) (Mere fact that other persons are stated to be the remaining partners of the firm in the petition for execution of the decree cannot make the execution invalid)

[See (11) 12 Ind Cas 1006 (100 1) 20 Mad 414]

5 (10) AIR 1937 Bom 44 (445) 51 Bom 791  
[See also (16) AIR 1936 Cal 271 (274 276 0) 53 Cal 714]

6 (15) AIR 1915 Cal 938 (212)

(25) AIR 1935 Rang 317 (816) (Deputy Reg. not empowered to grant leave cannot determine liability of contesting party)

(25) AIR 1925 S and B 31 (318) 19 S and L R 146  
(The fact that a decree is not provided for execution on personally against certain persons as partners is no bar to applying for leave against others under sub-rule (2))

(33) AIR 1938 Cal 315 (317 318)

[See (30) AIR 1930 Lah 213 (214)]

7 (33) AIR 1933 Lah 472 (470)

(25) AIR 1935 Lah 379 (379)

8 (24) AIR 19 4 Bom 306 (307 308)

9 (37) AIR 1937 Lah 59 (60)

**Note 3**

1 (6) AIR 1930 Cal 358 (357) 47 Cal 22

(33) AIR 1931 Bom 433 (434) 59 Bom 10

(71) AIR 1931 Lah 780 (3) 13 Lah 37

[But see (2) AIR 19 Bom 40 (430) (Overr)]

2 (20) AIR 19 0 Cal 33 (33) 47 Cal 20

(37) AIR 1933 Lah 43 (133) 53 Lah 16

summons by the arbitrators on an alleged partner of the firm, is not service within the meaning of sub rule (1) so as to enable the decree holder to take out execution against the person of such partner without the leave of the Court. Before ordering execution of an award, the Court will, therefore, have to determine in every case whether the alleged partner is liable as a partner or not and grant or refuse leave under sub rule (2)<sup>3</sup>

**4. Against any person who has appeared.**—Where an alleged partner refuses a summons sent to him under O 30 R 3, he must be deemed to be 'individually served' and if he fails to appear, execution can proceed against him under sub rule (1), clause (c) without any leave of the Court<sup>1</sup>. The words "or who has been adjudged to be a partner" in sub rule (1) evidently provide for a case where the person served on behalf of the firm denies that he is a partner, and the plaintiff asks for an issue being raised in the suit, as to whether the service on him is good service or not<sup>2</sup>. Where a person served with summons under O 30 R 3 as a partner of a firm enters appearance and makes an application denying liability on the allegation that he is not a partner, the appearance is one 'under protest' under O 30 R 8 and not one under O 30 R 6 and hence, in such a case an enquiry under sub rule (2) of this rule is not excluded<sup>3</sup>.

See also Notes on Rules 3, and 5 to 8 of Order 30

**5. Execution against persons other than those referred to in sub-rule (1) —Sub-rule (2).**—It has already been seen in Note 1 above that execution of a decree against a firm can be taken against the property of the partnership as well as personally against the partners referred to in clauses (b) and (c) of sub rule (1) and that as against an alleged partner not referred to therein, the leave of the Court is a condition precedent to an order for execution. The principle of the distinction is that, in the case of persons who cannot in law be fixed individually with the knowledge of the suit against the firm an opportunity must be given to them to dispute the liability under the decree<sup>1</sup>. See also sub rule (4)

- (24) AIR 1924 Cal 117 (118)  
(31) AIR 1931 Lah 736 (737 738) 13 Lah 327  
(25) AIR 1925 Sind 293 (294) 19 Sind L R 1  
(29) AIR 1929 Sind 28 (29) 23 Sind L R 422  
(31) AIR 1931 Sind 82 (84) 25 Sind L R 460  
(30) AIR 1936 Sind 211 (211) 30 Sind L R 6  
(35) Cal Cal L Jour 515 (518) 62 Cal 833  
[See also (24) AIR 1924 Lah 544 (544)]  
[But see (27) AIR 1927 Bom 428 (430) (Obiter)]  
3. (29) AIR 1929 Lah 228 (229 230)  
(31) AIR 1931 Lah 736 (738) 13 Lah 327  
(18) 19 Ind Cas 363 (366 367) 6 Sind L R 127  
(The arbitrator cannot decide this question)  
[See (25) AIR 1925 Sind 293 (294) 19 Sind L R 1]]

#### Note 4

- 1 (15) AIR 1915 Cal 238 (240, 241)  
2 (32) AIR 1932 Sind 199 (201) 26 Sind L R 228  
[See also (35) AIR 1935 Lah 520 (521) (Person appearing under protest asking Court to frame

both and claim the benefit of a decree in favour of the firm)]

- 3 (37) 41 Cal W N 566 (568)

#### Note 5

- 1 (32) AIR 1932 Bom 516 (519)  
[See also (26) AIR 1926 Cal 271 (274, 275) 53 Cal 214  
(36) AIR 1936 Pat 496 (497) (Decree against firm cannot be executed against individual partners without leave of Court under sub-rule (2)—Ex parte decree against firm mentioning also names of individual partners—In peculiar circumstances of this case it was held that the decree holder was precluded from contending that the decree was against individual partners)]

litigated when an application under O 21 R 50, C 1 C is made and cannot be gone into in proceedings for filing the award]]



**O. 21 R. 50**  
**Note 5**

Ordinarily, a decree is binding on the executing Court and no question of the liability of the judgment debtor under the judgment can be allowed to be raised in execution. But as in the case of a suit against a firm the decree is passed on service of summons in an extremely technical form as set forth in O 30 R 3, and as each partner is not necessarily a defendant in the suit and is not required to be served with the summons in the suit before the decree is passed, it is provided specifically in sub rule (2) read with sub rule (4) that in the case of persons not served in the suit, their liability under the decree, when disputed, may be heard and determined in execution.<sup>2</sup>

Where a person appears in answer to a notice issued to him under sub rule (2) and admits that he is a partner in the firm against whom a decree is passed, he cannot at the same time urge that the decree is not binding on the firm.<sup>3</sup> The reason is that the words "where the liability is not disputed" mean and can only mean liability as a partner in the firm and that is the only question which can be decided in proceedings taken under this sub rule.<sup>4</sup>

As to the nature of the defence that can be taken where the person on whom notice is served disputes liability as a partner see Notes 3 and 4 to Rule 8 of Order 30 and the cases cited therein and also the undermentioned cases.<sup>5</sup>

When the liability is decided in favour of the decree holder and leave is granted, the effect is that the decree against the firm which was executable or had been executed<sup>6</sup> against the property of the firm or against the persons referred to in clauses (b) and (c) of sub rule (1) becomes also *executable personally* against partners not served in the suit. Accordingly an application for leave under sub rule (2) is only ancillary to an application for execution and will not be barred by reason of its being made beyond three years from the date of the decree so long as the decree itself is otherwise kept alive according to law.<sup>7</sup> Though the words "may apply occur in sub rule (2) it has been held that no separate application for leave is necessary as the application for execution itself implies a prayer for leave.<sup>8</sup>

In the case of a Hindu son when the Court finds under sub rule (2) that the son is not a partner, the application against him under O 21 R 50 must be dismissed, and the decree holder left to remedies otherwise available to him.<sup>9</sup>

2 (3) AIR 1932 Bom 516 (570 521 522) (In absence of fraud or collusion on the liability is not to be disputed in execution and not by separate suit.) (See (88) AIR 1933 Lah 591 (591) (Where holder must establish the liability of the objector partners.)

3 See also (89) AIR 1932 Sind 199 (199 201) 6 Sind L R 299 (A case of appearance under protest under O 30 R 3).

4 (94) AIR 1934 Sind 135 (135) (If he wants to dispute the decree he should take proceedings in the suit to have the decree set aside.)

5 84) AIR 1934 Sind 135 (135)

6 39) AIR 1932 Bom 516 (520) [Award—Decree on the ground that reference to arbitration was unauthorized.]

7 (19) AIR 1940 Cal 98 (29) 43 Cal W N 397 (1939) (Decree on liability not confined to ground that person is not a partner but may be based on other grounds also—Objection may be taken that contract was beyond the scope of the reference or that a reference to arbitration was unauthorized.)

8 (81) AIR 1931 Lah 786 (739) 13 Lah 397

7 (32) AIR 1932 Bom 516 (519)

(93) AIR 1933 Sind 12 (18) 29 Sind L R 236

(31) AIR 1931 Lah 786 (787) 13 Lah 397

(31) AIR 1931 Sind 82 (83) 25 Sind L R 460

(36) AIR 1935 S C 138 (139) 30 Sind L R 88 (An application under O 21 R 50 (2) is an application in execution of a decree—Dismissing from AIR 1930 Sind 180.)

(35) AIR 1933 Mad 926 (926)

(See also (34) AIR 1933 Sind 161 (162) 1 L R (1933) Har 589 (FD) (Application under O 21 R 50 (2) is application in execution of decree.) [See however (30) AIR 1930 Sind 160 (161, 162) 24 Sind L R 133 (Though application for leave is not an execution application falling under Art 169 Limitation Act it falls under Art 161 and must be filed within three years of the decree.)]

8 (29) AIR 1939 Lah 293 (230)

(31) AIR 1931 Lah 726 (734) 13 Lah 397

9 (20) AIR 1940 Pat 20 (107)

(27) AIR 1937 Sind 247 (213)



**O.21 R.52**  
**Notes 1-2**

**1. Scope of the Rule.** — This rule deals with the attachment of property in the custody of a Court or of a public officer.<sup>1</sup> The property sought to be attached must, however, belong to the judgment debtor. Thus, Government promissory notes standing in the name of the judgment debtor in a bank, but which have been declared to belong to another, cannot be attached under this rule.<sup>2</sup> Where a judgment-debtor's property is sold in execution and the sale proceeds are deposited in Court, the surplus amount of the sale proceeds payable to the judgment debtor after payment of the decretal amount can be attached under this rule.<sup>3</sup>

The Court has no discretion to refuse to order attachment in cases under this rule.<sup>4</sup> The circumstance that one decree-holder has attached the property is no ground for preventing another decree-holder of the same judgment-debtor from attaching the same property.<sup>5</sup>

Where a decree-holder seeks to attach money of the judgment debtor already deposited in Court, it is necessary that he should put in an execution application in his suit to that effect and give notice to the judgment-debtor.<sup>6</sup> The attachment is to be made by issuing a notice to the custody Court, to hold the property subject to the orders of the Court issuing the notice.<sup>7</sup> Where the attaching Court and the custody Court are the same the High Court of Lahore<sup>8</sup> has held that it would be a meaningless formality to issue a precept to itself requesting it to hold the property subject to its own orders.

**2. Property in the custody of the Court or public officer.** — The rule permits of attachment of property not merely in the custody of Court but also of property in the custody of public officer, such as moneys in the hands of the Official trustee<sup>1</sup> or insured letters addressed to the judgment debtor lying in the custody of the post office.<sup>2</sup> Revenue or interest or dividends payable in future can also be attached under this rule.<sup>3</sup> For definition of public officer, see Section 2 (17). As to assets in the hands of the Collector in execution, see the undermentioned cases.<sup>4</sup> The word custody in the rule means actual custody.<sup>5</sup>

See also the undermentioned case.<sup>6</sup>

#### Order 21 Rule 52 — Note 1

1 (8) AIR 1925 Sind 214 (215) 29 Sind L R 251 (Rule 52 deals not only with money deposited in Court in pursuance of a decree but also with money which comes into the hands of an officer of the Court in various ways)

2 (97) 1 Cal W N 170 (172)

[See also (15) AIR 1915 Lah 147 (149) (Money deposited by agreement as security for decree to be passed cannot be attached)]

3 (37) AIR 1937 Nag 391 (392, 393) 1 L R (1938) Nag 402

4 (81) 8 Cal L Rep 17 (18)

5 (80) AIR 1930 Mad 4 (11)

6 (76) AIR 1926 Mad 1104 (1105)

7 (16) AIR 1916 Cal 570 (573)

(76) 19 South W R 87 (40) (Service of notice on the custody Court sufficient to complete attachment)

(14) AIR 1914 Upp Bur 25 (16) (Courts in different districts—Attachment without transfer held illegal)

(11) 1 Ind Cas 532 (533) (Low Bur) (Attachment by custody Court irregular)

(1) . . . . . makes

holding property—Refusal of presiding officer to acknowledge attachment will not affect validity of attachment — When attached property is money custody Court must make it over to the attaching Court when called upon to do so

[See also (36) AIR 1936 Cal 112 (114)]

8 (24) AIR 1928 Lah 593 (594)

#### Note 2

1 (40) 12 Mad 230 (232)

2 (30) 13 Mad 242 (247)

(16) AIR 1916 All 336 (337)

3. (15) AIR 1915 Bom 313 (314) 39 Bom 50

(90) 5 C P L R 147 (150)

4. (12) 16 Ind Cas 52 (60) 26 Bom 519 (Assets held by Collector in execution are assets of the Court transferring the decree — No other Court can attach them)

(92) 13 South W R 53 (59) (Assets held by Collector in execution are assets of the Court transferring the decree — Attachment of such assets — Notwithstanding the attachment, assets continue to be the property of judgment debtor until order of the attaching Court for payment of the assets to the decree holder)

5. (84) 1 Mad 47 (49)

6. (31) AIR 1931 All 337 (338) (4) regarding in

**3. Property in the hands of a receiver.** — Moneys in the hands of a receiver must be regarded as being in the custody of the Court and can be attached under this rule<sup>1</sup>. Leave of Court is, however, necessary before such attachment of property in his hands can be levied. The present rule does not affect the prevailing practice as to the necessity of obtaining leave in such cases<sup>2</sup>.

Where a receiver is appointed for the assets of a partnership in a partnership suit, the practice on the original side of the High Court of Bombay has been, to pass a *charging order* against the assets held by the receiver, on the application of an attaching creditor. By virtue of such order the receiver is bound to deal with the charge as per order of the Court issuing the same<sup>3</sup>. Where a receiver is appointed in a suit for administration of the estate of a deceased but no decree is passed, it has been held that the receiver appointed in the suit ought not to be directed to pay a judgment creditor who has obtained an attachment under this rule<sup>4</sup>.

See also the undermentioned case<sup>5</sup>.

**4. Property in the hands of the Official Assignee.** — The Official Assignee is a public officer coming within the definition of Section 2, clause (17), sub clause (d) of the Code. The amount in his hands payable by way of dividend to the judgment-debtor can be attached under this rule<sup>1</sup>.

**5. Anticipatory attachment.** — The rule applies only to attachment of property actually in the hands of the Court or the officer and not of property expected to reach the hands of such Court or officer<sup>1</sup>.

**6 Determination of questions of title and priority — Proviso.** — Under the proviso to this rule a question of title or priority arising between the decree holder and any other person is to be determined by the *custody* Court and not by the *attaching* Court<sup>1</sup>. Thus where Courts B, C and D have, in execution of decrees obtained by X, Y and Z respectively, successively attached a fund in the custody of Court A it is the latter Court that has to determine the priority between X, Y and Z

whose custody the amn has left the attached property is not a public officer )

Note 3

5 (36) AIR 1936 Rang 63 (64) (Appointment of receiver by consent of parties in suit by A against B—It was held that the other creditors of B could attach in hands of receiver only the amount which was in excess of the amount due to A)

Note 4

1 (35) AIR 1925 Bom 314 (314) 49 Bom 638 [See also (37) AIR 1937 Rang 538 (539) (Dividend in Official Assignee's hands to which

erty in hands of receiver can be attached with

Note 5

1 (99) 23 Bom 39 (41)  
(11) 11 Ind Cas 422 (425) (Cal)  
(17) AIR 1917 Cal 18 (15) 44 Cal 1072  
(15) AIR 1915 Mad 236 (236)

Note 6

1. (81) 7 Cal 553 (555)  
(31) 35 Cal W N 517 (519)

Airza J J  
(27) AIR 1927 Bom 405 (410) (Do J)

O.21 R.52  
Note 6

It has been held by a Full Bench of the High Court of Madras<sup>3</sup> that X is entitled as being the first attaching decree holder to priority over the claims of Y and Z and that the custody Court A is not entitled to award a *rateable distribution* among Y, Y and Z. The reason given is that Section 73 does not in terms apply to such cases inasmuch as the decree holders have not applied to Court A for execution of their decrees before the receipt by it of such assets and that there cannot be any rateable distribution of property apart from Section 73 on equitable grounds among any other class of decree holders than those specified in Section 73. And until the money is actually transferred to the credit of the suit in execution of the decree in which it was attached the Court continues to be merely the *custody Court*.<sup>5</sup> The High Court of Calcutta<sup>4</sup> has on the other hand held that attachment does not create any title in the attaching creditor and that the custody Court is bound to apply the rules of justice, equity and good conscience and distribute the fund attached rateably amongst the attaching decree holders. In the undermentioned case the same High Court has held that where the custody Court is different from the attaching Court the custody Court has no authority to make any rateable distribution and that it could only determine the question of priority and thereafter act under the instructions of the attaching Court.<sup>6</sup> The question has arisen in the High Court of Bombay with reference to the attachment of funds in the hands of a receiver appointed in a partnership action. In the undermentioned case<sup>6</sup> Farman J. held that one of several creditors cannot by attachment obtain priority over the other creditors and that a Court of Equity will refuse permission to attach except on terms which ensure equality among all the creditors. A contrary view was taken by Mirza J. in the cases cited below<sup>7</sup> following the Madras Full Bench case. The same High Court has also held that a creditor who has obtained a charging order in his favour is entitled to priority over other non attaching creditors.<sup>8</sup> The Lahore High Court has in the undermentioned case<sup>9</sup> held that the decree holder who attaches the money first is entitled to priority.

Where X obtains a decree in Court B and in execution thereof attaches a fund in Court A and before the transfer of the fund to Court B to the account of X's suit other decree holders have applied for execution to the Court B the matter falls within Section 73 and X and other decree holders will be entitled to rateable distribution.<sup>10</sup> As to the right of rateable distribution in cases in which the attaching Court and the custody Court are one and the same see Note 11 to Section 73.

The order passed under the proviso is not an administrative but a judicial order

- (68) 10 South W R 43 (43)
- (73) 20 South W R 73 (75)
- (28) AIR 1923 Mad 505 (507) 4F Mad 506
- (16) AIR 1911 Pat 321 (322) 1 L J 1 Jour 449
- (18) AIR 1918 Upp Bar 313 (32) 2 Upp Bar 181
- (9) AIR 1928 Sind 165 (166) 2 Sind L R 345
- (Held the Official Receiver is entitled to priority over attaching decree holders)
- (81) 6 Cal 146 (149) (Collector having custody cannot however decide claim)
- (70) 13 South W R 301 (302) (Do)
- (9) 13 Bora 710 (713)
- (33) AIR 1932 Cal 210 (218) II W (1932) Mad 1004 (Determination need not be deemed to be in rem suit in which property was placed in custody of Court)
- 2 (11) AIR 1921 Mad 715 (721) 44 Mad 100 (Overruling AIR 1917 Cal 179)
- [See also (19) AIR 1919 Mad 66 (68) 42 Mad 62]

- (15) AIR 1935 Mad 235 (236)
- 3 (33) AIR 1933 Mad 342 (343) (Attachment by two Courts of different grades—Full Bench order sending money to superior Court though attachment of inferior Court was prior—Held decree holder of inferior Court is not priority)
- 4 (17) AIR 1917 Cal 13 (17) 44 Cal 1072 (But see (31) 7 Cal 553 (555))
- 5 (33) AIR 1933 Cal 814 (814 815) (AIR 1917 Cal 13 distinguished as a case where the attaching and the custody Courts were the same)
- 6 (92) 1F Bom 577 (579)
- 7 (7) AIR 1927 Bom 40 (410)
- (27) AIR 1917 Bom 331 (337 338)
- 8 (90) AIR 1930 Bom 401 (405) 51 Bom Cr
- 9 (3) AIR 1935 Loh 914 (915)
- 10 (21) AIR 1971 Cal 1218 (1217) 44 W L 100
- (3) AIR 1935 Loh 914 (915)

**O. 21 R. 52**  
**Notes 6-9**

binding on the parties.<sup>11</sup> The enquiry under the proviso is of the same nature as an investigation of claim proceedings and a suit lies to set aside the order passed therein.<sup>12</sup> Further, a decision in a proceeding under the proviso between the decree holder and a stranger will not be one under Section 47.<sup>13</sup> Hence a separate suit to agitate the dispute between the attaching decree holder and a stranger claiming the money or other property attached will not be barred.<sup>14</sup>

*A* obtains a decree against *B*, *C* and *D*. The decree is joint and several against all the judgment debtors as regards a portion of the decretal amount and as regards the balance the decree is against *B* exclusively. Certain money is lying in Court which *A* wants to attach as being the exclusive property of *B*. *C* and *D* claim that the property is the joint property of *B*, *C* and *D* and not the exclusive property of *B*. The dispute is one between the parties to the suit and falls under Section 47<sup>1b</sup>.

**7. Effect of attachment under this Rule on any previous attachment.**—*A* files a suit against *B* and attaches before judgment certain moveable properties belonging to *B*. The attached property being perishable is sold and the proceeds are kept in Court. *C* who has obtained a decree against *B* attaches the amount in Court deposit under the provisions of this rule. If at that time *A* has not obtained a decree in his suit and applied for execution thereof, *C* will be entitled to apply the amount attached in satisfaction of his decree and the prior attachment before judgment obtained by *A* will confer no right in his favour so as to affect the right of *C*.<sup>1</sup> But if *A* has actually obtained a decree and applies for execution at the time of *C*'s attachment different equities will arise and both *A* and *C* will be entitled to share the proceeds rateably between themselves.<sup>2</sup>

8. *Step-in-a-id.* — Where an attachment is effected under this rule of moneys lying to the credit of the judgment debtor in the treasury, and more than three years after the attachment an application is made for payment of the amount attached, the latter application is not one for execution but one to take a step in aid of the prior execution application and is not barred.<sup>1</sup>

**9. Appeal.** — It was held in the undermentioned case that where a decree holder in a Munsif's Court obtained an order of attachment under this rule of certain moneys lying to the credit of the judgment debtor in the sub Court and in pursuance thereof obtained an order of payment from the sub Court, an appeal lay to the District Court and not directly to the High Court. The dispute was held to be one relating only to the Munsif's Court's decree.<sup>1</sup> As to whether the question arising under the proviso to this rule falls within the scope of Section 47 so as to be open to appeal, see Section 47, Note 5 and the cases cited there.

custody of Court—Same property subsequently sold by *B* in execution of his decree against same judgment debtor and purchased by himself — *B* gets a good title — But where he has not complied with O 21 R 52 and the property is again sold in execution of the decree which *A* gets the latter cannot be made liable for any loss sustained by *B* on account of such re-sale //

### Netc 8

**Note 7**

1 (15) AIR 1915 All 275 (276-277) 37 All 578  
{See also (36) AIR 1936 Cal 112 (114) (Movable  
property attached before judgment by A and in

1 (01) 24 MAR 1981 (1981)

**Note 9**

1. (1S) AIR 1919 Mod 921 (921)

O. 21 R. 52  
Note 10

10. Revision. — No revision lies from an order by the custody Court determining a question of priority under the proviso to this rule as there is no question of *jurisdiction* involved<sup>1</sup>

O. 21 R. 53

**R. 53.** [S 273 ] (1) Where the property to be attached is a decree, either for the payment of money<sup>3</sup> or for sale in enforcement of a mortgage or charge,<sup>3a</sup> the attachment shall be made, —

(a) if the decrees were passed by the same Court,<sup>5</sup> then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court,<sup>6</sup> then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution<sup>8</sup> of its decree unless and until —

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree<sup>9</sup> and apply the net proceeds in satisfaction of the decree sought to be executed

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1)<sup>4</sup> shall be deemed to be the representative<sup>10</sup> of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or

charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. O. 21 R. 58

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment<sup>11</sup> of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

[ 1877, S. 273. ]

#### Local Amendments

##### ALLAHABAD

(1) In sub rule (1) (b) and in sub rule (4), *after* the words "to such other Court" *add* the words "and to any other Court to which the decree has been transferred for execution "

(2) In sub-rule (6) *for* the words "after receipt of notice thereof," *read* the words "after receipt of notice, or with the knowledge thereof "

##### CALCUTTA

(1) In sub rule (1) (b) *after* the words "to such other Court " *insert* the words "and to any Court to which it has been transferred for execution", also *insert* therein the words "or Courts" *after* the words "requesting such other Court "

(2) In sub-rule (1) (b) (ii) *cancel* the words "to execute its own decree" and *substitute* therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court "

(3) In sub rule (4) *insert* *after* the words "by sending to such other Court" the words "and to any Court to which it has been transferred for execution "

(4) In sub rule (6) *substitute* the words "in contravention of the said order with knowledge thereof " *for* the words "in contravention of such order after the receipt of notice thereof "

##### LAHORE

(1) *Add* the following words to sub rule (1) (b), *after* the words "to such other Court"

"and to the Court to which it has been transferred for execution "

(2) In sub rule (1) (b) (ii), *substitute* the words "the attached " *for* the words "its own", and *insert* the following words between the words "executed or" and "his judgment debtor ":



O. 21 R 53

with the consent of the said decree holder expressed in writing or with the permission of the attaching Court

(3) In sub rule (6) *substitute* the words with the knowledge for the words after receipt of notice

MADRAS

(1) In sub rule (1) (b) (ii)

(i) after the words judgment debtor and before the words applies add the words if he has obtained the consent in writing of the decree holder or the permission of the attaching Court and

(ii) for the words its own *substitute* the words the attached

(2) Add the following as sub rule (1) (c)

(c) If the decree sought to be attached has been sent for execution to another Court the Court which passed the decree shall send a copy of the said notice to the former Court and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it

NAGPUR

1) In sub clause (1) of clause (b) of sub rule (1)

(i) After the word judgment debtor insert the words with the consent of the said decree holder expressed in writing or with the permission of the attaching Court

ii) For the words its own *substitute* the words the attached

(2) In clause (b) of sub rule (1) and in sub rule (4) after the words to such other Court insert the words and to any other Court to which the decree has been transferred for execution

N W F P

(1) In sub rule (1) (b) and in sub rule (4) after the words to such other Court add the words or to any other Court to which the decree has been transferred for execution

(2) In sub rule (1) (b) (ii) for the words its own decree *substitute* the words the attached decree

(3) In sub rule (6) for the words after receipt of notice thereof read after receipt of notice or with the knowledge thereof

ODISHA

(1) In sub rule (1) (b) and in sub rule (4) after the words to such other Court add the words and to any other Court to which the decree has been transferred for execution

(2) In sub rule (6) for the words after receipt of notice thereof read the words after receipt of notice or with the knowledge thereof

PATNA

*Substitute* the following for sub rule (1) (b)

(b) If the decree sought to be attached was passed by another Court then by the issue to such other Court (or to the Court to which the decree may have been transferred for execution) of a notice by the Court before which the application has been made requesting such other Court (or the Court to which the decree may have been transferred for execution as the case may be) to stay the execution of the decree sought to be attached unless and until —

(i) the Court which has issued the notice shall cancel the same or

(1) the holder of the decree sought to be executed, or his judgment debtor, with the consent of the said decree holder expressed in writing or the permission of the attaching Court, applies to such other Court (or to the Court to which the decree may have been transferred for execution) to execute the attached decree "

# RANGOON

(1) In clause (b) of sub rule (1) after the words "to such other Court" the words "and to any Court to which it may have been transferred for execution" shall be added, and for the word "its" the word "the" shall be substituted

(2) In sub clause (ii) of clause (b) of sub rule (1) for the words "its own," the words "the attached" shall be substituted

(3) To sub clause (ii) of clause (b) of sub rule (1) the following shall be added, namely —

"with the consent of the said decree holder expressed in writing or with the permission of the attaching Court

(4) In sub rule (6) for the words "after receipt of notice thereof" the words "with the knowledge thereof" shall be substituted

## Synopsis

- |   |  |
|---|--|
| 1 Legislative changes                                     | 6 Decree passed by different Courts              |
| 2 Scope of the Rule                                       | 7 Effect of attachment                           |
| 3 Decree for money  | 8 Stay of execution — Sub rule (1)               |
| 3a Decree for sale in enforcement of a mortgage or charge | 9 Execution of attached decree — Sub-rule (2)    |
| 4 Other decrees   | 10 Representative — Sub rule (3)                 |
| 4a Preliminary decree for accounts — Attachability of     | 11 Adjustment of attached decree — Sub-rule (6). |
| 5 Decree passed by the same Court                         | 12 Step in aid                                   |

## Other Topics (miscellaneous)

Defective attachment See Note 6

Maintenance decrees See Note 4

Revenue Court decrees See Note 3

## 1. Legislative changes. —

- 1 In sub rule (1) the words "or for sale in enforcement of a mortgage or charge" have been newly added
- 2 In clause (b) (ii) of the same sub rule the words "or his judgment debtor" are new
- 3 Sub rules (2), (3) and (6) and clause (a) of sub rule (1) are new

**2. Scope of the Rule. —** This rule makes a distinction, for the purposes of attachment, between decrees for the payment of money or for sale in enforcement of a mortgage or charge, and other decrees. Where a decree of the former class is attached the mode of realization of the attached decree is by execution thereof<sup>1</sup> The holder of the decree sought to be executed is conferred the power of executing such attached decree and for that purpose the rule declares that he should be deemed to be a representative of the holder of the attached decree

## Order 21 Rule 53 — Note 2

- { 76 } 2 All 290 (291)  
{ 65 } 1885 All W N 123 (123)  
{ 93 } 20 Cal 111 (113)  
[See also (71) 15 Suth W R 31 (35)]

O. 21 R. 53  
Notes 2-3

In the case of other decrees sub rule (4) prescribes the manner of attachment thereof. But the rule is silent as to how they should be realized after attachment. Such decrees should therefore be sold after attachment by Court auction as being 'other saleable property of the judgment debtor' under Section 60<sup>2</sup>. In Madras, by virtue of Rule 178 of the Civil Rules of Practice, even in cases not falling under sub rule (1) of this rule, a decree cannot be ordered to be sold in execution of another decree. That rule has been held to be not *ultra vires* of the rule making powers of the High Court<sup>3</sup>.

A mere order for attachment will not effect the attachment of a decree under this rule. The attachment will not be complete unless the formalities prescribed by the rule are observed. Thus in the case of an attachment of a decree for money passed by a Court other than the Court which orders the attachment, it is essential that notice must be issued to the Court by which the decree has been passed under sub rule (1) clause (b)<sup>4</sup>.

Notice to the holder of the decree sought to be attached is not necessary for effecting an attachment of a decree for the payment of money or for sale in enforcement of a mortgage or charge. Such notice is only necessary in the case of other decrees under sub rule (4)<sup>5</sup>.

The rule applies to attachment of decrees whether made before or after judgment<sup>6</sup>. It does not apply to a case where the creditor of a mortgagee attached the deposit made in Court by the mortgagor to redeem the property before sale in execution<sup>7</sup>. For the attachment and the subsequent execution of decrees of Civil Courts in execution of certificates issued under the provisions of certain local Public Demands Recovery Acts, see the undermentioned provisions<sup>8</sup>.

Where an *ex parte* decree which has been attached in execution of another decree is set aside on the application of the judgment debtor and a fresh decree in favour of the plaintiff is passed after trial on the merits, the original attachment must be taken to have revived as soon as a fresh decree on the merits is passed<sup>9</sup>.

**3 Decree for money.**—A decree for the payment of money is not attachable as a debt under Rule 46 but should be attached under this rule<sup>1</sup>. The following have been held to be money decrees attachable as such under this rule—

1 Decree for mesne profits<sup>2</sup> whether ascertained or unascertained<sup>3</sup>

2 Decree for arrears of rent<sup>4</sup>

3 A certificate as to deficiency of price granted under Rule 71 of this Order<sup>5</sup>

2 (32) AIR 1932 Cal 80 (82) 58 Cal 934

3 (34) AIR 1934 Mad 692 (694 695) 58 Mad 285 (Judgment debtor should be allowed to take objection to the salubility of the attached decree in view of R. 178 Civil Rules of Practice)

4 (39) 43 Cal W N 374 (377) (In absence of such notice the holder of the decree sought to be executed does not become representative of decree sought to be attached and cannot execute the same)

5 (38) AIR 1933 Cal 401 (402)

6 (12) 22 Mad L Jour 394 (395)

7 (33) AIR 1933 Cal 59 (41) 59 Cal 1464

8 The Bengal Public Demands Recovery Act III of 1919 S. 19 (9) The Bihar and Orissa Public Demands Recovery Act IV of 1914, Section 21 (2)

(37) AIR 1933 Cal 468 (472 473) (Bengal Public Demands Recovery Act S. 19—Attaching certi

fiat holder is representative of original decree-holder only for purposes of execution and cannot agree to adjustment of decree)

9. (33) AIR 1933 Rang 816 (817)

Note 3

1 (53) 6 Mad 418 (419)  
(25) AIR 1925 All 264 (276) (Revenue Court decree—Attachable under this rule)  
(22) 21 All 405 (406 407) (Revenue Court decree—Filed under the old Code cannot be attached as a d l t)

2 (16) AIR 1918 Pat 65 (67) 4 Pat L Jour 23  
(67) 8 Suth W R 9 (11)

3 (24) 2 W L L Jour 249 (259 260) (A decree for unascertained mesne profits)  
(67) 8 Suth W R 9 (10) (Do)

4 (48) 25 Cal 322 (323)

5 (26) AIR 1926 All 370 (393)

But the rule applies only to cases where the right attached is expressly settled by the decree. Thus, a right to recover mesne profits by way of restitution by reason of reversal of the decree in appeal cannot be attached.<sup>6</sup>

As noticed in Note 2, after attachment under this rule the money decree should be executed and not sold. See also Note 9 below.

**3a. "Decree for sale in enforcement of a mortgage or charge."** — In the absence of these words under the old Code there was a conflict of opinion as to whether a decree for sale in enforcement of a mortgage was or was not a money decree and as to the mode of execution of such a decree after attachment. The High Courts of Allahabad<sup>1</sup> and Calcutta<sup>2</sup> held that it was not a money decree and that it should be sold after attachment. The High Court of Madras,<sup>3</sup> on the other hand, held that it was a money decree which should be attached and executed under the corresponding Section 273. The conflict has been set at rest by the Legislature by giving effect to the Madras view. Under the present rule such decrees are placed on the same footing as money decrees.<sup>4</sup> In the case of a decree for maintenance charging immovable property also, the proper course for the decree holder is to apply for execution, and not for the sale of the decree attached.<sup>5</sup>

If, however, in contravention of the provisions of this rule a decree for money or a mortgage decree for sale is sold and not executed, after attachment, the sale cannot be regarded as a nullity which confers no rights on the purchasers. The rule is merely one of procedure and ought not to be given a scope which will interfere with the substantive rights of creditors conferred by Section 60 of the Code.<sup>6</sup>

A preliminary decree in a mortgage suit is neither a decree for the payment of money nor one for sale in enforcement of a mortgage and is not covered by sub rule (1) of this rule.<sup>7</sup> Such a decree is, however, attachable property of the judgment debtor.<sup>8</sup>

**4. Other decrees.** — A decree relating to immovable property is not itself immovable property. Such a decree should therefore be attached only under this rule and not under the next rule.<sup>1</sup> Thus a decree for possession of immovable property,<sup>2</sup> or a preliminary decree for partition,<sup>3</sup> or a decree for foreclosure,<sup>4</sup> should be attached under this rule. As pointed out in Note 1, such decrees should be sold after attachment, and cannot be executed.

6 (01) 24 Mad 341 (345)

Note 3a

1 (06) 29 All 771 (774)

2 (10) 5 Ind Cas 302 (304) (Cal)

(04) 6 Cal W N 5 (6)

(09) 4 Cal W N xxxv (xxxvi)

(05) 11 Cal L Jour 493 (502-503)

3 (09) 1 Ind Cas 535 (536, 537) 31 Mad 442

(But a sale held in execution of a decree for money is not altogether invalid and without jurisdiction.)

holder has no *locus standi* to apply for final decree—Nor does mere attachment amount to assignment creation or devolution of any interest within Order 22 Rule 10.)

(87) AIR 1937 Oudh 265 (266) 13 Luck 237

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1. (19) AIR 1919 Nag 19 (70) 16 Nag L R 72.

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(Do)]  
1442

(81) 6 Cal 213 (217)

(1937)

(36) AIR 1936 All 857 (858) (Attaching decree

# **0.21 R.53** **Notes 4a-7**

**4a Preliminary decree for accounts — Attachability of** — There is a conflict of decisions as to whether a preliminary decree for accounts can be attached under this rule. It was held by the Bombay High Court in the undermentioned case<sup>1</sup> that a preliminary decree for the dissolution of a partnership and for accounts is a decree for money within the meaning of this rule and can be attached. But the Calcutta High Court in the case cited below<sup>2</sup> dissented from this view and held that such a decree is not a decree for money and also that it could not be attached and sold in execution. But in the undermentioned case<sup>3</sup> the same High Court held that a preliminary decree in a suit for accounts is saleable property which is attachable under Section 60. The question arose before the Madras High Court in the case noted below<sup>4</sup> but the Judges who presided differed in their opinion.

**5 Decree passed by the same Court** — In the case of a decree for the payment of money or for sale in enforcement of a mortgage or charge where the decree sought to be executed and the decree sought to be attached are passed by the same Court the attachment is made under sub rule (1) clause (a) by order of the Court. In the case of other decrees the attachment is made under sub rule (4) by the issue of a notice to the holder of the decree sought to be attached prohibiting him from transferring or charging the same in any way.

**6 Decree passed by different Courts** — An order of attachment under this rule by Court X of a decree passed by Court Y can be made either by Court X or by the Court to which the decree is transferred for execution.<sup>1</sup>

After receiving notice of attachment under this rule the Court whose decree is attached has no jurisdiction to proceed with the sale ignoring the order. The sale if held in such a case will be void.<sup>2</sup>

The attachment of a decree for money passed by another Court is complete as soon as a notice under sub rule (1) clause (b) is served on the Court which passed such decree.<sup>3</sup>

**7 Effect of attachment** — The effect of attachment of a decree under this rule is to stay execution of the attached decree until the conditions mentioned therein happen.<sup>1</sup> The decree is not permanently rendered incapable of execution by reason of the attachment nor is the decree holder's interest destroyed.<sup>2</sup> The judgment creditor as pointed out by Maclean C J still had an interest in the decree which he obtained and the attachment order did not prevent him from presenting the decree with a view to execution. The addition of the words "or his judgment debtor" in sub rule (1) clause (b) gives legislative recognition to the right of the holder of the decree attached to apply for execution after attachment.<sup>3</sup>

## **Note 4a**

- 1 (1937) 77 Bom 556 (560)
- 2 (27) AIR 1937 Cal 4 (6-7)
- 3 (35) AIR 1935 Cal 751 (752)
- 4 (1930) AIR 1930 Mad 611 (613-619) 50 Mad 573 (F.B.) (Preliminary decree directing taking of partnership accounts & money decree — Per Phillips J — Thiruvankatael v. J. contra)

## **Note 6**

- 1 (12) 1<sup>st</sup> Ind Cas 3 3 (37-39) (Mad) (Even if the attachment by the transferee Court is conclusive it is not void — Such defect if any may be waived by parties — Per Sundara Jy. J.)
- 2 (1930) 30 Cal 1101 (1105)

## **3 (37) AIR 1937 All (3) (61)**

## **Note 7**

- 1 (1910) 13 Ind Cas 907 (907) (Cal)
- 2 (16) AIR 1916 Cal 670 (621)
- 3 (33) AIR 1933 Oudh 349 (349-350) (Preliminary decree for foreclosure obtained by A — Attachment of preliminary decree by B — Subsequent final decree obtained by A — A is entitled to execution)

The rule mentions only the *holder of the decree* sought to be executed or his *judgment debtor* as having the right to apply for execution after attachment. But, can a *transferee* of the decree, whose transfer is prior to the attachment, apply for execution of the decree after attachment under this rule? The High Court of Madras in its earlier decisions<sup>1</sup> held that the words 'his judgment debtor' do not include a transferee from the judgment debtor and that the remedy of the latter is only to prefer a claim under Rule 58 of this Order and have the attachment raised before he can apply for execution. In a later decision<sup>2</sup> however, the same High Court has dissented from this view and held that the transferee is entitled to execute the decree notwithstanding the subsequent attachment inasmuch as his rights are prior to the attachment and Rule 16 confers a right of execution in his favour. The High Court of Rangoon<sup>3</sup> and the Judicial Commissioner's Court of Nagpur,<sup>4</sup> have also held that a transferee stands in the same position as his transferor, and is entitled to apply for execution. The High Court of Patna<sup>5</sup> has gone a step further and held that a transferee of the decree *even after attachment* is entitled to apply for execution by virtue of Rule 16. The reasoning of the Patna High Court is that in the case of money decrees the present rule does not prohibit a transfer of the decree during the pendency of the attachment, and the general prohibition contained in Section 64 does not apply to the specific provision in this rule. But the right of the assignee to execute the decree in such a case is subject to the right of the attachor just as the assignor's right would be.<sup>6</sup>

A filed a suit against B and attached before judgment a decree which B had obtained against C. C paid into Court various sums of money towards the latter decree. Then a decree was passed in favour of A in the suit which he had filed against B. Thereupon A applied to draw out the moneys which had been deposited by C. It was held that A was entitled to do so.<sup>10</sup>

**8. Stay of execution — Sub-rule (1).** — The object of the stay is to prevent the holder of the attached decree from realizing and taking away the fruits of that decree.<sup>1</sup> But the stay is not an absolute stay but a limited one and, as already noticed, does not prevent the holder of the decree sought to be executed or his judgment debtor from executing the attached decree.<sup>2</sup> The provision in clause (b) (ii) of sub rule (1) does

(84) AIR 1934 Cal 140 (142)

(84) AIR 1934 Lah 142 (143) (Either may apply — Original decree holder applying and receiving money before satisfaction of attaching decree holder's claim — Court can order refund under Section 151.)

(85) AIR 1935 Mad 413 (414) (The fact that the attachment of the decree is in execution of a decree for restitution of conjugal rights and that under O 21 R 32 property attached in execution of such a decree cannot be sold before one year of the attachment does not preclude the execution of the attached decree under this sub rule before one year.)

(34) AIR 1935 Bom 416 (417) (But amount realized should be deposited in Court for benefit of creditor.)

4 (12) 13 Ind Cas 659 (660) (Mad)

(10) 5 Ind Cas 1010 (1010) (Mad)

(03) 3 Ind Cas 909 (909) 33 Mad 62

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7 (27) AIR 1927 Nag 132 (133) 23 Nag L R 20  
8. (29) AIR 1929 Pat 1 (3) 7 Pat 726

against A)

(See also (38) AIR 1933 Cal 401 (401, 402) (In this case, the assignee wanted to execute the decree for his own exclusive benefit without

10  
decrees in favour of A, the attachment operates  
the  
the

#### Note 8

1 (97) 24 Cal 778 (782)

2 (24) AIR 1921 Bom 593 (394) 48 Bom 495

**O.21 R.53**  
**Notes 8-10**

not mean that when the holder of the decree sought to be executed makes such an application, the attached decree ceases to be an attached decree it only means that a period is provided by the rule up to which a stay of execution is to be made by the Court to which notice is sent to enable the attaching decree holder to apply for execution of the attached decree<sup>3</sup>

**9. Execution of attached decree — Sub-rule (2).** — Under sub rule (2) the attaching decree holder is entitled to apply for execution of the attached decree. He can take the necessary steps for the realization of the proceeds of the attached decree and apply them in satisfaction of his decree<sup>1</sup>

**10. Representative — Sub-rule (3).** — Sub rule (3) makes it quite clear that once a decree has been attached by another decree holder, the latter becomes a representative of the holder of the attached decree and is entitled to take out execution in the same way as the original holder thereof could have done<sup>1</sup> See also Note 2, to Section 47

Thus where in execution of a decree obtained by *A* against *B* a decree which *B* holds against a company in liquidation is attached the Court will direct the liquidator to recognise *A* as the representative of *B* and allow him to prove for the decree debt in the name of *B* and to receive and apply dividends payable to *B* in satisfaction of *A*'s decree debt<sup>2</sup>

The attaching decree holder is entitled to take moneys deposited by the judgment debtor and certify payment<sup>3</sup> Moneys brought into Court by the judgment debtor become forthwith available for the satisfaction of the decree sought to be executed and interest ceases to run from the date of the deposit<sup>4</sup> The attaching creditor has the same remedies as his judgment debtor and can also proceed against any sureties for the decree amount<sup>5</sup> If the decree is attached after execution sale but before confirmation it has been held that the attaching decree holder is entitled to

**3** (85) AIR 1935 Lah 194 (196) 15 Lah 910

**Note 9**

**1** (93) 17 Mad 58 (60)

(1900) 1900 All W N 93 (100) (Death of judgment debtor after transfer of the attached decree to the attaching Court—Legal representative not to be impleaded)

[See (26) AIR 1926 Mad 371 (372 376) (Debt

(88) 15 Cal 371 (375)

(35) AIR 1935 All 125 (125) (Attaching decree holder is entitled to make objection in execution

default — Held that this was no bar to proceeding with the execution of the attached decree)

per Henry JJ

**Note 10**

**1** (30) AIR 1930 All 659 (661)

(Or) 29 Mad 318 (319)

(93) 16 Mad 20 (20)

vary for attaching decree holder to execute attached decree)

[See also (97) 21 Cal 778 (783)]

**2** (07) 30 Mad 533 (535)

**3** (30) AIR 1930 All 659 (661)

(39) 43 Cal W N 1076 (1078) (Satisfaction of *B* — Attachment before judgment of *B*'s decree against *C* — Payment into Court by *C* — Then decree passed in *A*'s suit — *A* is entitled to draw the moneys deposited by *C*)

**4** (21) AIR 1921 Cal 540 (541 542)

**5** (19) AIR 1919 Lah 275 (276) 1919 Pun No 44

apply for confirmation of sale in his favour<sup>6</sup>

O. 21 R. 53  
Notes 10-11

Where an alleged attachment under this rule is invalid for want of compliance with the prescribed formalities the attaching decree holder does not become the representative of the holder of the attached decree. In such a case the mere fact that the name of the attaching decree holder is substituted in the record for that of the original holder of the attached decree will not preclude the judgment debtor under the latter decree to object to the execution of such decree by the substituted person, when no notice of the substitution was given to him and he had no opportunity to contest the same<sup>7</sup>

A question arising between a person attaching a decree under this rule and an assignee of such decree will be a question between persons claiming to be representatives of the same party and as such will not be within Section 47 of the Code<sup>8</sup> See also the undermentioned cases<sup>9</sup>

**11. Adjustment of attached decree—Sub-rule (6)**—As pointed out by their Lordships of the High Court of Madras in the undermentioned Full Bench decision<sup>1</sup> clause (6) of the rule provides an exception to the general rule embodied in Section 64 of the Code and is a special case of the application of the well known principle of justice and equity intended for the protection of parties to a *bona fide* transaction. After the judgment debtor under the attached decree receives either through Court or otherwise notice of the order of attachment any payment or adjustment by him to his decree holder will not be recognized by the Court<sup>2</sup> But if such judgment debtor should in ignorance of the attachment have made any payment or adjustment it should be regarded as a payment or adjustment properly made under the decree to the rightful person<sup>3</sup> The judgment debtor under the attached decree cannot plead as against the attaching decree holder an uncertified payment or adjustment made before the date of attachment<sup>4</sup> The reason is that the judgment debtor could not have successfully raised the same plea as against his decree holder by reason of the provisions of O. 21 R. 2 *ante*

The rule prohibits an adjustment between the judgment debtor under the decree attached and the decree holder thereof and not an adjustment between the attaching decree holder and the judgment debtor<sup>5</sup>

If an application for execution by the attaching decree holder is struck off for default it has been held that the attachment is not put an end to and the judgment debtor cannot therefore make any payment to his decree holder. The provisions of

6 (1917) 11 Cal W N 158 (160)

7 (1930) 48 Cal W N 374 (378-379)

8 (1927) AIR 1927 Mad 1025 (1025-1026)

(But see (1916) AIR 1916 Cal 471 (472) (Submitted not correct))

9 (1935) AIR 1935 Oudh 272 (273) 11 Luck 26 (Question between holder of attached decree and holder of decree sought to be executed by the attachment is not one between parties to the attached decree and S. 47 does not apply)

(1937) AIR 1937 Cal 177 (178) (Dispute between two persons attaching same decree—Judgment debtor and attaching decree interested—S. 47 applies)

(1939) 43 Cal W N 1076 (1077) (Dispute between attaching decree holder and another decree holder against an judgment debtor in respect of certain mortgages—Court to the credit of the latter is not within S. 47 and no appeal lies)

#### Note 11

- 1 (1917) 11 Cal W N 158 (160)
- 2 (1917) 11 Cal W N 158 (160)
- 3 (1917) 11 Cal W N 158 (160)
- 4 (1917) 11 Cal W N 158 (160)
- 5 (1917) 11 Cal W N 158 (160)
- 6 (1917) 11 Cal W N 158 (160)
- 7 (1917) 11 Cal W N 158 (160)
- 8 (1917) 11 Cal W N 158 (160)
- 9 (1917) 11 Cal W N 158 (160)
- 10 (1917) 11 Cal W N 158 (160)
- 11 (1917) 11 Cal W N 158 (160)
- 12 (1917) 11 Cal W N 158 (160)
- 13 (1917) 11 Cal W N 158 (160)
- 14 (1917) 11 Cal W N 158 (160)
- 15 (1917) 11 Cal W N 158 (160)
- 16 (1917) 11 Cal W N 158 (160)
- 17 (1917) 11 Cal W N 158 (160)
- 18 (1917) 11 Cal W N 158 (160)
- 19 (1917) 11 Cal W N 158 (160)
- 20 (1917) 11 Cal W N 158 (160)
- 21 (1917) 11 Cal W N 158 (160)
- 22 (1917) 11 Cal W N 158 (160)
- 23 (1917) 11 Cal W N 158 (160)
- 24 (1917) 11 Cal W N 158 (160)
- 25 (1917) 11 Cal W N 158 (160)
- 26 (1917) 11 Cal W N 158 (160)
- 27 (1917) 11 Cal W N 158 (160)
- 28 (1917) 11 Cal W N 158 (160)
- 29 (1917) 11 Cal W N 158 (160)
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- 31 (1917) 11 Cal W N 158 (160)
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- 34 (1917) 11 Cal W N 158 (160)
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- 89 (1917) 11 Cal W N 158 (160)
- 90 (1917) 11 Cal W N 158 (160)
- 91 (1917) 11 Cal W N 158 (160)
- 92 (1917) 11 Cal W N 158 (160)
- 93 (1917) 11 Cal W N 158 (160)
- 94 (1917) 11 Cal W N 158 (160)
- 95 (1917) 11 Cal W N 158 (160)
- 96 (1917) 11 Cal W N 158 (160)
- 97 (1917) 11 Cal W N 158 (160)
- 98 (1917) 11 Cal W N 158 (160)
- 99 (1917) 11 Cal W N 158 (160)
- 100 (1917) 11 Cal W N 158 (160)



O 21 R 53  
Notes 11-12

Rule 57 of this Order do not apply to a default on the part of the attaching decree-holder<sup>6</sup>

**12. Step-in-aid.** — An application for execution of a decree under attachment by the attaching decree holder is a step in aid of execution of the decree within the meaning of Article 182 of the Limitation Act<sup>1</sup> But an application for attachment of a decree is not a step in aid of execution of the attached decree<sup>2</sup> The reason is that instead of being a step in aid of execution, it rather arrests the execution of that decree, for the Court has to stay the execution under clause (b)

O. 21 R. 54

**R. 54. [S. 274.]** (1) Where the property is immoveable,<sup>1</sup>

Attachment of immoveable property.

the attachment<sup>3</sup> shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed<sup>6</sup> at some place on or adjacent to such property by beat of drum<sup>7</sup> or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property<sup>8</sup> and then upon a conspicuous part of the court house,<sup>9</sup> and also, where the property is land paying revenue to the Government, in the office of the Collector<sup>10</sup> of the district in which the land is situate.

[1877, S. 274; 1859, Ss. 235, 239. See S. 64 and O. 21 R 67.]

#### Local Amendments

##### ALLAHABAD

Add the following as sub rule (3)

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment debtor from the date on which such order is made "

Note — See the undermentioned decision<sup>1</sup> under the sub rule

##### BOMBAY

Add the following to sub rule (1)

"Such order shall take effect, where there is no consideration for such transfer

(But see (37) AIR 1937 Cal 468 (473) (Attaching decree holder becomes representative of original decree holder only for executing attached decree and satisfying his own decree — Attaching decree holder is not clothed with original decree holder's right to adjust decree in any way he likes))

for default as regards the latter — Still, it can execute the attached decree))

Note 12

C. 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

in execution of decree against B attaching B's decree against C and also proceeding against other properties of B — Execution also dismissed

or charge from the date of such order and where there is consideration for such transfer or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged

O 21 R. 54

**CALCUTTA**

Add the following as sub rule (3)

(3) Such order shall take effect where there is no consideration for such transfer or charge from the date of the order and where there is consideration for such transfer or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged or from the date when the order is proclaimed under sub rule (2) whichever is earlier

**LAHORE**

(1) At the end of sub rule (2) substitute a semicolon for full stop and add

Where the property is land situated in a Cantonment a copy of the order shall also be forwarded to the Military Estates Officer in whose area that Cantonment is situated

(2) Add following as sub rule (3)

(3) The order shall take effect as against persons claiming under a gratuitous transfer from the judgment debtor from the date of the order of attachment and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation whichever is earlier

**MADRAS**

Add the following as sub rule (3)

(3) The order of attachment shall be deemed to have been made as against transferees without consideration from the judgment debtor from the date of the order of attachment and as against all other persons from the date on which they respectively had knowledge of the order of attachment or the date on which the order was duly proclaimed under sub rule (2) whichever is the earlier

**NAGPUR**

Add the following as sub rule (3)

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment debtor from the date on which such order is made

Note — See the undermentioned case <sup>1</sup>

**N W F P**

Add the following as sub rule (3)

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment debtor from the date on which such order is made

**OUDH**

Add the following as sub rule (3)

(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment debtor from the date on which such order is made

**RANGOON**

Add the following as sub rule (3)

(3) The order of attachment shall take effect as against transferees without consideration from the judgment debtor from the date of the order of attachment and as against all other persons from the date on which they respectively had knowledge of the order of attachment or the date on which the order was duly proclaimed under sub rule (2) whichever is the earlier

**O 21 R. 54 (Nagpur Amendment)**

<sup>1</sup> (30) 19 Nag L Jour 94 (97) (The word pur in its technical English legal sense and included in sub-rule (3) to R 54 of O 21 is used a mortgagee)

O. 21 R. 54  
Notes 1-3a

## Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Attachment of immovable property — General.</li> <li>2. Attachment of mortgage debt. See Note 4 to Rule 46</li> <li>3. Immovable property.</li> <li>3a. Attachment of property belonging to a Hindu coparcener.</li> <li>4. Attachment, when complete.</li> <li>5. Service of prohibitory order.</li> </ol> | <ol style="list-style-type: none"> <li>6. Proclamation of order of attachment.</li> <li>7. Beat of drum.</li> <li>8. Affixing copy on conspicuous part of the property.</li> <li>9. Affixing copy in court-house.</li> <li>10. Affixing copy in Collector's office.</li> <li>11. Effect of attachment and re-attachment</li> <li>12. Absence of attachment and irregular and invalid attachment.</li> </ol> |
|---|---|

**1. Attachment of immovable property.—General.** — The rule deals with attachment of *immovable property*. The word "attachment" in Section 64 of the Code means, so far as immovable property is concerned, an attachment effected in the manner provided for by this rule.<sup>1</sup> An attachment is a necessary preliminary to execution proceedings<sup>2</sup> and the object of the rule in prescribing a particular way of notifying the attachment is, as pointed out by Mahmood, J., in *Ganga Din v Khushali*,<sup>3</sup> "to give notice to the judgment debtor not to alienate his property and to the public not to accept any alienation from him."

See Note 2 to Section 64, *ante*

As already pointed out in Rule 53 above, a decree, though relating to immovable property, is not itself immovable property, and cannot be attached as such under this rule but only under Rule 53.<sup>4</sup>

This rule extends to attachment of immovable property under the Chota Nagpur Tenancy Act, VI of 1920. See Section 50.

**2. Attachment of mortgage debt.** — See Note 4 to Rule 46

**3. Immovable property.** — See Note 4 to Section 16, *ante*, for the meaning of the words 'immovable property.' The following have been held to be immovable property within the meaning of this rule —

(1) The equity of redemption in a mortgage<sup>5</sup>

(2) The life interest taken by a Parsee widow under her husband's will in the income of his immovable property.<sup>6</sup>

**3a. Attachment of property belonging to a Hindu coparcener.** — An attachment of the share of an undivided coparcener in a joint Hindu family should be made in respect of his undivided share in the *whole family property*, and not of his share in *each item* of it.<sup>1</sup> Such an attachment has the effect of preventing the accrual of title by survivorship to the other members, in the event of the member,

### Order 21 Rule 54 — Note 1

1. (17) AIR 1917 Cal 832 (882)
2. (30) AIR 1930 Pat 108 (110) 8 Pat 801  
{ 83 } 5 All 86 (91)  
(91) 15 Bom 222 (228) 18 Ind App 22 (PC) (No attachment is necessary in the case of mortgage decree for sale)  
(80) 4 Bom 516 (500) (Do)  
(94) 21 Cal 639 (641) (Do)  
(95) 18 Mad 437 (439) (Do)  
[See (88) 12 Bom 358 (370) (Do)]  
(99) 26 Cal 127 (129) (Do)]

3. (85) 7 All 702 (707)
4. (19) AIR 1919 Nag 19 (19) 16 Nag L R 252  
(02) 6 Cal W N 5 (6)  
(86) 10 Bom 444 (417)  
[But see (71) 9 Bom H C R 64 (65) (Not good law)]

### Note 3

1. (21) AIR 1921 Cal 801 (803)  
(97) 21 Bom 226 (228)
2. (99) 23 Bom 1 (11)

### Note 3a

1. (20) AIR 1920 Mad 1035 (1036)

whose share is attached, dying after attachment and before sale<sup>2</sup>

O. 21 R. 54  
Notes 3a-6

**4. Attachment, when complete.**—An attachment under this rule is not complete unless *first*, the order of attachment has been issued and *secondly*, in execution of that order, the other formalities prescribed by the Code have been complied with<sup>1</sup> No notice is necessary before ordering an attachment of property<sup>2</sup> See for a full discussion Note 3 to Section 64, *ante*

**5. Service of prohibitory order.**—The mere writing of an order is not enough. It must be served on the judgment debtor and he must have an opportunity of knowing that he is prohibited<sup>1</sup> There is a presumption that official acts are regularly performed Where it was found that the prohibitory order was duly served on the judgment debtors, but that portion of the record which would show that the service was effected in the prescribed manner had been destroyed, it was held that the execution sale was not vitiated on that account<sup>2</sup>

Where the property to be attached is within the jurisdiction of the Court, there is nothing to prevent the Court from issuing the prohibitory order to the judgment debtor living outside the jurisdiction of the Court<sup>3</sup>

**6. Proclamation of order of attachment.**—A mere prohibitory order will not constitute a sufficient attachment so as to operate as a valid prohibition against any alienation by the judgment-debtor unless the proclamation described in the second part of the rule is carried out<sup>1</sup> The publication of the proclamation as required by

2 (14) AIR 1914 31 2 22 201

(14) AIR 1914 Mad 118 (118) (Attachment before judgment followed by decree has the same effect)

(94) 17 Mad 144 (145) (Attachment before judgment—Defendant dying before decree—Held survivorship not affected)

[But see (14) AIR 1914 Bom 266 (257) 21 Ind Cas 380 (332) 88 Bom 105 (Attachment before judgment without an order for sale is not sufficient to operate as a bar to survivorship)]

Note 4

house—Attachment is not effective)

(18) AIR 1918 Cal 489 (489)

court house—No valid attachment—But that fact will not affect the right of person obtaining order of attachment to apply under O. 21 R. 90 to set aside sale of property in execution of another decree held after his order of attachment and decree)

(37) AIR 1937 Lah 671 (672) (Omission to affix notice etc., and make proclamation cannot be looked upon as a trivial irregularity as that is the only way in which the public is informed of the existence of an attachment)

to the contrary—Attachment is presumed to be valid)]

[See however (33) AIR 1938 Cal 236 (237) (Conditional order of attachment under O. 38, III 5—No process issued under O. 21 R. 54 but bailiff observing all formalities required by R. 54—Attachment held to be effectual)]

2. (36) AIR 1936 Nag 77 (78)

Note 5

1. (10) AIR 1919 Mad 694 (595) 42 Mad 565 (05) 27 All 253 (259) (Warrant of attachment should show the amount for which property is attached)

(10) AIR 1919 Mad 694 (595) 42 Mad 565

Note 6

1. (23) AIR 1923 Lah 423 (424) 4 Lah 211

[See also (37) AIR 1937 Cal 375 (376) (Attachment before judgment—Order of attachment in form No. 5 of Appendix I published—No publi-

**J. 21 R. 55**  
**Notes 6-10**

the rule constitutes sufficient notice to the judgment-debtor<sup>1</sup>

The proclamation is merely a ministerial act, and the delay on the part of the officer in effecting it as for instance where an attachment which was ordered before judgment is not completed till after judgment, does not vitiate the proceedings<sup>2</sup> As to the effect of the omission to publish the sale proclamation, see Notes to Rule 90, *infra*

See also the undermentioned cases<sup>3</sup>

**7. Beat of drum** — A proclamation of attachment should be made by beat of drum at some place on or adjacent to the property attached<sup>4</sup> The omission to have the drum beaten as required by the rule is a material irregularity which will vitiate the execution sale<sup>5</sup>

**8. Affixing copy on conspicuous part of the property.** — A copy of the proclamation order must be affixed on a conspicuous part of the property<sup>1</sup> Where *prima facie* this is not done it is a material irregularity which will afford a ground for setting aside the execution sale<sup>2</sup>

**9. Affixing copy in court-house** — A copy of the proclamation of sale must, under Rule 67 *infra* read with this rule be affixed on a conspicuous part of the court house and under Rule 64 the sale must take place only after the expiration of at least 30 days from the day on which it was so affixed<sup>1</sup>

An omission to affix a copy of the attachment order in a conspicuous part of the court house is also a material irregularity within the meaning of Rule 90<sup>2</sup>

Where the process server's report which purports to say what was done by him, omits to mention that a copy of the attachment order was affixed on the court house, it must be presumed, until the contrary is proved, that such copy was not affixed, and the attachment must be held to be invalid<sup>3</sup>

**10. Affixing copy in Collector's office** — Where the property attached is land paying revenue to Government the rule requires in addition that the order of attachment should be affixed in the Collector's office<sup>1</sup> Rent payable in the case of

cases of attachment for No 24 Appendix F 44 (1) is under 21 R 4—Attachment is invalid — No order of attachment is made under 21 R 54 or to publication of attachment order as required by it — No process under 8 114 Evidence Act can be brought in that attachment was properly made (1)

2 (26) AIR 1920 Oudh 45 (37)

3 (33) AIR 1931 Rang 434 (435) 1930 R G L 559 (S B) (Personal service of the prohibitory order on the judgment debtor is not necessary)

4 (34) AIR 1936 Rang 403 (405) (Personal service on judgment debtor not necessary)

5 (19) AIR 1919 Mad 752 (753) 42 Mad 1

6 (33) AIR 1933 Oudh 225 (226) (Process for proclamation of order of attachment—Non payment of—Held in circumstances of case there was no negligence on decree holder's part and that dismissal of execution application for default was not justified)

#### Note 7

1 (66) 10 Bom 504 (505)

2 (32) AIR 1932 Oudh 76 (76) (Drum not beaten owing to resistance—Order proclaimed in a loud voice—Held there was sufficient compliance)

#### Note 8

1 (81) 7 Cal 466 (467)

2 (35) AIR 1935 Loh 57 (53) (Mere affixature in the village is not sufficient compliance)

3 (76) 25 South W R 364 (365)

4 (9) AIR 1908 Pat 24 (27) 6 Pat 568 (A separate proclamation of sale need not be served on every man comprising an estate or tenure)

5 (86) AIR 1936 Rang 403 (405) (Single parcel of land with buildings thereon—Copy of order of attachment may be affixed on any building or conspicuous part of land)

6 (23) AIR 1908 Lah 671 (671)

7 (97) 1637 Pun Re No 5 page 20

8 (78) 1678 Pun Re No 37 page 190

9 (18) AIR 1918 Pat 265 (269)

#### Note 9

1 (18) AIR 1918 Nag 213 (214)

2 (20) AIR 1920 Lah 24 (25)

[See also (80) 2 All 58 (60)]

[See however (98) 1693 Pun Re No 83 p 231]

3 (33) AIR 1939 Lah 254 (255)

#### Note 10

1 (31) AIR 1931 Pat 55 (59) 9 Pat 860

2 (82) 8 Cal 932 (932) (Decision under O 21 R 67)

enfranchised *shrotriem* villages in the Presidency of Madras is "revenue" within the meaning of this rule and the procedure prescribed should be followed in attaching such properties.<sup>2</sup> Where a house stands on a site which is assessed to revenue, the property is still land paying revenue to Government and omission to affix a copy of the order in the Collector's office constitutes a material irregularity under Rule 90, *infra*.<sup>3</sup>

O. 21 R. 54  
Notes 10-12

See also the undermentioned case.<sup>4</sup>

**11. Effect of attachment and re-attachment.**—An attachment under this rule does not constitute dispossession of the party in actual possession.<sup>1</sup> Nor does it confer any interest or title in the property in favour of the attaching party.<sup>2</sup> As noticed in Note 6 to Section 64 *ante*, the effect of attachment is to restrain alienation by the judgment debtor and any rights acquired by reason of a private transfer subsequent to the attachment are void against all claims enforceable under the attachment.<sup>3</sup> But, an agricultural lease granted by a landlord in the ordinary course of management would not be prohibited under this rule.<sup>4</sup> It has also been held that a sale effected in pursuance of a contract for sale entered into before the attachment is not affected by the attachment.<sup>5</sup>

A re attachment of property *ex majori cautela* after decree does not imply an abandonment of the attachment obtained before decree.<sup>6</sup> See also Note 7 to Section 64.

**12. Absence of attachment and irregular and invalid attachment.**—Attachment is a step taken only in order to keep the property of the judgment debtor intact and to enable the decree holder to bring it to sale. It is a step in execution designed for the protection of the judgment creditor and not for the benefit of the judgment debtor.<sup>1</sup> Where therefore a sale takes place without the property sold having been attached it is not a nullity and will not be set aside unless substantial loss or injury is proved to have resulted therefrom.<sup>2</sup> The absence of attachment is only an irregularity which does not affect the jurisdiction of the Court to sell.<sup>3</sup> Similarly, any

2	( 32 ) 14 Mad 124 (1901) (1901) (1901)
3	(
4	(Property attached—
	§ 6 Rightful owner not prevented from alienating )

presumed under S. 114 Evidence Act )

#### Note 11

- 1 ( 80 ) 4 Bom 529 (585)  
( 20 ) AIR 1926 Sind 199 (200) 19 Sind L R 35  
( 20 ) AIR 1926 Mad 42 (43) (Adverse possession not put an end to by attachment)  
( 07 ) 30 Mad 207 (203) (Attaching creditor can not maintain an action for wrongful removal of attached property)  
[See however ( 86 ) AIR 1936 Nag 120 (120, 121) 31 Nag L R Sup 212 (Immoveable property attached in execution is in possession of Court)]

- 2 ( 29 ) AIR 1929 Bom 200 (201)  
( 34 ) AIR 1933 Mad 360 (363) ILR (1933) Mad 41 (11 B) (Hence attaching creditor is not secured creditor)

See also Note 5 to S. 64

- 3 See Notes 5 and 10 to S. 64 and also the following cases  
( 03 ) 25 All 431 (434) (Property not belonging to judgment-debtor attached—Rightful owner not prevented from alienating)  
( 89 ) 1833 All W N 192 (193)  
( 17 ) AIR 1917 Cal 281 (282)

- ( 27 ) AIR 1927 Mad 190 (191)  
( 85 ) AIR 1930 Lah 71 (75) 16 Lah 328  
[See also ( 87 ) AIR 1937 Mad 811 (812)]  
4. ( 36 ) AIR 1936 All 265 (266) (Attachment of malguzari share—Letting out lands in ordinary course of management is not prohibited—Such power however cannot be exercised to defraud attaching creditor)  
5. ( 35 ) AIR 1935 Mad 872 (579) 59 Mad 1 (Attachment fastens to debtor a right to unpaid purchase money)  
6 ( 15 ) AIR 1915 Mad 396 (336)  
( 16 ) AIR 1916 Pat 853 (355)

#### Note 12

- 1 ( 34 ) AIR 1934 Bom 241 (243)  
2 ( 18 ) AIR 1919 Mad 1262 (1263)  
( 12 ) 16 Ind Cas 433 (439) (Mad)  
( 94 ) 8 Mad L Jour 1 (3)  
( 16 ) AIR 1916 Cal 465 (467, 468)  
( 07 ) 84 Cal 747 (507)  
(1900) 27 Cal 750 (752)  
( 91 ) 18 Cal 143 (197)  
[But see ( 83 ) 10 All 506 (511)]  
3. ( 97 ) 21 All 311 (314)  
( 30 ) AIR 1930 Lah 355 (356)

**O. 21 R. 54**  
**Notes 12**

defect or error in the *mode* of attachment is only an irregularity which does not render the sale *ipso facto* void <sup>4</sup> See Notes to Rule 90 *infra*

But as between the decree holder and the auction purchaser on the one hand, and an alienee from the judgment debtor on the other, different equities come into operation <sup>5</sup> As pointed out in Note 4 a *regularly perfected attachment* is a condition precedent to a restraint on alienation after attachment so as to attract the provisions of Section 64 <sup>6</sup> A private alienation of property after an order of attachment which has not been carried into effect is *valid* unless proof is given that all the requirements of the rule have been complied with <sup>7</sup>

An attachment which is *prima facie* *invalid* as for instance, where the decree is set aside on appeal at the time of attachment, cannot confer any jurisdiction on the Court to sell and the sale if held in pursuance of such attachment, is *void* <sup>8</sup>

**O. 21 R. 55**      **Removal of attachment after satisfaction of decree****R. 55. [S 275 ] Where —**

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or
- (c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

[1877, S 275; 1859, S 245 See Rule 57 and Order 38 Rule 9 ]

<sup>4</sup> (10) 6 Ind Cas 718 (715) 1910 Pun Re No 40  
(85) 7 All 731 (738) (Order not affixed in Collector's office)

(96) 18 All 469 (471) (Attachment under wrong provision of law)

(19) 52 Ind Cas 167 (167) (Upp Bur B R) (Case of revenue sale)

(20) AIR 1930 Cal 353 (355)

(91) 18 Cal 422 (426)

(07) 5 Cal L Jour 80 (84)

(07) 6 Suth W R Misc 52 (53)

(95) 5 Mad L Jour 70 (73 74) (Delay in affixing sale proclamation)

(23) AIR 1923 Nag 78 (79)

(10) 5 Ind Cas 798 (799) 13 Oudh Cas 43

[See (29) AIR 1929 Lah 441 (442)]

[But see (90) 1890 Pun Re No 76 page 227 ]

■ (16) AIR 1916 Oudh 169 (173)

6 (85) 7 All 702 (708 710)

(85) AIR 1935 Lah 57 (59) (Failure to affix copies of order on conspicuous part of the attached property)

(81) 3 All 695 (701)

## Local Amendments

O. 21 R. 55

## ALLAHABAD

*Substitute* the following for Rule 55

'55 (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under Section 73 (1) in respect of the property of the same judgment debtor by persons other than the holder of the decree for the execution of which the original order was passed

(2) Where —

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment debtor notice of which has been sent to the sale officer under sub section (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court or

(b) satisfaction of the decree [including any decree passed against the same judgment debtor notice of which has been sent to the sale officer under sub section (1)], is otherwise made through the Court or certified to the Court or

(c) the decree [including any decree passed against the same judgment debtor, notice of which has been sent to the sale officer under sub section (1)] is set aside or reversed

the attachment shall be deemed to be withdrawn and in the case of immovable property the withdrawal shall if the judgment debtor so desires be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

## OUDH

sub sec 11 is to the Court under Section 73 in respect of the property of a judgment debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed notice shall be sent to the sale officer executing the decree

(2) Where —

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment debtor notice of which has been sent to the sale officer under sub rule (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court or

(b) satisfaction of the decree [including any decree passed against the same judgment debtor notice of which has been sent to the sale officer under sub rule (1)] is otherwise made through the Court or certified to the Court or

(c) the decree [including any decree passed against the same judgment debtor, notice of which has been sent to the sale officer under sub rule (1)] is set aside or reversed

the attachment shall be deemed to be withdrawn and, in the case of immovable property the withdrawal shall if the judgment debtor so desires be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

Note — See the undermentioned case<sup>1</sup>

*Synopsis*

- 1 Legislative changes
- 2 Scope of the Rule

- 3 Attachment shall be deemed to be withdrawn
- 4 Revival of attachment

O 21 R 55 (Oudh Amendment)  
1 (36) 161 Ind Cis 1031 (1032) (Oudh) (Unless along with the decree of the attaching creditor,

the decree of an applicant for rateable distribution is also satisfied the attachment shall not be deemed to be withdrawn)



O. 21 R. 55  
Notes 1-3

**1. Legislative changes. —**

- 1 The words "or certified to the Court" are new
- 2 The words "the attachment shall be deemed to be withdrawn, etc.," have been substituted for the words "an order shall be issued for the withdrawal of attachment"

**2. Scope of the Rule. —** On any of the three things mentioned in clauses (a), (b) and (c) happening, the attachment is automatically deemed to be withdrawn. No express order is now necessary, as it was, under the old Code<sup>1</sup>

The rule applies only where the decree is fully and entirely satisfied<sup>2</sup>. An attachment cannot be partially raised by consent of parties without an express order of the Court<sup>3</sup>

The words "amount decreed" mean, in the case of an instalment decree, the instalment which has become due and in respect of which the attachment has been made<sup>4</sup>

A mere tender of money before the Judge is not sufficient to entitle the judgment debtor to have the sale of properties stayed, the law contemplates that payment should be made in accordance with the rules and forms of the Court<sup>5</sup>

It is the duty of the judgment debtor to apprise the Court of the fact of satisfaction of the decree otherwise, if the Court executes the decree in ignorance of the satisfaction thereof the sale will not be held to be invalid on that ground alone<sup>6</sup>

This rule applies to proceedings in respect of immovables under the Chota Nagpur Tenancy Act see Section 210 (3) (b), Bengal Act, VI of 1908, as amended by Bihar and Orissa Act, VI of 1920, Section 50 (1)

As to whether money paid under this rule is available for rateable distribution to other decree holders who have not attached the properties, see Note 4 to Section 73 *ante*, and also the undermentioned case<sup>7</sup> under the Allahabad amendment to this rule

The rule is not exhaustive of the modes in which attachment ceases<sup>8</sup>. Thus, an attachment ceases as soon as the sale of the property attached takes place<sup>9</sup>

**3. "Attachment shall be deemed to be withdrawn." —** As has been seen already, an attachment will automatically cease on payment made under clause (a). Where, therefore, by reason of such payment an attachment ceases, another decree holder who has applied for execution against the same judgment-debtor, but who has not attached the properties, cannot have the property sold under the attachment that has ceased<sup>1</sup>

Even under the old Code it was held that, on payment of the decree amount into Court, the attachment became inoperative even though it was not formally withdrawn<sup>2</sup> and that a private alienation after the attaching creditor had been satisfied would prevail against subsequent attachments<sup>3</sup>

**Order 21 Rule 55 — Note 2**

1. (03) 4 Ind Cas 97 (97) (Mad)
2. (12) 15 Ind Cas 677 (678) (All)
3. (27) AIR 1927 Mad 648 (649)
4. (28) AIR 1928 Nag 65 (66)
5. 2 Hay 302

6  
7

attaching decree holder)

8. (37) AIR 1937 Cal 390 (392) (O 21 R 60

mentions one of the circumstances under which attachment may be withdrawn)  
(37) AIR 1937 Pesh 90 (91)  
9. (37) AIR 1937 Pesh 90 (91) (Attachment ceases with sale and does not subvert full confirmation—Therefore objection under O 21 R 55 cannot be considered after sale)

**Note 3**

1. (11) 12 Ind Cas 911 (912) 36 Bom 156
2. (05) 23 Mad 380 (385)
3. (09) 1908 Pun Re No 81, page 381

As seen in Note 4 to Section 73 *ante* the payment under this rule is subject to the claims of other decree holders for rateable distribution. It has been held that where the decretal amount is paid into Court under clause (v) of this rule but owing to the claims of other decree holders for rateable distribution the attaching decree holder gets only a portion of the money deposited the attachment will not cease.<sup>4</sup> The reason given is that the rule contemplates a cessation of attachment only on the decree being fully satisfied.

O 21 R. 55.  
Notes 3-4

**4 Revival of attachment** — The rule provides that the attachment shall be deemed to be withdrawn when the decree is set aside or reversed. But if on second appeal the reversal of the decree by the first Appellate Court is in turn reversed and the original decree restored the attachment will be revived and a sale can be ordered on the strength thereof.<sup>1</sup> See also Note 9 to Section 64.

**R. 56. [S 277]** Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

O. 21 R. 56

Order for payment of coin or currency notes to party entitled under decree

[1877, S 277, 1859, S 242 See Rr 64, 79 and 81 Cf O 39, R 10]

**1 "Current coin"** — The word *current* has been newly added before the word *coin*. If the coin is not current it has to be dealt with as any other moveable property.

**R. 57. [New]** Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

O. 21 R. 57.]

Determination of attachment

[See Rr 55, 60 and 63 Cf O 38, Rr 8, 9 and 11]

**Note 4**

1 (18) AIR 1919 Oudh 275 (278)

[See however (37) AIR 1937 Lah 169 (170)]

171) (Attachment in execution of decree — Reversal of decree and consequent order removing attachment — If decree is reversed after remand in favour of decree-holder — Original attachment cannot revive and abatement between removal of original attachment and subsequent attachment is not void.)

## Local Amendments

21 R 87  
Note 1

## CALCUTTA

Add the following words at the end of the rule

Unless the Court shall make an order to the contrary

## MADRAS

Substitute the following for Rule 57

57 (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a future date it shall state whether the attachment continues or ceases. Provided that when the Court dismisses such an application by reason of the decree holder's default the order shall state that the attachment do cease.

(2) Where the property attached is a decree of the nature mentioned in sub rule (1) of Rule 53 and the Court executing the attached decree dismisses the application for execution of the attached decree it shall report to the Court which attached the decree the fact of such dismissal. Upon the receipt of such report the Court attaching the decree shall proceed under the provisions of sub rule (1) and communicate its decision to the Court whose decree is attached.

## NAGPUR

Substitute the following rule for Rule 57

57 Where any property has been attached in execution of a decree and the Court for any reason passes an order dismissing the execution application the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction the attachment shall be deemed to have ceased to exist.

## N W F P

Cancel the concluding sentence of Rule 57 'upon the dismissal it shall cease' and substitute the following

'In dismissing such application the Court shall direct whether the attachment shall continue or cease. In the absence of any such direction the attachment shall be deemed to cease.'

## OUDH

Substitute the following for Rule 57

57 Where any property has been attached in execution of a decree and the Court for any reason passes an order dismissing the execution application the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction the attachment shall be deemed to subsist.

## PATNA

Delete the last sentence and add the following sub paragraph

Upon every order dismissing an execution case in which there is an attachment the attachment shall cease unless the Court otherwise directs.

## Synopsis

- 1 Scope and object of the Rule
- 2 'By reason of the decree holder's default'
- 3 Effect of dismissal of application
- 4 Dismissal of application by Collector
- 5 Execution removed from file for statistical purposes

- 6 Responsibility of sapurdar of attached property after dismissal for default
- 7 Revival of attachment when possible
- 8 Attachment before judgment
- 9 Default in executing attached decree See Note 11 to Rule 57

## Other Topics (miscellaneous)

Limitation inapplicable to execution petition subsequent to striking off order See Note 5  
Not retrospective See Note 1

Proper course on default See Note 8  
Striking off — Eff ct See Note 5

**1. Scope and object of the Rule.** — This rule is new. There was no corresponding provision in the Code of 1882 enabling the executing Court to dismiss

an execution application when the decree holder was not diligent in prosecuting the same. The Court could not act under Chapter VII (now Order 9) or under Section 157 (now O 17 R 2) as those provisions applied only to *suits*, nor could the Court apply those provisions by virtue of Section 647 (now Section 141), inasmuch as the Judicial Committee held in *Thakur Prasad v Fakirulla*, I L R 17 Allahabad 106 (P C), that that Section did not apply to execution proceedings. Hence, with a view to prevent the accumulation of execution applications from encumbering the files of the Courts and in order to show a better statistical return, the subordinate Courts resorted to the practice of disposing of them by passing such orders as "recorded" or "struck off" on such applications. Such a practice was not authorized by the provisions of the Code and, in spite of the fact that the High Courts condemned the same,<sup>1</sup> and although a Full Bench of the High Court of Allahabad<sup>2</sup> pointed out that the Court could, under its *inherent* power, *dismiss* an application for the laches of the decree-holder, this unauthorized practice nevertheless persisted. Such disposals also led to further doubts and complications as to whether an attachment previously effected did or did not subsist after the passing of the order. It was held in several cases that the attachment was not necessarily put an end to by reason of the order "striking off" the application and that it was a question of *intention* depending on the circumstances of each case as to whether or not it subsisted.<sup>3</sup>

The present rule prescribes the procedure to be followed, where after attachment in execution the application for execution cannot further be proceeded with *by reason of the decree holder's default*.<sup>4</sup> The object of the rule is —

- (1) to put an end to the practice of disposing of execution applications by such orders as "application struck off" or "lodged" and,
- (2) to remove the doubt that existed under the old Code as to the effect of an order of dismissal upon attachment, by providing in explicit terms that the attachment should cease upon the dismissal, *irrespective of any question of intention*.<sup>5</sup>

Under the present rule, the Court should not "strike off" execution applications for default of the decree holder.<sup>6</sup> If it does pass such an order, it will be deemed to be one of dismissal.<sup>7</sup>

The provisions of this rule have been held to have no retrospective effect and do not apply to orders passed before the coming into force of the present Code.<sup>8</sup>

2. "By reason of the decree-holder's default." — The default referred to by the rule is not confined merely to a default in appearance or in the payment of

**Order 21 Rule 57 — Note 1**

1. ('84) 10 Cal 416 (422)
- { '95) 18 All 49 (51)
- { '93) 15 All 84 (90, 95)
2. ('93) 15 All 84 (95)

- (37) 1937 Mad W N 490 (486)
5. ('19) AIR 1919 Lah 337 (339) 1919 Pun Ra No 154

9. ('15) AIR 1915 M. 1121 (1122)
- { '16) AIR 1916 Mad 330 (330)
- { '17) AIR 1917 Mad 1101 (1103)

**O.21 R.57**  
**Notes 1-2**

**O.21 R.57**  
**Notes 2-3**

process fees, or in production of documents. It means failure to do what one is legally bound to do, that is, to go on with the application and have the property sold.<sup>1</sup> Thus, an omission to serve notice on the judgment-debtor as required by Rule 66 of this Order,<sup>2</sup> or failure to furnish any information called for by the Court,<sup>3</sup> amounts to a default within the meaning of this rule. Similarly, if the decree holder withdraws his application,<sup>4</sup> or requests the Court to strike it off,<sup>5</sup> or consents to an application for adjournment of the sale made by the judgment debtor,<sup>6</sup> he thereby precludes himself from proceeding with the execution application and the Court can dismiss the same for default under this rule. But an omission to do anything which he is not under an obligation to do, such as not being present at the time of the sale, or his failure to bid at such sale, does not constitute a default<sup>7</sup> and, therefore, a dismissal of the application for want of bidders at the sale will not have the effect of putting an end to the attachment under this rule.<sup>8</sup>

The default contemplated by this rule refers to a stage *after* the attachment and *not before* the attachment. Applying this principle, the High Court of Madras has held in a case where, though there was an attachment, the parties as well as the Court were proceeding in ignorance of the attachment, as though there was none, the dismissal of the application at a stage when the Court thought that the attachment was yet to be effected, does not come within the scope of this rule.<sup>9</sup> This view has also been followed by the Lahore High Court.<sup>10</sup>

As to the effect of dismissal on a ground other than the default of the decreeholder, see Note 3 below.

**3. Effect of dismissal of application.**— Where an execution application is dismissed for default of the decree holder under this rule, the attachment previously effected ceases forthwith<sup>1</sup> No question of any intention arises, under the present Code, a mistaken impression on the part of the decree-holder that the attachment continued notwithstanding the dismissal of the application or the fact that he prays for sale only of the attached property in a subsequent petition will not have the effect of nullifying the imperative provisions of this rule<sup>2</sup> The decree holder can only apply for a *fresh attachment* and then bring the property to sale, if he wants to proceed against that property<sup>3</sup>

### Note 2

1. (19) AIR 1919 All 194 (195, 196) 41 All 157.  
(84) AIR 1934 Lah 395 (396)  
(85) AIR 1935 Mad 17 (20)  
(11) 9 Ind Cas 558 (560) 38 Cal 482

8 Lah 7.  
23 Ondb

- (34) AIR 1934 Lah 697 (698)  
 (38) AIR 1938 Bom 18 (20) I L R (1937) Bom  
 890  
 2. (11) 9 Ind Cas 558 (560) 38 Cal 482  
 (18) 18 Ind Cas 441 (442) (Cal) (Proclamation  
 not made)

**7. 1. 1. 1.**

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[But see ('33) AIR 1933 Rang 109 (171)]

9. (23) AIR 1923 Mad 703 (705)  
10. ('38) AIR 1938 Lah 728 (728, 729) (AIR 1938  
Lah 123, Reversed)

### Note 3

- 1 / 281 4TR 1002 b - 00 / 911 c b m 0412

sal of execution application for default under this rule the execution proceedings come to a close and any intermediate order passed in the course of such proceedings becomes a nullity )]

2. (15) AIR 1915 Mad 337 (337)

Where the Court passes an order "Petition dismissed, attachment to continue", what is the legal effect of the direction regarding the continuance of the attachment? On the one hand, the High Courts of Calcutta,<sup>4</sup> Lahore<sup>5</sup> and Madras<sup>6</sup> and the Judicial Commissioner's Court of Nagpur<sup>7</sup> have held that the direction is of no legal effect or consequence and that attachment ceases forthwith. The High Court of Allahabad<sup>8</sup> has, on the other hand, held that the order though not a proper one, cannot be treated as a nullity having no effect upon the parties, but that it should be treated as an order adjourning the case *sine die*. Under the rule as amended in Nagpur in 1930, the Court has power, while dismissing an application for execution, to continue the attachment.<sup>9</sup>

The rule applies, in terms only to cases of dismissal by reason of the *decree holder's default*. Where the dismissal is not due to the default of the decree holder, the question whether the attachment ceases by reason of the dismissal, depends upon the circumstances of each case.<sup>10</sup> It has thus been held that where the dismissal is due to a mistake of the Court,<sup>11</sup> or in consequence of an order of stay,<sup>12</sup> or of injunction<sup>13</sup> passed by a competent Court, the attachment is not put an end to by reason of the order of dismissal. But the Court has power to direct even in such cases by an *explicit order*, that the attachment should cease even though there is no default on the part of the decree holder.<sup>14</sup>

**4. Dismissal of application by Collector.** — Where execution proceedings are transferred to the Collector he has power to dismiss the execution application for default under this rule and upon such a dismissal the attachment ceases.<sup>1</sup>

**5. Execution removed from file for statistical purposes.** — As seen in Note 1 the Court should under this rule either dismiss or adjourn the application and not simply 'strike it off'. Even in cases to which the rule does not apply, there is no provision of law authorizing the Court to lodge an application or record it or strike it off from the file for what is commonly called statistical purposes.<sup>1</sup> The proper course in such cases is to adjourn the application and not to strike it off the file. Where the

4 (11) 9 Ind Cas 558 (560) 38 Cal 482

5 (89) AIR 1938 Lah 590 (592)

6 (80) AIR 1930 Mad 414 (415)

[See however (85) AIR 1935 Mad 17 (20) 11

(One of the conditions in the instalment order under O 20 II 11, sub rule (2) being that the execution position of the decree holder should be dismissed but that the attachment should

(No default by decree holder—Held attachment

under O 21 R 57)]

7 (2) AIR 1929 Nag 82 (83)

8 (25) AIR 1925 All 456 (456)

(22) AIR 1923 All 62 (63) 44 All 274

[But see (10) AIR 1919 All 194 (195, 196) 41 All 157]

9 (36) AIR 1936 Nag 277 (278) 1 L R (1939) Nag 316

10 (17) AIR 1917 Mad 705 (705)

(33) AIR 1933 Pat 603 (610)

(18) AIR 1918 Mad 1010 (1011)

(18) AIR 1918 Pat 599 (600) 3 Pat L Jour 310

Note 4

1. (23) AIR 1923 Nag 18 (19)

(22) AIR 1922 Nag 267 (270) 11 Nag L II 152

Note 5

1. (26) AIR 1926 Mad 453 (454)

O 21 R 57  
Notes 5-8

Court does however pass such an order as struck off or recorded or closed or consigned to the record room etc it would only amount to an adjournment *sine die* and the application will be deemed nevertheless to be pending<sup>2</sup> The removal for statistical purposes is not a judicial determination and no fresh application is necessary to continue the same<sup>3</sup>

**6 Responsibility of sapurdar of attached property after dismissal for default** — A *sapurdar* is responsible to the Court for the production of the property entrusted with him. He cannot escape liability by pleading that owing to the decree holder's default the execution application was dismissed with the result that the attachment terminated under this rule and that therefore he handed over the property to the judgment debtor<sup>1</sup>

**7 Revival of attachment, when possible** — On the dismissal of an execution application for default the attachment ceases. A revival of the execution proceedings for instance by an application for review does not operate to revive the attachment so as to prejudice the rights of a third party in the property acquired in the meantime<sup>1</sup>. Thus if the judgment debtor transfers the property after an order of dismissal under this rule the transferee gets the property free from attachment<sup>2</sup>. But where there is no question of prejudice to third parties the attachment can also be revived<sup>3</sup>.

**8 Attachment before judgment** — There is a conflict of judicial opinion as to the effect of an order of dismissal of an execution application under this rule upon attachment effected *before judgment*. The High Courts of Allahabad<sup>1</sup>, Calcutta<sup>2</sup> and Patna<sup>3</sup> have held that the present rule applies only to cases where the property is *attached in execution of a decree* as the rule itself expressly states and that consequently the dismissal of an execution application for default does not put an end to the attachment before judgment. A Full Bench of the High Court of Madras<sup>4</sup> and the Judicial

of the applica on ]]

3 (20) AIR 1920 Mad 858 (858) (Limitation inapplicable to execution petition after struck off order)

(16) AIR 1916 Mad 937 (938) (Do)  
(67) 11 Suth W R 205 (206)

Note 6

1 (19) AIR 1919 Lah 108 (108) 1919 Pun Re No 60

Note 7

trained by temporary injunction—Petition recorded)

(30) AIR 1930 Mad 803 (305) (Petition recorded because appeal pending—Attachment not put an end to)

(28) AIR 1928 Mad 398 (399) (Petition closed—Must be deemed pending)

(20) AIR 1930 Lah 647 (651) (Sale stayed—

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Note 8

Commissioner's Court of Nagpur<sup>5</sup> have, on the other hand, taken a contrary view. According to them, the words "any property attached in execution of a decree" should be construed as meaning "where property has been in a state of attachment in execution" and the decree holder by electing to take the benefit of O 38 R 11 and proceeding to execute the decree without a fresh attachment is, in effect, asking the Court to treat the attachment as one in execution. The attachment before judgment therefore ceases upon the dismissal of the application for execution. The High Court of Bombay<sup>6</sup> has accepted the view of the Madras Full Bench but held that the dismissal of an execution application in relation to *moveable* property has not the effect of putting an end to an attachment of *immovable* properties.

O. 21 R. 57  
Notes 8-9

9. Default in executing attached decree. — See Note 11 to Rule 53 *ante*

### Local Amendment

#### RANGOON

The following shall be inserted as Rule 57A

"57A A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court "

O. 21 R. 57A  
(Rangoon)

### INVESTIGATION OF CLAIMS AND OBJECTIONS

**R. 58.** [S. 278.] (1) Where any claim is preferred<sup>3</sup> to, or any objection is made<sup>3</sup> to the attachment of, any property attached<sup>7</sup> in execution of a decree<sup>2</sup> on the ground that such property is not liable to such attachment,<sup>4</sup> the Court shall proceed

O. 21 R. 58

Investigation of claims to, and objections to attachment of, attached property.

to investigate the claim<sup>20</sup> or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided<sup>21</sup> that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the

investigation of the claim or objection.

[ 1877, S. 278; 1859, S. 246. See S. 47.]

#### ALLAHABAD

### Local Amendments

*Idid* the following words to sub rule (2) :

'or may in its discretion make an order postponing the delivery of the property

5. (21) AIR 1921 Nag 67 (59) 17 Nag LR 6. (31) AIR 1931 Bom 550 (554) 55 Bom CR 3  
121 (Affirming AIR 1929 Bom 311)  
( 22) AIR 1922 Nag 81 (51) ( 29) AIR 1929 Bom 321 (322, 323) 53 Bom 543.



**O. 21 R 58** after the sale pending such investigation And in no case shall the sale become absolute until the claim or objection has been decided

**CALCUTTA**

Add the following words at the end of sub rule (2)

upon such terms as to security or otherwise as to the Court shall seem fit

**LAHORE**

Add the following to proviso under sub rule (1)

and that if an objection is not made within a reasonable time of the first attachment the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree unless he can prove a title required subsequent to the date of the first attachment

**NAGPUR**

In sub rule (2) after the word objection where it occurs for the second time insert the following words

or where the property to be sold is immovable property the Court may in its discretion direct that the sale be held but shall not become absolute until the claim or objection is decided

**OUDH**

Add the following words to sub rule (2)

or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation And in no case shall the sale become absolute until the claim or objection has been decided

**PATNA**

Substitute the following for Rule 58

58 (1) When any claim is preferred to any property the subject matter of the execution proceedings or any objection is made to the attachment thereof on the which is not bound under the decree the Court shall proceed to investigate the examination of the claimant or objector and in all other respects as if he was a party to the suit

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed

(2) Where the property to which the claim or objection applies has been advertised for sale the Court ordering the sale may in its discretion make an order postponing the delivery of the property after the sale pending the investigation of the claim or objection And in no case shall the sale become absolute until the claim or objection has been decided

*Synopsis*

- |   |   |
|---|---|
| 1 Investigation of claims and objections                            | 12 Claim to property attached in execution of rent decree   |
| 2 Attachment before judgment See Note 6 to Rule 63                  | 12a Property attached in execution of decree in favour of company in liquidation—Claim to such property |
| 3 Who   | 13 Who can prefer claim   |
| 4 " " " " " "   | 14 Parties and representatives  |
| 5 " " " " " "   | 15 Trustees and shewabts  |
| 6 Burden of proof is on claimant to establish possession in himself | 16 Claim by Official Receiver or Official Assignee  |
| 7 Any property attached   | 17 Claims by third persons  |
| 8 Claim in debts attached in execution                              | 18 Claims by transferee of property from the judgment debtor  |
| 9 Claim to decree attached in execution                             | 19 Assignee of decree from the judgment debtor  |
| 10 Claim to property seized by receiver                             | 19a Objection by tenant of judgment debtor See Notes to O 21 R 61                                       |
| 11 Claims to properties ordered to be sold under a mortgage decree  |   |

## 20. "Shall proceed to investigate the claim."

## 21. Proviso.

## 22. Dismissal for default. See Note 4 to Rule 63

## 22a. Reference to arbitration.

## 22b. Transfer of proceedings under this Rule.

23. Effect of order — *Res judicata*.

## 23a. Proclamation of sale pending claim-petition.

## 24. Appeal.

## 25. Revision.

O. 21 R. 58  
Note 1

## Other Topics (miscellaneous)

Applicability See Notes 4, 5, 11 and 12  
 Insolvency of judgment debtor—No bar to claim  
 See Note 10

Nature of investigation See Note 1  
 Nature of remedy See Note 1  
 Scope and object of Rules 58 to 63 See Note 1

**1. Investigation of claims and objections.** — Where property is attached in execution of a decree, it is possible that third parties, or even the parties themselves, have objections to such attachment being made. Where a *party or his representative* has any such objection, the question is one falling also within Section 47 and therefore must be decided by the Court *executing* the decree and *not by a separate suit*.<sup>1</sup> The enquiry under that Section is a *full enquiry* and the determination of the question after such enquiry amounts to a *decree*.<sup>2</sup> The remedy of the party aggrieved by the order is by way of appeal.<sup>3</sup> On the other hand, where a *third party* has a claim or an objection to the attachment of property attached in execution of a decree, there are two courses open to him. He may straightway file a *suit* claiming the appropriate relief, or he may file an *application* under this rule to the Court executing the decree. But he cannot prefer an *appeal* against the order of attachment.<sup>4</sup> He is not *bound* to prefer a claim or an objection under this rule.<sup>5</sup> The reason is that the remedy provided by this rule is a *summary and concurrent* remedy provided with the object of securing a speedy settlement of title raised at execution sales,<sup>6</sup> and, as has been seen in Note 63 to

## Order 21 Rule 58 — Note 1

(29) AIR 1929 Pat 141(142) 8 Pat 717 (Objection by defendant against whom suit was dismissed falls under Section 47)

Must be deemed a party within S. 47

only legal representatives but also representatives in interest—Objection by representative in interest

## See also the following cases

(95) 17 All 215 (210) (Objection by judgment debtor's representative that attached property is his own)  
 (02) 2 Ind Cas 432(432) (Mad) (Judgment debtor's representative claiming charge on land sold in

execution)  
 (17) AIR 1917 Mad 168 (169) (Claim preferred by legal representative)  
 (29) AIR 1929 Oudh 21 (21) (Objector legal representative of deceased judgment debtor)  
 (27) AIR 1927 Lah 903 (906) (Objection by transferee from judgment debtor — Held to fall under S. 47)  
 (87) 10 Mad 117 (121)  
 (01) 24 Mad 658 (659)  
 (07) 30 Mad 215 (216)  
 (26) AIR 1926 Oudh 64 (64) (Objection by pro forma defendant falls under S. 47)  
 [But see (39) AIR 1939 Pat 354 (356) (Repre

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 Court cannot shut out any party from producing evidence]

3. See Note 84 to Section 47.

4. (37) AIR 1937 Lah 313 (313)

5. (13) 18 Ind Cas 949 (951) 40 Cal 598 40 Ind App 56 (P C) (The remedy under this rule

(85) 11 Cal 673 (670)

**O. 21 R. 58**  
**Notes 1-4**

Section 9, *ante*, the existence of such a remedy does not bar a regular suit or other available remedy to the party aggrieved<sup>7</sup> Where such third party prefers a claim under this rule the enquiry is only a *summary investigation* and not a full trial of the issues between the parties<sup>8</sup> The party aggrieved by an order passed after such investigation should file a suit under Rule 63 within one year thereof for setting aside the order

Where a decree holder applies for the attachment of a certain property as belonging to the judgment debtor, it is not for the Court to anticipate proceedings under this rule and refuse to order attachment on the ground that the property does not belong to the judgment debtor<sup>9</sup>

As seen in Note 2 to Section 70, a Collector to whom the execution of a decree has been transferred has no power to inquire into objections to attachment under this rule<sup>10</sup>

This rule and Rule 63 do not apply to the Vizagapatnam Agency Tracts<sup>11</sup>

**2. Attachment before judgment.**— See Note 6 to Rule 63

**3. "Where any claim is preferred to or any objection is made"**— The rule is very wide and comprises claims of *third parties* whether put forward by themselves or on their behalf by the parties to the suit or their representatives<sup>1</sup>

See also the undermentioned case<sup>2</sup>

**4 "On the ground that such property is not liable to such attachment."**— The rule presupposes the *existence of an attachment* and the ground of the application is that the property is *not liable* to attachment<sup>1</sup> Where there is *no attachment* at all, an objection under this rule is incompetent<sup>2</sup> Nor can the objector prefer an application under this rule merely on the ground that he has not been made a party to the execution proceedings<sup>3</sup> It has been held by the High Court of Allahabad<sup>4</sup> that the words 'on the ground that such property is not liable to attachment' have reference merely to a case where an *objection is made to an attachment* and not to a claim preferred to the property The High Court of Madras<sup>5</sup> has also held that it is open to a claimant to put forward his claim under this rule on the ground that the Court which passed the decree had no *jurisdiction* to pass it or that the Court which executes the decree has

[See however (35) AIR 1935 All 183 (185) (Procedure to be followed is not a summary procedure)]

10 (36) AIR 1936 Bom 227 (231) 60 Bom 516  
11 (16) AIR 1916 Mad 4 (6)  
(22) AIR 1922 Mad 271 (272) 46 Mad 85

**Note 3**

1 (99) 23 Mad 195 (202) (FB)  
2 (133) AIR 1933 Sind 128 (127) (Decree holder not objecting to oral objections to attachment —He cannot subsequently urge that no written application was submitted)

**Note 4**

1 (23) AIR 1923 Bom 381 (382)  
(24) AIR 1924 Mad 859 (859)

(41) AIR 1921 Mad 3 (3-3) (Omission to take action under O 21 R 58 by withdrawing claim does not bar action under Rule 69)]

8 (20) AIR 1920 Mad 187 (189)

(26) AIR 1926 Nag 197 (198)

9 (35) AIR 1935 Lah 114 (114 115) (If the decree holder misused his powers he is liable to pay damages and costs and that is a sufficient guarantee against a frivolous application by the decree holder)

no jurisdiction to do so or that the attachment made is not legal or valid<sup>6</sup>

But it is not open to a claimant to attack the *validity* of the decree<sup>7</sup> or the decree holder's *right to execute* the same, it is thus not open to him to plead that the execution application is barred by limitation<sup>8</sup>

O. 21 R. 58.  
Notes 4-7

**5. Objections raised after sale.** — It has been held by the High Courts of Calcutta, Lahore, Patna and Rangoon and the Judicial Commissioner's Court of Peshawar that a Court has no jurisdiction to entertain a claim under this rule after the execution sale has taken place<sup>1</sup> The reason is that the attachment is *ipso facto* determined after the sale has taken place<sup>2</sup> But the High Courts of Madras and Nagpur and the Judicial Commissioner's Court of Sind have expressed the view that a claim can be preferred after court auction sale but before confirmation of the same, on the ground that the attachment subsists till the confirmation of the sale<sup>3</sup> The Patna High Court<sup>4</sup> has also held in a recent case that under the amendment of the rule by that Court, a Court can deal with a claim petition under Rule 58 even after a sale has taken place provided that it has not been confirmed The amendment of the rule by the Allahabad High Court also contemplates that an objection under this rule can be dealt with after an execution sale but before its confirmation<sup>5</sup>

An objection by a *party* to the suit or his representative falls under Section 47 and can be raised even after the sale<sup>6</sup>

**6. Burden of proof is on claimant to establish possession in himself.** — Rule 59 prescribes that the claimant must adduce evidence to show that on the date of the attachment he had some interest in, or was possessed of, the property attached The burden of proof is therefore clearly upon the claimant or objector to establish possession in himself<sup>1</sup>

**7. Any property attached.** — The rule applies to *any* property attached in execution of a decree Thus it will include a claim to moveables,<sup>1</sup> or to a fractional share of the immovable property attached,<sup>2</sup> or to a share of the moveables seized in

6 (127) AIR 1927 Mad 450 (455)

7 (35) AIR 1935 Lah 549 (550) (Mortgage de

was not liable to sale in execution)

(39) AIR 1939 Pat 480 (482) (Question of justification for decree cannot be gone into in suit under O 21 R 68)

8 (21) AIR 1921 Pat 811 (811)

(20) AIR 1929 Rang 152 (152, 153) 7 Rang 132

Note 5

1 (27) AIR 1926 Cal 468 (468)

(12) 16 Ind C= 53 (53) (Cal)

(CJ) 11 Suth W R 54 (53)

2 (102) AIR 1924 Pat 470 (470)

(497)

4. (39) AIR 1939 Pat 430 (431) 1939 Pat W N 229 (230)

5 (39) AIR 1939 All 598 (599) 1939 All L Jour 622 (623)

6 (37) AIR 1937 Pesh 82 (53) (Widow of deceased judgment debtor added as legal representative can object that property attached and sold is her dower property)

Note 6

1. judgment debtor is on decree-holder)

Note 7

(37) AIR 1937 Pesh 90 (91) (Order rejecting such objection is not conclusive)

(37) AIR 1937 Pesh 97 (99)

**O. 21 R. 58** motion and the person preferring the objection is merely in the position of a defendant  
**Notes 12a-14** defending a suit

**13 Who can prefer claim** — All persons who at the date of the attachment have some interest in or are possessed of the property attached can prefer a claim under this rule<sup>1</sup> (see Rule 59). Thus an objection by a person who *subsequent* to the attachment purchases the property in execution of another decree is not one within this rule<sup>2</sup>. The Court has however inherent power to deal with such an objection<sup>3</sup>.

In the undermentioned case<sup>4</sup> where certain post office cash certificates standing in the name of a person were attached in execution of a decree it was held that an objection by the Postmaster General having custody of the cash certificates came within this rule. It has also been held that an objection taken by the Secretary of State for India to whom notice is issued under O 21 R. 48 for the attachment of the salary of a Government servant, comes under this rule<sup>5</sup>.

A co-operative society has an interest in the shares of a member as these shares form part of its capital. Hence where these shares are attached in execution of a decree against the member the society has *locus standi* to object to the attachment under this rule<sup>6</sup>.

There is a difference of opinion as to whether an application by a mortgagee praying that the sale may be subject to his mortgage is one falling under Rule 66 or under this rule. See Note 2 to Rule 62.

As to whether a usufructuary mortgagee can make a claim under this rule see Rule 62 *infra*.

**14 Parties and representatives** — It has been seen in Note 16 to Section 47 that objections to attachment raised by parties or their representatives *as representing third parties or as trustees* are really objections by third parties and do not fall within the scope of Section 47. Such objections will therefore have to be decided under the provisions of Rules 58 to 63<sup>1</sup>. Thus, a claim by the *karnavan* of a Malabar *tarwad* that the whole of the *tarwad* property is not liable to attachment in execution of a personal decree against him falls under this rule<sup>2</sup>.

A Hindu debtor dies leaving B a daughter, and C a daughter's son. A's

#### Note 13

1 (84) AIR 1934 Pat 511 (511, 512) 13 Pat 765 (Where the interest of a claimant accrued after the attachment which was effected he cannot come under Rule 58.)

(35) AIR 1935 Lah 677 (678) (Occupancy rights of judgment debtor attached — Landlord has sufficient interest in the property to entitle him to prefer objection.)

2 (34) AIR 1934 Pat 511 (510) 13 Pat 765 (Dismissal of objection on ground of claimant not having any interest in the attached property at the date of the attachment does not affect the claimant's title as the order does not come under O 21 R. 63.)

(35) AIR 1935 Nag 171 (177) 31 Nag L R 301  
 (39) AIR 1939 Lah 300 (381) 41 Pun L R 305 (0)

3 (35) AIR 1935 Nag 171 (172) 31 Nag L R 301

(39) AIR 1939 Lah 300 (381)

4 (34) AIR 1934 Cal 415 (415)

5 (30) AIR 1936 Lah 761 (762)

6 (39) AIR 1939 Lah 305 (306)

#### Note 14

1 See the cases cited in Note 16 to Section 47 and the following cases:

(85) 7 All 547 (549, 550)

(01) 23 All 263 (265)

(80) 4 All 190 (192) (Decree against firm — Claim by a partner that property attached is his private property — Falls under this rule.)

(36) AIR 1936 Pat 256 (257) (Above rule not confined to cases where object on is made by shikast mutawalli or trustee — Judgment debtor objecting that property in his possession — Objection against

one member of a firm and attachment — O her members claim is one under this rule.)

2 (1900) 10 Mad L J 85 (86)

(16) AIR 1916 Mad 789 (790)

creditor sues *C* alone and obtains a decree against *A*'s assets in his hands. In execution of the decree property in the hands of *B* (the daughter) is attached as being the assets of the deceased *B* objects on the ground that the property is her personal property and does not form part of the assets of the deceased. It was held that *B*'s objection was one by a *stranger* and as such came within this rule and not under Section 47<sup>3</sup>. See also Notes 45 and 46 to Sect on 47.

D 21 R 58  
Notes 14-17

**15 Trustees and shebats** — On the same principle as discussed in Note 14 above a personal decree against a trustee or *shebat* does not estop him from asserting the claim of the beneficiary or of the charitable institution under this rule when the latter's property is attached in execution<sup>1</sup>. Thus where *A* in execution of a decree for money against *B* personally attaches and proceeds to sell property of which *B* alleges that he is in possession not in his own right but as *shebat* of a deity to whom the property has been dedicated *B*'s claim will fall under this rule<sup>2</sup>.

See also Note 46 to Section 47 and the cases cited therein.

**16 Claim by Official Receiver or Official Assignee** — If the vesting order takes place before attachment the Official Receiver can prefer a claim under this rule<sup>1</sup>. But if the vesting order is subsequent to the attachment then the claim of the Official Receiver does not fall under this rule but is a statutory claim under Section 51 of the Provincial Insolvency Act which should be dealt with under Section 151 of the Code. Articles 11 and 13 Limitation Act do not apply to the latter class of cases<sup>2</sup>.

See also Note 93 to Section 47.

**17 Claims by third persons** — The procedure under this rule applies as has been seen in Note 1 *ante* only to claims of *third* persons<sup>1</sup>. Pending suit by a creditor against his debtor's estate the Administrator General was authorized to collect the debts due to the deceased debtor. The creditor on obtaining decree in his suit

[See however (04) 14 Mad L Jour 187 (188)]  
3 (32) AIR 1932 All 263 (264)  
[See also (88) AIR 1939 Na 321 (32)  
(Decree against sons as legal representatives of the deceased — W do not in pleadings — Objection by W do not)]

creditors)  
(36) AIR 1936 Snd 2 (3) 30 Snd L R 298

#### Note 15

1 (18) 21 Ind Cas 748 (748) (Mad)  
(88) 15 Cal 879 (340) 15 Ind App 1 (PC)  
(04) 28 Bo 48 (460)  
(10) AIR 1919 Cal 215 (246 247) 46 Cal 877  
(16) AIR 1918 Cal 275 (276)

under this rule)  
2 (22) AIR 1922 Mad 189 (190 191) 45 Mad 70  
See also the following cases  
(85) 7 All 752 (755)  
(96) 21 Bom 205 (216)  
(96) 20 Bom 403 (406)  
(01) 29 Cal 428 (432) (FB)

ot  
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to authority of pleader for himself in his

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#### Note 16

1 (36) AIR 1936 Cal 53 (574) I L R (193)  
1 Cal 961 (Office Receiver not representative of court judgment debtor)  
(35) AIR 1935 Mad 151 (159) 59 Mad 403 (In such case Official Receiver does not act as representative of judgment debtor but of the

him S 47 does not apply — It is claim under O 1 R 58 and as such order on such application is not appealable)

#### Note 17

1 (85) 7 All 365 (366)  
(90) 11 Bom 400 (92) (As to form of application under the Code)  
[See 2 Ind Jur (N) 339]

**O. 21 R. 58** attached a debt due to the deceased. It was held that the Administrator General was entitled to make a claim under this rule and have the attachment raised.<sup>1</sup>

**Notes 17-20**

See also Note 13 above

**18. Claims by transferee of property from the judgment-debtor** — A transferee of property, attached in execution of a decree is entitled to object under this rule to the attachment made subsequent to his transfer.<sup>1</sup> A simple mortgagee can also prefer a claim under this rule.<sup>2</sup> See also Notes under Rule 62.

**19. Assignee of decree from the judgment-debtor** — The transferee of a decree from the judgment debtor can put in an application under this rule to remove an attachment of the decree made subsequent to the transfer.<sup>1</sup>

**19a. Objection by tenant of judgment-debtor.** — See Notes to O 21 R 61

**20 "Shall proceed to investigate the claim"** — It is the duty of the Court to investigate a claim preferred to it under this rule<sup>1</sup> unless it sees reason to reject it on the ground of delay. It ought not without investigation simply *notify the claim* in the sale proclamation<sup>2</sup> although if the Court does pass such an order, it is not invalid and will be conclusive until set aside by a suit under Rule 63.<sup>3</sup> Similarly the Court should not reject a claim without investigation merely on the ground that the question of possession or title is doubtful or complicated.<sup>4</sup> In the undermentioned case<sup>5</sup> it was held by the Madras High Court that an order for merely notifying a claim does not preclude the executing Court from subsequently investigating the claim on the merits. See also Note 5 to Order 21 Rule 63.

As pointed out by Lord Hobhouse in delivering the judgment of the Board in *Sardhar Lal v Ambika Prasad*<sup>6</sup>

The Code does not prescribe the extent to which the investigation should go and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time leaving the aggrieved party to bring the suit which the law allows to him.

2 (99) 23 Bom 428 (430)

**Note 18**

1 (26) AIR 1926 All 244 (245)

(67) 8 Suth W R 378 (379)

(17) AIR 1917 Mad 4 (5) (Attachment of pro

allow claim hastily without investigation)  
(1965) 4 Suth W R 85 (85)

(35) AIR 1935 All 183 (185) (Court cannot shut out any party from producing evidence)

(85) AIR 1935 Rang 207 (208) (Claimant setting up mortgage — Executing Court should inquire into existence and genuineness of mortgage — Merely leaving it to bailiff to make intimation to bidders that there was a claim of mortgage is not enough)

[See (39) AIR 1939 Nag 183 (186) 1 LR (1939) Nag 549 (Transferee subsequent to attachment cannot claim under this rule, he being bound by decree and being thus a representative of a

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(FB) (Per Seshagiri Ayyar J)  
(24) AIR 1924 Mad 147 (148) (AIR 1919 Mad 738 (FB) Followed)

(26) AIR 1926 Mad 216 (217)

(23) AIR 1923 Mad 795 (795)

3 (19) AIR 1919 Mad 738 (742) 41 Mad 965 (FB)

**Note 19**

1 (28) AIR 1928 Rang 75 (26) 5 Rang 595

(1900) 10 Mad L Jour 116 (117)

**Note 20**

1 (67) 8 Suth W R 378 (379)

(33) AIR 1933 Lah 421 (421) (Court should not

It is not possible to define the amount of enquiry which constitutes an investigation. If the order purports to deal with the merits it must be taken that there has been an investigation.<sup>7</sup>

What is to be investigated is indicated by the next three following rules, viz., Rules 59 to 61. The question to be decided is, whether on the date of the attachment the judgment-debtor or the objector was in possession and where the Court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the judgment debtor.<sup>8</sup> The sole question to be investigated is, thus, one of possession.<sup>9</sup> Questions of *legal right* and *title* are not relevant, except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment-debtor or some other person.<sup>10</sup> To that extent the title may be part of the enquiry. But ultimate questions of trust,<sup>11</sup> or complicated questions like the *benami* nature of a transaction,<sup>12</sup> are not within the scope of the enquiry and are not intended to be gone into. As pointed out by Mr. Justice Sadasiva Ayyar in *Ramaswami Chetty v. Mallappa*<sup>13</sup>.

"In summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of 'emergent' disputes, the Court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud, trust and so on, while giving the party defeated in the summary enquiry, the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit. The Court is bound to order the release of an attached property if it finds possession in the claimant on his own account *even if there is title and disposing power remaining in the judgment debtor*."

The High Court of Allahabad<sup>14</sup> has however held that it cannot be said that the Court acts without jurisdiction if it does not go into the question of possession but decides the claim on some other basis. Similarly, where the claimant adduced no

7. ('06) 29 Mad 225 (227)

('17) AIR 1917 Oudh 99 (101) 19 Oudh Cas 357  
(Order passed on a perfunctory investigation is an operative order)

8. (20) AIR 1929 Pat 279 (274)

(20) AIR 1920 Mad 748 (753) 43 Mad 760 (FB)

(30) AIR 1935 All 117 (119)

(85) AIR 1935 Pat 267 (268) (For this purpose, it is often necessary to go into the question if objector's possession was the result of a purchase and whether the purchase was a *benami* purchase or not)

9. ('31) AIR 1931 Lah 666 (666)

(02) 29 Cal 543 (546)

('15) AIR 1915 Cal 116 (117)

('28) AIR 1928 Mad 163 (163)

('27) AIR 1927 Nag 286 (288)

('29) AIR 1929 Nag 66 (67)

('26) AIR 1926 Nag 197 (198)

(22) AIR 1927 Low Bur 16 (16) (Court should not go into the question whether possession is

19. ('06) 29 Mad 225 (227)

'17) AIR 1917 Oudh 99 (101) 19 Oudh Cas 357  
(Order passed on a perfunctory investigation is an operative order)

necessary)

('37) 1937 Mad WN 320 (320)

(30) AIR 1930 Rang 395 (396) (If necessary, Court can go into question of validity of registered or other document)

(84) AIR 1934 Rang 212 (213)

('35) AIR 1935 Pat 267 (268) (Possession of claimant as a result of purchase from judgment-debtor — Inquiry whether purchase is *benami*)

11. ('24) AIR 1924 Cal 744 (748) 51 Cal 519

('37) 11 Cal 617 (620)

12. ('24) AIR 1924 Pat 506 (507).

(29) AIR 1929 Pat 273 (274).

(36) AIR 1936 Bom 160 (162) 60 Bom 226.

[But see ('73) 20 Sath WN 202 (202)]

13. ('20) AIR 1920 Mad 748 (756) 43 Mad 760 (FB)

[See also (02) 29 Cal 543 (546) (Observations to the same effect)]

14. ('12) 11 Ind Cas 790 (792) : 11 All 365.



**O. 21 R 55** evidences as to possession<sup>15</sup> or where the title of the claimant had been expressly negatived in a prior litigation to which he was a party<sup>16</sup> it was held that the Court rightly decided the claim on the basis of title alone

**21. Proviso** — If the Court is of opinion that the application preferred under this rule has been negligently or unnecessarily delayed it can refuse to investigate it. But the Court cannot dismiss a claim petition under this rule on the ground of delay, without giving an opportunity to the claimant or his counsel to explain the delay and without considering the explanation that might be so offered.<sup>1</sup> If the Court does entertain the claim and investigate the same it is bound to pass an order under Rule 60 or Rule 61. A dismissal on the ground of delay after investigation is illegal.<sup>2</sup>

It has been held that an order rejecting a claim on the ground of delay has also to be set aside by a regular suit within one year from the date of the order. Otherwise the order is conclusive within the meaning of Rule 63.<sup>3</sup> But there is a conflict of decisions as to whether an order passed without investigation falls under Rule 63. See Note 5 to Rule 63.

In the case of an attachment before judgment a claim or objection under this rule need not be preferred before a decree is passed in the suit. A claim or objection preferred within a reasonable time after an application for execution is made by the decree holder cannot be considered to be unnecessarily delayed.<sup>4</sup>

**22 Dismissal for default** — See Note 4 to Rule 63.

**22a Reference to arbitration** — An objection under this rule in a proceeding in execution. Hence Section 141 of the Code does not apply to such an objection. Consequently Schedule II of the Code also does not apply to such an objection and so the Court has no power to refer it to arbitration.<sup>1</sup>

**22b Transfer of proceedings under this Rule** — An objection under this rule can only be decided by the executing Court. Hence a transfer to another Court of such an objection alone without transferring the execution proceedings also is not according to law.<sup>1</sup>

**23 Effect of order — Res judicata** — An order passed on a claim petition disallowing the claim bars on general principles of *res judicata* a fresh application on the same grounds<sup>1</sup> and is conclusive between the parties subject to the result of suit contemplated by Rule 63. On the same principle a defeated claimant is not entitled to apply under O 21 R 100 *infra* the reason being that the scope of an enquiry under Rule 100 is the same as that of an enquiry under this rule.<sup>2</sup> So also where a claim

1 (17) AIR 1917 Mad 311 (311)

16 (17) AIR 1917 Iow Bur 79 (80)

Note 21

1 (33) AIR 1933 All 751 (751)

(37) AIR 1937 Oudh 265 (269) 13 Luck 111

2 (18) AIR 1918 Upp Bur 32 (32) 2 Upp Bur

Rul 136

(17) AIR 1917 Cal 9 (10) (Proviso applies even to cases where Court has become possessed of the property attached by usurpation of authority)

Note 22a

1 (36) AIR 1936 All 878 (390) 59 All 70

Note 22b

1 (38) AIR 1938 Lah 90 (90)

Note 23

" " " "

2 (33) AIR 1933 Cal 233 (231)

(35) AIR 1935 Pat 122 (123)

(35) 158 Ind Cas 333 (338) (Pat)

[See also (34) AIR 1934 Lah 193 (194) (Petitioner a father a claim under this rule dismissed and order becoming conclusive — He cannot object under R 97)]

under this rule ■ rejected the claimant cannot raise the same question by way of defence to ■ suit for possession by the auction purchaser<sup>3</sup>

O. 21 R. 58  
Note 23

But the order passed in ■ claim proceeding is only *quoad* the particular claimant or the particular property attached and cannot be regarded as ■ general decision enuring to the benefit of others who are not parties thereto<sup>4</sup> Thus, an order in favour of one of several decree holders disallowing a claim cannot be availed of in favour of the other decree holders who are not parties to the claim<sup>5</sup> A in executing a decree against B attaches certain properties and C prefers a claim thereto C's claim is dismissed and he does not file ■ suit under Rule 63 A purchases the property in court auction in execution of his decree and gets delivery of possession by dispossessing D, who is ■ *bona fide* court auction purchaser of C's interest in execution of ■ decree against him D is not barred from applying under Rule 101 for restoration of possession of which he was dispossessed by reason of the fact that C became concluded by the order against him in his application under this rule<sup>6</sup> But where a claim under this rule has been disallowed and the order disallowing the claim has not been set aside by ■ suit under Rule 63, it has been held that a person holding a decree against the defeated claimant and seeking to attach the property in execution of his decree will be bound by the previous order dismissing the claim of his judgment debtor<sup>7</sup> Where a claim is preferred by the manager of the Court of Wards on behalf of ■ minor ward without the sanction of the Court of Wards, the order disallowing the claim is not binding on the minor ward<sup>8</sup>

In execution of ■ decree by A against B, C prefers a claim on the basis of a transfer of the property (which has been attached) in his favour by the judgment-debtor The claim ■ upheld A does not get the order upholding the claim set aside by a suit under Rule 63 Then B ■ declared an insolvent and in the insolvency proceedings A applies for the annulment of the transfer in favour of C The application is not barred The reason is that in the execution proceedings A was acting on his own behalf, but in the insolvency proceedings he acts in a representative capacity on behalf of all the creditors of the insolvent generally<sup>9</sup>

Where on a claim by a third party that he is the owner of a property attached in execution of a decree against another, the attachment is set aside on that ground, the decision that the third party is the owner of the property is not binding on the judgment debtor But if the judgment debtor has appeared and opposed the claim and the matter is decided, the decision may be binding on him<sup>10</sup>

3 (35) AIR 1935 Cal 500 (507) (Claimant asserting his own title to the property — Claim dismissed — Suit for possession by auction purchaser — Defence by defeated claimant on same ground ■ barred)

(35) AIR 1935 Rang 161 (162)

(See however (39) AIR 1939 Mad 456 (461) 11 R (139) Mad 803 (SB) (Though dismissal of his appeal on finding that claimant was not in possession of the attached property a reverse possession from before attachment can be relied on by claimant when he ■ sued for possession by auction purchaser))

4 (67) 8 Suth W R 27 (28)

(74) 21 Suth W R 290 (311)

(67) 6 Suth W R 157 (157)

(02) 25 Mad 721 (729)

(92) 15 Mad 477 (479)

5 (96) 18 All 419 (419)

7. (36) AIR 1936 All 722 (723) (A I R 1935 All 683, Relied on)

8 (99) 27 Cal 242 (252 253)

9 (35) AIR 1935 Mad 670 (671)

10 (39) AIR 1939 All 723 (729)

**O 21 R 58**      **23a Proclamation of sale pending claim petition.** — A Court cannot order  
**Notes 23a-25** the issue of a proclamation of sale while a claim petition is pending<sup>1</sup>

**24 Appeal** — No appeal lies against an order allowing or rejecting a claim under this rule. The order is *conclusive* subject to the result of the suit contemplated by Rule 63<sup>1</sup>. Under the special provisions of the Agra Tenancy Act 1926 such an order passed by an Assistant Collector Second Class is however appealable to the Collector but the party aggrieved by the appellate order of the Collector is not barred from filing a suit under O 21 R 63<sup>2</sup>. There is a conflict of opinion as to whether an order dismissing a claim petition is a judgment within the meaning of Clause 15 of the Letters Patent and is appealable as such. According to the High Court of Madras<sup>3</sup> it is a judgment and is appealable as such and the period of limitation for the suit under Rule 63 runs from the date of the appellate order. The High Court of Rangoon<sup>4</sup> has on the other hand held that the refusal of the summary remedy under O 21 R 58 leaves open the right of bringing a regular suit and have the question finally decided and that it cannot therefore be a judgment within the meaning of Clause 15 of the Letters Patent (Rangoon). The High Court of Calcutta<sup>5</sup> has held without deciding whether the order is a judgment or not that the concluding words of Rule 63 *infra* preclude an appeal from the order.

dec  
 O

order passed thereon is a  
 described as one under  
 with it as such<sup>6</sup>

**25 Revision** — See Notes 8, 11 and 23 to Section 115 *ante* and the cases cited below<sup>1</sup>

#### Note 23a

**1** (40) AIR 1940 Mad 6 (7) 1939 Mad W N 76 (776)

#### Note 24

**1** (23) AIR 1928 All 292 (92)  
 (32) AIR 1932 All 263 (964)  
 (82) 4 All 190 (101, 192)  
 (50) 2 All 52 (753)  
 (80) 1886 All W N 39 (40)  
 (88) 1888 All W N 77 (78)  
 (04) 23 Bom 458 (460)  
 (1000) 9 Bom L R 241 (242)

**3** (0) 95 Mad 555 (539)

(10) AIR 1916 Mad 893 (894) 89 Mad 1196

Note The corresponding Clause in the Letters

Later sue under O 21 R 63)

(39) AIR 1939 Lah 907 (209) (Person added as  
 1)

defendant against whom suit was dismissed comes  
 under Sect on 47)

#### Note 25

**1** (67) 9 All 232 (233, 234) (Refusal to entertain  
 claim—Revision lies)

decree holder's prayer to attach property of joint

**R. 59. [S. 279.]** The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached. 0.21 R.59

Evidence to be adduced by claimant.

evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

**Local Amendment****PATNA**

*Substitute the following for Rule 59*

"59 The claimant or objector must adduce evidence to show that at the date of the decree or of the attachment as the case may be, he had some interest in, or was possessed of, the property in question

**Synopsis**

- 1 The claimant or objector must adduce evidence
- 2 "Some interest"

- 3 "Or was possessed of"
4. Limits of enquiry under Rules 59 to 61 See Note 20 to Rule 58

1. The claimant or objector must adduce evidence. — The burden is on the claimant to prove that on the date of the attachment he was in possession of the property attached<sup>1</sup> If he proves that, then the burden of proving that he is not the owner or holds it in trust for the judgment debtor is upon the decree holder<sup>2</sup>

2. "Some interest." — The claimant may raise an objection not only on the ground that he is in possession of the property attached but also on the ground that he has some interest in the property<sup>1</sup> A beneficial interest is as much an interest within the meaning of the rule as a legal interest in the property attached<sup>2</sup> The Upper Burma Judicial Commissioner's Court<sup>3</sup> has held that a mortgagor without possession can prefer a claim on the ground that his interest in the property, viz., the equity of

ment debtor without adequate reasons by allowing objections of third party before attachment is effected — High Court should interfere in revision )

( 88 ) AIR 1933 Lah 421 (421) (Allowing claim without investigation—Revision will lie )

( 88 ) AIR 1933 Pat 158 (159)

( 88 ) AIR 1933 Rang 259 (260) (Wrong order on claim petition—There can be no defence to suit under Rule 63—In such a case High Court may interfere in revision )

( 29 ) AIR 1929 Pat 751 (752) 9 Pat 647 (Not deciding question of possession—Revision lies )

( 34 ) AIR 1934 Lah 176 (176) (Objection rejected treating the decree wrongly as a mortgage decree—Revision lies )

( 36 ) AIR 1936 Lah 761 (762) (Revision does not lie )

( 37 ) AIR 1937 Oudh 269 (269) 18 Luck 111 (No opportunity given to explain delay — Revision lies )

( 34 ) AIR 1934 Rang 230 (230) (No revision lies )

( 30 ) AIR 1930 Rang 306 (306) 14 Rang 516 (Failure to make enquiry into the question of

title when it was necessary—Revision lies )

**Order 21 Rule 59 — Note 1**

1. ( 69 ) 2 Beng L R 91 (102) (FB) (Per Peacock, C J)

- 2 ( 03 ) 2 Low Bur Rul 152 (155, 153)
- ( 33 ) AIR 1933 Oudh 473 (474)
- ( 37 ) AIR 1937 Cal 639 (640)

**Note 2**

- 1

**O 21 R. 59** redemption cannot be attached and sold in execution of a decree against the mortgagee  
**Notes 2-4** in possession

The rule does not mean that if the claimant establishes that he has some interest in the property he is entitled to succeed irrespective of the question of possession nor does it imply that if he fails to establish the particular interest he sets up his claim must be disallowed irrespective of the question of possession. In each of the cases mentioned in Rules 60 and 61 the Court must determine the question of possession of the judgment debtor and cannot base its decision merely on the question of validity of the claim or of title to the attached property. The expression "some interest" means such interest as would render the possession of the judgment debtor possession not on his account but on account of or in trust for the claimant.<sup>4</sup>

A advances money to B in order that A may advance it to C and C executes a mortgage in favour of A for the money. A then sues C on the mortgage and gets a decree. A has no interest in the decree and is therefore not entitled to object to the attachment of the decree.<sup>5</sup>

An attachment of property does not by itself create any interest in the property in favour of the person at whose instance the attachment is made. Hence the mere fact that a person has already attached the property will not entitle him to raise an objection under this rule.<sup>6</sup>

See also Note 13 to Order 21 Rule 58

**3. "Or was possessed of"** — These words are not restricted merely to tangible or physical possession but include *constructive* possession and possession in law of debts and other intangible property.<sup>1</sup>

**4 Limits of enquiry under Rules 59 to 61.** — See Note 20 to Rule 58

**O. 21 R. 60**

**R. 60.** [S 280] Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on

<sup>4</sup> (15) AIR 1915 Cal 116 (117)  
 (93) AIR 1933 N 997 (1900) C —

may advance it to B. X does not thereby obtain any rights in the bond that may be executed by B in favour of A.)

<sup>6</sup> (35) AIR 1935 Nag 171 (172) 31 Nag L R 301

**Note II**

<sup>1</sup> (04) 17 Mad 67 (70) (FB)  
 (07) 4 Low Bur Rul 289 (290)

account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment

O. 21 R. 60  
Note 1

[1877, S. 280; 1859, S. 220 See S. 63]

### Local Amendment

#### PATNA

*Substitute the following for Rule 60*

"60 Where upon the said investigation the Court is satisfied that for the reasons stated in the claim or objection such property was not, at the date of the decree, or when attached, as the case may be, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from the execution proceedings, or from attachment

Where the property has been sold, such order shall have the effect of setting aside the sale, and if it has been purchased by a third party in good faith, the Court may make such order for his compensation by the decree holder or objector, to an extent not exceeding 12½ per cent of the purchase price, as it thinks fit

### Synopsis

- |  |  |
|--|--|
| 1. Release of property from attachment — General | 4 Partly on his own account and partly on account of some other person |
| 2 Property in possession of third person         | 5 Effect of an order of release.                                       |
| 3 Property in possession of judgment-debtor.     | 6 Appeal   |
|  | 7. Revision See Note 25 to Rule 58                                     |

**1. Release of property from attachment — General.** — A release from attachment can be made under this rule, only if the conditions prescribed in this rule are satisfied, namely—

- (1) That the property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant paying rent to him
- (2) That the property being in the possession of the judgment debtor at such time, it was so, not on his own account or as his own property, but on account of, or in trust for, some other person, viz, the claimant
- (3) That the property was in possession of the judgment debtor partly on his own account and partly on account of some other person<sup>1</sup>

In the last case, the release is to be ordered to the extent to which the possession of the claimant is established<sup>2</sup> In such a case the Court should define the share of the judgment debtor and that of the claimant and sell only the former<sup>3</sup>

#### Order 21 Rule 60 — Note 1

- 1 (06) 8 Bom L R 791 (707)  
{ 28) AIR 1928 All 668 (669)  
{ 18) AIR 1918 Low Bur 32 (32) (Extent of enquiry into title laid down)  
{ 97) 24 Cal 563 (566)  
2 (70) 18 South W R 63 (66, 67) (F B)  
{ 97) 24 Cal 563 (566)

#### (87) 12 Bom 231 (235)

- { See also (32) AIR 1932 Bom 210 (215) (Undivided interest of a member of a joint family attached during pendency of partition suit — Final decree for partition passed subsequently — Court must take notice of partition and pro-claim for sale ascertained share of the member )  
3. (05) 27 All 464 (465)

O. 21 R. 61  
Notes 1-3

PATNA

## Local Amendment

*Substitute the following for Rule 61*

'61 Where the Court is satisfied that the property was at the time of the decree, or of the attachment, as the case may be, in the possession of the judgment debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim

## Synopsis

- |   |                                   |
|---|-----------------------------------|
| 1 Disallowance of claim                                 | 3 Effect of order under this Rule |
| 2 Order without dealing with the question of possession | 4 Appeal                          |
|   | 5 Revision                        |

**1. Disallowance of claim** — Where the property attached is found to be in the possession of the judgment debtor on his own account, or if the claimant is in possession as trustee for the judgment debtor, the Court is bound to disallow the claim under this rule<sup>1</sup>. Similarly, where the claimant, though in possession, is only a tenant of the judgment debtor paying rent to him his possession is regarded as that of the judgment debtor and his claim cannot be allowed<sup>2</sup>.

**2. Order without dealing with the question of possession.** — As already pointed out in Note 20 to Rule 58, the sole question to be considered in the investigation of a claim is the question of possession. But if the Court erroneously does not consider the question of possession, but decides the claim on some other ground, *e.g.* on the ground of title, the order cannot be considered to be one passed without jurisdiction and a nullity. It will nevertheless be conclusive unless set aside in a suit under Rule 63<sup>3</sup>. But such an order can be revised by the High Court<sup>4</sup>.

**3 Effect of order under this Rule.** — An order disallowing a claim under this rule is only *provisional* and if the defeated claimant succeeds in the suit filed under Rule 63 his rights as on the date of attachment will be restored. If the court auction sale takes place the auction purchaser's rights will be subject to the result of the suit<sup>5</sup>. An order under this rule when it becomes conclusive under Rule 63 *infra*, does not operate as an order *in rem* so as to render void the transfer upon which the claimant relied. The order only precludes the defeated claimant from proceeding against the decree holder or the auction purchaser on the basis of that transfer but otherwise it does not affect the validity of the deed of transfer<sup>6</sup>. An order dismissing a claim does not necessarily imply an *adjudication* that the claimant was not in possession at the

### Order 21 Rule 61 — Note 1

- 1 (12) 17 Ind Cas 12 (12) (Cal)
- (33) AIR 1933 Mad 839 (840)
- (83) 1883 All W N 205 (205) (After disallowing claim Court should not stay sale)
- (17) AIR 1917 Oudh 92 (96) (Defeated claimant to pay full costs to decree holder though claim only to portion of attached property)
- (36) AIR 1936 Rang 306 (307) 14 Rang 516

### Note 2

- 1 (90) 17 Cal 260 (262)
- 2 (33) AIR 1933 Mad 879 (880 883) 57 Mad 195 (A obtained a decree against B—B had mortgaged his property to C—A attached B's properties—C preferred claim stating that he had purchased property mortgaged to him from B—B's mortgage revived under law—Mortgage in law revived)

date of the attachment as under Rule 68 a claim may also be dismissed on the ground of undue delay<sup>3</sup>

O 21 R 61  
Notes 3-5

See also Note 16 to Rule 63 Note 4 to O 21 R 55 and Note 9 to Section 64

4 Appeal — No appeal lies from an order under this rule<sup>1</sup>

5 Revision — See Note 20 to Rule 58

## R. 62. [S 282] Where the Court is satisfied that the

O 21 R 62

Continuance of attachment subject to claim of incumbrancer

property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may

do so, subject to such mortgage or charge

[1877, S 282]

### Synopsis

1 Scope of the Rule

2 'Subject to mortgage'

3 Mortgage in favour of a person not in possession

4 Notification of mortgage or charge

See Note 1

5 Effect of order under this Rule

6 Appeal

7 Revision See Note 25 to Rule 58

1 Scope of the Rule — The rule is an enabling provision which empowers the Court to direct the continuance of the attachment subject to a mortgage or charge in favour of a person not in possession

The question of the existence of a mortgage over the property attached can be raised in two ways and at two stages in execution. One is when the Court has to prepare the proclamation for sale by public auction. This is provided for in Rule 66 of this Order. That rule enacts that the sale proclamation shall specify as fairly and accurately as possible any encumbrance to which the property is subject after giving notice to the decree holder and the judgment debtor. The other stage is that provided for by this rule<sup>1</sup>. The difference between the two provisions is very important. Where properties are sold subject to a mortgage under this rule the Court does so *after being satisfied of the existence of the mortgage and sells only the judgment debtor's right of redemption* so that the purchaser does not acquire any greater rights than that of redeeming the mortgage<sup>2</sup>. The order continuing the attachment subject to the mortgage or refusing to do so is conclusive as to the rights of the parties and if no suit is filed within the period of one year prescribed by Article 11 of the Limitation Act the mortgagee or the purchaser as the case may be cannot either as plaintiff or as defendant assert the right denied by that order<sup>3</sup>. In the case of a proclamation of sale issued

of C did not revive and the mortgage had become extinguished in sale)

(15) AIR 1915 Oudh 157 (158)

3 (39) AIR 1939 Mad 456 (461) ILR (1939) Vol 63 (S B) (Even if the dismissal is based on finding that defendant was not in possession he is not barred from raising plea of adverse possession in suit for possession by auction purchaser)

#### Note 4

3 (97) AIR 1927 Bom 231 (235)

1 (84) G All 103 (110)

(7) AIR 1927 Rng 137 (139) 5 Rang 110

#### Order 21 Rule 62 — Note 1

1 (30) AIR 1936 Cal 590 (592)

2 (06) 98 All 418 (420)

purchaser cannot claim enforcement of mortgage)



O. 21 R. 62  
Notes 1-2

under Rule 66, the Court does not decide the question whether the mortgage subsists or not and the purchaser buys the property subject to such risks as the notice might involve. He is not precluded from questioning the validity of the mortgage.<sup>4</sup> The Chief Court of Oudh has in the undermentioned case<sup>5</sup> held that there is no difference between an order passed under this rule and an order passed under Rule 66 so far as the auction purchasers are concerned. It is submitted that the view is not correct.

The rule does not apply to claims arising in execution of a mortgage decree.<sup>6</sup>

**2 "Subject to mortgage."** — Has the executing Court power to decide under this rule the question of the truth or validity of the mortgage? In other words, if the Court rejects a claim of the mortgagee on the ground that the mortgage is not true, is he bound to file a suit within the period of limitation prescribed by Article 11 of the Limitation Act on pain of losing his rights under the mortgage if he does not do so? Upon this point there is a conflict of judicial opinion. The High Court of Bombay,<sup>1</sup> and the High Court of Allahabad<sup>2</sup> in a case decided under the old Code, have held that the rule is only a provision enabling the Court to continue an attachment subject to a mortgage if it finds that a mortgage exists and that the Court has no power to declare the mortgage invalid. The ratio of these decisions is that it is only where the Court is satisfied as to the existence of the mortgage that it can act under this rule, but that where it is not so satisfied it can do nothing under this rule but can only notify the mortgage under R. 66. The Lahore High Court<sup>3</sup> has also held that the objection of a mortgagee of the attached property does not come under Rule 66 and that an order rejecting his objection does not come under Rule 63. The High Court of Allahabad<sup>4</sup> in cases decided under the present Code, the High Courts of Calcutta,<sup>5</sup> Madras,<sup>6</sup> Patna<sup>7</sup> and Rangoon<sup>8</sup>

(89) AIR 1939 Cal 620 (221) ILR (1939) 2 Cal 291

(36) AIR 1936 Cal 590 (592) (Attachment continued subject to mortgage—Suit under Rule 63 not brought — Auction purchaser cannot challenge mortgage)

(83) AIR 1939 Mad 393 (395) ILR (1939) Mad 600  
(See (77) AIR 1937 Oudh 159 (164) 12 Luck 540 (1 property purchased in execution subject

—As  
pur  
out

(15) AIR 1915 Oudh 163 (164)

(20) AIR 1920 All 165 (166)

(37) AIR 1937 Nag 303 (309) ILR (1937) Nag

GG5  
(AIR 1939 Cal 620 (221) ILR (1939) Cal 291)

5 (25) AIR 1925 Oudh 154 (156, 157) 27 Oudh Cas 303

6 (31) AIR 1931 Oudh 157 (159)

(17) AIR 1917 Oudh 92 (96)

Note 2

1 (16) AIR 1916 Bom 179 (150) 41 Bom 64

(Distinguishing 22 Bom 640)

(14) AIR 1914 Bom 302 (303)

(But see (94) 7 C P L R 73 (75))

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is

(09) 9 Ind Cas 793 (794) 31 All 583 26 Ind App 203 (P C)

and the Judicial Commissioner's Court of Nagpur<sup>9</sup> have, on the other hand, held that an order rejecting the claim of a mortgagee on the ground that the mortgage is not true or valid is an order which will be *conclusive* unless set aside in a suit under Rule 63. As pointed out by Ashworth, J., of the Allahabad High Court, the expression "where the Court is satisfied" confers jurisdiction on the Court to come to a finding of fact as to the existence of the mortgage. Without such finding of fact it cannot be said to be satisfied about it. The rule, in effect, provides for two alternative or mutually exclusive orders. One is an order that, as the mortgage exists, the attachment shall be continued subject to it, and the other is that no mortgage shall be deemed to exist. The latter order, no less than the former, is contemplated by Rule 63<sup>10</sup>. It may appear anomalous that an executing Court should thus be given power to decide as to the validity and existence of a mortgage in favour of a third party the value of which may exceed the pecuniary limits of the jurisdiction of the Court. But the mortgagee is not bound to prefer a claim. If he chooses to avail himself of the advantages of the speedy and summary remedy provided for in this Chapter, he must suffer its disadvantages as well<sup>11</sup>. But, where a mortgagee does not file a petition of objection or claim, but merely informs the Court about his mortgage and prays that it may be notified in the sale proclamation, and the Court, on the allegation of the judgment debtor, goes into the question of the satisfaction of the mortgage and finds that it is discharged and dismisses the mortgagee's petition, the order is not one under this rule and hence, the mortgagee is not bound to bring a suit to set it aside within a year<sup>12</sup>.

Where a claim is preferred on the ground that the properties attached in execution of a decree are subject to a mortgage, the Court is bound to investigate the claim and cannot order simply without investigation that the sale would be held with notice of the mortgage. Such an order is not contemplated by this rule<sup>13</sup>.

**3. Mortgage in favour of a person not in possession.** — The rule refers only to the case of a claim of a mortgagee not in possession<sup>1</sup>. Can a mortgagee in possession ask the Court to direct the continuance of the attachment subject to his mortgage? The High Court of Bombay<sup>2</sup> has held that a mortgagee in possession is not in possession as *trustee* for the judgment debtor but on his own account and that, therefore, he is entitled to a release of the attachment under Rule 60 and not merely to an order directing the sale subject to his mortgage. The High Courts of Calcutta<sup>3</sup> and Patna<sup>4</sup> and the Judicial Commissioner's Court of Oudh,<sup>5</sup> while agreeing with the view of the Bombay High Court that he is entitled to a release under Rule 60, have held that in cases where the intention of the decree holder is to attach only the equity of redemption and not the whole property, the Court can order the continuance of the attachment of the equity of redemption alone. The High Court of Rangoon<sup>6</sup> has also held that the equity of redemption in a possessory mortgage can be attached and sold

<sup>9</sup> (80) AIR 1930 Nag 116 (119) 26 Nag L R 196 (F B) (AIR 1926 Nag 423 Overruled)

<sup>13</sup>

Note 2

<sup>1</sup> (24) AIR 1924 Oudh 384 (385)

nothing

F Bar

O 21 R 62  
Notes 3-7

It has been held in certain decisions<sup>7</sup> that a usufructuary mortgagee is not entitled to object to an attachment under Rule 58 and that if he does file an objection and such objection is dismissed he is not bound to sue to set aside the order within one year but may proceed under O 21 R 100 when he is dispossessed by the auction purchaser.

See also the undermentioned case<sup>8</sup>

4 Notification of mortgage or charge. — See Note 1 above

5 Effect of order under this Rule. — The effect of an order under this rule continuing an attachment subject to a mortgage is that the purchaser at the auction sale takes only the mortgagor's right of redemption<sup>1</sup>. But he is entitled to file a suit questioning the *bona fides* and validity of the mortgage within a year of the order<sup>2</sup>. If the Court disallows the claim of the mortgagee the order is conclusive against him unless he files a suit within one year to vacate the order<sup>3</sup>.

6 Appeal. — An order under this rule is not appealable. See Note 24 to Rule 58.

7 Revision. — See Note 23 to Rule 58.

O 21 R 63

**R. 63.** [S 283] Where a claim or an objection is preferred, the party against whom an order is made<sup>3</sup> may institute a suit to establish the right which he claims<sup>7</sup> to the property in dispute,<sup>17</sup> but, subject to the result of such suit, if any, the order shall be conclusive<sup>18</sup>.

[1877, S 283, 1859, S 220]

### Synopsis

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|--|--|
| <p>1 Legislative changes</p> <p>2 Scope of the Rule</p> <p>3 The party against whom an order is made</p> <p>4 Order dismissing a claim for default</p> <p>4a Ex parte order against decree holder</p> <p>5 Order refusing to investigate</p> <p>5a Withdrawal of claim</p> <p>6 Attachment before judgment</p> <p>7 May institute a suit to establish the right which he claims<sup>7</sup></p> <p>8 Parties to the suit</p> | <p>9 Consequential relief, if and when should be asked</p> <p>10 Damages for wrongful attachment—</p> <p>11 If can be asked for under this Rule</p> <p>11 Suit not necessary if property is released from attachment</p> <p>12 Claimant can pay money under protest</p> <p>13 Other remedies open to a claimant or objector</p> <p>14 Objector can plead invalidity of attachment</p> <p>15 Limitation for suits under this Rule</p> |
|--|--|
- 7 (38) AIR 1938 Lah 569 (569) 1 L.R. (1939) Lah 593
- (37) AIR 1937 Pat 63 (64) 16 Pat 54 (PB)
- (Claim by mortgagee dismissed for default—Suit under O 21 R 63 not necessary)
- (22) AIR 1922 Pat 408 (408) 1 Pat 153
- 8 (36) AIR 1936 Oudh 263 (264) 12 Luck 144
- (Usufructuary mortgagee's objection to attachment dismissed and property sold and delivered to auction purchaser.—Usufructuary mortgagee is not entitled to sue under §§ 68 T P Act)

### Note 5

- 1 (19) AIR 1919 Low Bur 124 (124)
- (10) 5 Ind Cas 374 (375) (AIR)
- (16) AIR 1916 Cal 349 (351)
- [See also (10) 8 Ind Cas 117 (118) 35 Msd 30]
- 2 (31) AIR 1931 All 189 (190) 59 All 1032
- (55) 2 Cal L Jour 377 (381) (He can do so even by way of defence to a suit by the mortgagee)
- 3 (93) 22 Bom 640 (645)
- (39) AIR 1933 All 67 (653)
- (39) AIR 1933 Pat 21 (22)

- 16 Subject to the result of the suit the order is conclusive
- 17 Property in respect of which the order is conclusive
- 18 Effect of decision in claim cases as to possession
- 19 Burden of proof in a suit under this Rule
- 20 Defence of fraudulent transfer by the judgment debtor — It can be raised in the suit

- 21 Jurisdiction
- 22 Valuation of suit for court fees
- 23 Insolvency of judgment debtor
- 24 Effect of attachment on adverse possession
- 25 Costs
- 25a Decree holder's suit under this Rule whether step in aid of execution
- 26 Appeal
- 27 Revision

*Other Topics (miscellaneous)*

- Auction purchaser's right to question validity of encumbrance See Notes 8 and 16
- Effect of decree in claim suit on attachment and execution proceedings See Notes 2 7 16 and 17
- Hindu reversioner's suit See Note 8
- Inapplicability in the absence of claim order See Note 9
- Limitation for suit by minors See Note 15
- Limitation for suit for damages for wrongful seizure of moveables See Note 15

- Nature of trial See Notes 1 and 7
- Non parties to claim petition — Limitation See Note 8
- Remedy by suit permissive or alternative See Notes 4 12 and 13
- Right of suit not personal See Note 8
- Sale prior to suit—*Lis pendens* — Vendee bound by decree See Note 16
- Vendee from successful claimant — Unnecessary party See Note 8
- Withdrawal of claim—Effect See Note 5

**1 Legislative changes** — The words 'Where a claim or an objection is preferred the party against whom an order is made' have been substituted for the words 'the party against whom an order under Sections 280 281 or 282 is passed'. The result of the change is to widen the scope of the rule so as to include *any order* passed on an investigation of a claim.<sup>1</sup> See also Notes 4 and 5 *infra*

**2 Scope of the Rule** — The rule gives a statutory right of suit to the party against whom an order is passed in the claim proceedings.<sup>1</sup> Such a suit has to be filed within one year from the date of the order as prescribed by Article 11 of the Limitation Act.<sup>2</sup> If no suit is filed the order becomes *conclusive* as to the rights

**Order 21 Rule 63 — Note 1**

- 1 (16) AIR 1916 Mad 448 (444)

**Note 2**

- 1 (18) AIR 1918 Mad 76 (77)
- (83) AIR 1933 Mad 340 (340) (Appointment of receiver under S 92—Attachment in execution of decree—Dismissal of claim and suit under O 21 R 63—Sanction to sue receiver is not necessary—Statutory right of suit cannot be defeated by a rule of practice)
- (84) AIR 1931 Mad 485 (435) 57 Mad 822 (Claim under O 21 R 53 by party to suit and

Attachment in execution of decree against real owner—Objection by benamidar allowed—Suit by decree holder for declaration in maintainable) [See (23) AIR 1923 Rang 82 (83 84) (No cause of action for suit under this rule before attachment and claim order)]  
(39) AIR 1932 All 502 (503) 54 All 767 (Claim in suit on Revenue Court—Order affirmed or reversed in appeal under S 247 Agra Tenancy Act by Collector—The appellate order is not final and aggrieved party has right of suit under this rule)

—also known as 'suit to set aside the order' as appropriate—Decree holder however attaching property—Claims and objection under O 21 R 53

2 (19) AIR 1919 Cal 835 (936) 45 Cal 785 (Suit brought after one year was dismissed)  
(29) AIR 1929 Pat 116 (117) (Dismissal on preliminary ground as to maintainability fails under this rule.)

**O. 21 R. 53**  
**Note 2**

asserted in the objection proceedings<sup>3</sup> The policy of the Legislature is to secure a speedy settlement of questions of title raised in execution sales and the finding of the Court in the claim proceedings is a summary decision from which the suit allowed under this rule is *in the nature of an appeal* The object of the Legislature in prescribing a suit by way of appeal is to give the parties an opportunity of placing their respective cases *fully* before the Court because a summary investigation might not furnish sufficient material for a decision by an Appellate Court<sup>4</sup> In a suit filed under this rule the Court is not restricted to the question of possession, but questions of title also can be fully gone into<sup>5</sup>

The object of the suit is to establish the right which has been negatived by the claim order<sup>6</sup> and is in substance to set it aside<sup>7</sup> But there is no other restriction prescribed as regards the *nature* of such a suit though the defeated party is placed at a disadvantage as regards the period of limitation for filing the suit<sup>8</sup> Thus his right of suit under this rule is not in any way governed or qualified by the proviso to Section 42 of the Specific Relief Act and a suit cannot be dismissed on the ground that a *further relief* than a mere declaration has not been asked for<sup>9</sup> On the other hand a plaintiff in a suit under this rule is not precluded from asking for *other reliefs* than a mere declaration of the right denied to him by the claim order<sup>10</sup>

The order passed in the claim proceedings as the rule itself says is *subject to the result of the suit*<sup>11</sup> The right restored to the parties on the termination of the suit is the right which they asked the Court to give a decision upon *on the date of attachment* and the decision places the parties in *status quo ante* either by vacating or confirming the order<sup>12</sup> See also Notes 7 and 24 *infra*

If an objection to attachment does not fall under O 21 R 58 an order disposing of the objection will not be governed by this rule<sup>13</sup>

3 (23) AIR 1923 Rang 156 (156)

(20) AIR 1920 Mad 206 (208)

[See also (84) AIR 1934 Bom 189 (198) (Two persons making unsuccessful claims asserting prior mortgages against oral charge—Suit by

equity has to see whether there is an honest suit for declaration or whether the declaration is sought on principles which would be held by a Court to be inequitable)

(38) AIR 1938 Mad 741 (742)

10 See Note 9 *infra*

11 (92) 2 Upp Bur Rul 255

12 (18) AIR 1918 Mad 577 (573)

(94) 18 Bom 260 (263)

wrongly treated as one under O 21 R 53—Remedy is by motion of objection falls under S 47—Remedy is by appeal and regular suit not maintainable)  
(38) AIR 1938 Lah 760 (761) (Objection by

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(69) 11 Suth W R 487 (485)

7 (86) 8 All 6 (9) 12 Ind App 150 (PC)

(38) AIR 1933 Nag 376 (377) (The suit under O 21 R 53 is substantially one to set aside a summary decision or order of any Civil Court)

8 (31) AIR 1931 Lah 430 (431)

9 (30) AIR 1930 All 395 (396) (But a Court of

O. 21 R. 63  
Note 3

3. "The party against whom an order is made." — The rule does not speak of any party but only the party against whom the order is made<sup>1</sup> and the right of suit and the conclusiveness of the order in the absence of such suit are only with reference to such a party. A person who is not a party to the claim proceedings and against whom there is no order, is not affected by the order, although he may be interested in the property attached, nor is he bound to file a suit under this rule. Thus, a judgment debtor who is not, in fact, a party to the claim proceedings does not, in the eye of law, become such by reason solely of his being the judgment debtor<sup>2</sup>. He cannot be regarded as a necessary party to the claim enquiry and it depends on the facts and circumstances of each case whether he was in fact a party<sup>3</sup>. In objection proceedings the contest is really between the decree holder who asserts that the property is liable to attachment and the claimant who alleges that it is not in the actual or constructive possession of the judgment debtor and therefore not liable to attachment. The order made in such a case is either that the property is released from attachment as not being in the possession of the judgment debtor or the claim be disallowed. But such an order does not affect the right or title of the judgment-debtor to the property. The order is only conclusive between the claimant and the decree holder who is proceeding against the property<sup>4</sup>. Hence, a suit by the judgment-debtor against the successful claimant<sup>5</sup> or a suit by the defeated claimant against the judgment debtor,<sup>6</sup> in cases where the judgment debtor is not a party to the claim enquiry, is not affected by the provisions of this rule and is not governed by the period of limitation prescribed by Article 11 of the Limitation Act. But if the judgment debtor was in fact a party to the claim, he is bound by the order passed therein and he can also file a suit under this rule in case the order is against him<sup>7</sup>.

A Hindu reversioner whose right to the estate is contingent and accrues only after the death of the limited owner, is not bound to sue within one year by reason of his having preferred a claim unsuccessfully in execution of a decree against the widow. He is not debarred by reason of the claim order from filing a suit after the death of the widow<sup>8</sup>.

(37) AIR 1937 Peah 97 (99) (In this case it was held that attachment ceases after sale and that

tion—See Note 5 to O. 21 R. 58)

Note 3

1. (19) 1919 Mad 738 (742) 41 Mad 985 (FB)

2. (24) AIR 1924 All 802 (803) 46 All 45

passed ex parte against him—see also rule 3 of this rule)

8. (96) 20 Bom 601 (503)

O 21 R 63  
Note 2

asserted in the objection proceedings<sup>3</sup> The policy of the Legislature is to secure a speedy settlement of questions of title raised in execution sales and the finding of the Court in the claim proceedings is a summary decision from which the suit allowed under this rule is *in the nature of an appeal* The object of the Legislature in prescribing a suit by way of appeal is to give the parties an opportunity of placing their respective cases *fully* before the Court because a summary investigation might not furnish sufficient material for a decision by an Appellate Court<sup>4</sup> In a suit filed under this rule the Court is not restricted to the question of possession but questions of title also can be fully gone into<sup>5</sup>

The object of the suit is to establish the right which has been negatived by the claim order<sup>6</sup> and is in substance to set it aside<sup>7</sup> But there is no other restriction prescribed as regards the *nature* of such a suit though the defeated party is placed at a disadvantage as regards the period of limitation for filing the suit<sup>8</sup> Thus his right of suit under this rule is not in any way governed or qualified by the proviso to Section 42 of the Specific Relief Act and a suit cannot be dismissed on the ground that a *further relief* than a mere declaration has not been asked for<sup>9</sup> On the other hand a plaintiff in a suit under this rule is not precluded from asking for *other reliefs* than a mere declaration of the right denied to him by the claim order<sup>10</sup>

The order passed in the claim proceedings as the rule itself says is *subject to the result of the suit*<sup>11</sup> The right restored to the parties on the termination of the suit is the right which they asked the Court to give a decision upon *on the date of attachment* and the decision places the parties in *status quo ante* either by creating or confirming the order<sup>12</sup> See also Notes 7 and 21 *infra*

If an objection to attachment does not fall under O 21 R 58 an order disposing of the objection will not be governed by this rule<sup>13</sup>

- 3 (23) AIR 1923 Rang 156 (156)  
(20) AIR 1920 Mad 206 (208)  
(See also (34) AIR 1934 Bom 189 (193) (Two

equity has to see whether there is an honest suit for declaration or whether the declaration is sought on principles which would be held by a Court to be inequitable)  
(38) AIR 1938 Mad 741 (742)  
10 See Note 9 *infra*  
11 (92) 2 Upp Bur Rul 255  
12 (18) AIR 1918 Mad 572 (573)  
(94) 18 Bom 260 (263)

order does not become conclusive even against

passed becoming conclusive under this rule—  
Subsequent suit for partition by plaintiffs as heirs to their father's estate is not barred}}

- 4 (26) AIR 1916 Nag 197 (198)  
5 (20) AIR 1920 Mad 748 (753 756) 43 Mad 760 (FB)  
(69) 11 South W R 482 (485)

- 7 (86) 8 All 6 (9) 12 Ind App 170 (PC)  
(39) AIR 1938 Nag 376 (377) (The suit under O 21 R 63 is substantially one to set aside a summary decision or order of any Civil Court)  
8 (31) AIR 1931 Lah 430 (431)  
9 (30) AIR 1930 All 395 (396) (But a Court in

such party is barred by it

on by pro  
- Suit by

such order has been passed without notice to the decree holder, it has been held that the Court has inherent power to set aside the order<sup>2</sup>

O. 21 R. 58  
Notes 4a-5

**5. Order refusing to investigate.** — Section 283 of the old Code applied only to orders passed under Sections 280, 281 and 282 and consequently it was held that an order passed without investigation rejecting a claim on the ground of delay was not an order contemplated by the Section and hence, the one year's rule of limitation would not apply to such a case<sup>1</sup>. Under the present rule, it has been held that orders passed, whether with or without investigation, are placed on the same footing, with the result that, if the party against whom the order of rejection is made under the proviso to Rule 58 does not file a suit within one year, the order becomes conclusive against him<sup>3</sup> (See also Note 21 to O 21 R 58 and Notes 4 and 4a to this rule). Thus, an order passed on a claim, that the allegation of the claimant will be notified to the bidders as the petition was put in too late, has been held by a Full Bench of the High Court of Madras<sup>4</sup> to be a conclusive order against the claimant within the meaning of this rule. But in several decisions, even under the present Code, it has been held that an order passed without investigation is not within this rule<sup>4</sup>.

An order refusing to entertain a claim on the ground that the Court has no jurisdiction to entertain it, has been held not to amount to an order under this rule<sup>5</sup>. Similarly, an order saying "Whatever right the defendant has will pass by the sale. The petition does not require any investigation. The claim put forward by the petitioner will be noted in the sale proclamation"<sup>6</sup>, or an order "Sale stopped. The claim cannot be

2 (86) AIR 1936 Pat 176 (177) (*Ex parte* order made without notice to decree holder — Such order is made subject to the implication that it may be revoked at the instance of decree holder) belated)

**Note 5**

1. (74) 6 N W P H C R 185 (188)
- (79) 4 Bom 21 (23)
- (10) 5 Ind Cas 298 (300) (Cal)
- (86) 12 Cal 108 (109)
- (72) 8 Beng L R App 30 (41)
- (71) 7 Beng L R 233n (239n)
- (67) 7 Suth W R 441 (445)
- (70) 13 Suth W R 431 (431)
- (1864) 2 Suth W R 263 (263, 264)
- (70) 14 Suth W R 864 (864)
- (08) 81 Mad 5 (6)
- (95) 18 Mad 265 (266)
- (94) 1894 All W N 14 (14)
2. (28) AIR 1929 All 827 (828)

does not apply where a claim has not been disposed of on the merits or has been rejected as being too late)

(27) AIR 1937 Nag 149 (149) ILR (1930) Nag 450 (No investigation under R 58—O 21 R 53)

to investigate claim—Rule applies)

- (39) AIR 1935 Lah 677 (677, 678) (There is a right of suit when the objections are dismissed without enquiry on the ground that they were

execution having been already transferred to Collector — Rejection is on ground of want of jurisdiction)

[See also (37) AIR 1937 Pesh 90 (91)]

6. (23) AIR 1923 Mad 223 (223, 226)

(82) 11 Cal L Rep 352 (354)





limitation for such suits the question arises whether Article 11 of the Limitation Act will apply. That Article in terms applies only to an order on a claim preferred to or objection made to the attachment of property attached in execution of a decree. Therefore if the claim is preferred and decided before decree Article 11 would not apply and the period of limitation to set aside the order would be governed by the residuary Article 120.<sup>3</sup> But where after decree the decree holder applies for execution and a claim to the attachment is thereafter raised and decided in the course of execution it has been held by a Full Bench of the High Court of Madras that Article 11 would apply.<sup>4</sup> The reason is that an attachment before judgment becomes one in execution by virtue of the decree holder's application for execution and a claim preferred thereafter may be considered to be one preferred to property attached in execution of a decree.

Under O 33 R 9 the Court is bound to withdraw the attachment upon the dismissal of the suit. The reversal of the dismissal does not operate so as to revive the attachment. A fresh attachment is necessary and the objector is entitled to prefer a fresh claim in respect of such attachment and the period of one year should be counted from the date when such claim is rejected.<sup>5</sup> Under Rule 13 of Order 38 a Provincial Small Cause Court has no jurisdiction to attach immovable property before judgment or to determine any claim or objection in respect of such an attachment.<sup>6</sup>

7. "May institute a suit to establish the right which he claims"—An order in a claim proceeding is not conclusive a suit may be brought to contest it within the period prescribed by Article 11 of the Limitation Act.<sup>1</sup> This right of suit cannot be defeated or affected by reason of the fact that the property has been sold away in court auction.<sup>2</sup>

The suit contemplated by the rule is a suit to establish the right claimed in the enquiry<sup>3</sup> that is the liability or non liability of the property attached to satisfy the decree under execution<sup>4</sup> and not the liability of third persons to satisfy the decree by the sale of their right title and interest in the property.<sup>5</sup> The suit is in essence a continuation of the execution proceedings<sup>6</sup> though the scope of the enquiry is much wider. What is decided in the suit is the question of title and not merely

3 (84) AIR 1934 Pat 590 (581)  
(21) AIR 1931 Mad 168 (168 167) 44 Mad 902 (FB)

bound to  
by him in

4 (21) AIR 1921 Mad 163 (166 167) 44 Mad 902 (FB)

by defendant  
claimant—Frame of—Prayer for declaration of right as against decree holder is necessary—Suit merely for possession as against persons in possession is not one under this rule.]

5 (25) AIR 1925 Cal 1147 (1148)  
[See also (11) 9 Ind Cas 918 (920 921) (Cal)]  
6 (21) AIR 1924 Cal 193 (196)

4 (36) AIR 1936 Lah 524 (52) 17 Lah 669  
(Plaintiff is not bound to establish his title to the property in every case)  
5 (36) 23 Cal 302 (303)

Note 7

1 (89) 15 Cal 521 (50) 15 Ind App 193 (PC)  
(31) 25 All 57 (59)  
(35) AIR 1935 R 161 (162) (Order can be got rid of only by instituting a suit—Otherwise the order can not be impeached even by way of defence to a suit)  
2 (23) AIR 1923 Pat 152 (152)  
3 (29) AIR 1928 S 810 (810) (811)  
(89) 11 South W R 40 (41)  
(81) 7 W L R 20 (20) (111)  
(31) 1 Cal 1 Jour 202 (202 300)  
(36) AIR 1936 L sh 206 (07) (But a defendant

under O 21 R 63 is in no continuation of claim and ground—For basis of property from claimant after order has been passed in his favour but before institution of suit under O 21 R 63 is independent title and hence is not necessary party to suit)  
(35) AIR 1938 Pat 469 (471)

**O. 21 R. 53**  
**Notes 7-8**

the question of possession<sup>7</sup> Suits brought under this rule are substantive suits and must be tried like any other suit subject to the ordinary rules of procedure and evidence<sup>8</sup> They are not limited by any special standard of evidence or law The claimant may if necessary, thrash out his title in the fullest and most ultimate sense<sup>9</sup>

In a suit by the decree holder under this rule he must establish that on the date of the attachment the judgment debtor had a subsisting right to the property and the suit must be tried as if it were a suit by the judgment debtor himself for possession<sup>10</sup> Similarly in a suit by a defeated claimant he must establish that the judgment debtor had no right to the property It is not necessary for the plaintiff in such a suit to establish his own title to the property where it is shown that the judgment debtor had no title to it and that at the time of the attachment the property was in the possession of the claimant<sup>11</sup> In a suit by a defeated claimant the discharge of the attachment order cannot properly be asked for The claimant's remedy is to establish his title by a declaratory decree and then to carry the decree to the Court by which the order of attachment was issued and such Court is bound to recognize the adjudication and govern itself accordingly<sup>12</sup>

Where the same property is attached by two different persons holding different decrees against the same judgment debtor and an objection preferred under Rule 53 is dismissed the two separate attachments give rise to two separate causes of action<sup>13</sup>

See also the undermentioned decisions<sup>14</sup> and also Notes 2 and 24

**8 Parties to the suit.** — When a suit is brought under this rule by an attaching decree holder to establish his right to attach and bring to sale certain property and in order to succeed it is necessary to avoid a transfer of the property on

(87) AIR 1937 Pesh 18 (16)

(75) 24 Suth W R 70 (71) (Suit ought to be stayed by executing Court))

9 (24) AIR 1924 Cal 744 (748) 51 Cal 548  
(33) AIR 1933 Mad 393 (329)

10 (10) 8 Ind Gas 639 (642) 95 Bom 79

11 (36) AIR 1936 Lah 524 (527) 17 Lah 668  
(15 Cal 674 and 8 Cal L Jour 381 Followed)

[See also (39) AIR 1939 Sind 177 (177) I L R (1939) Kar 539 (Suit by decree holder under Rule 63 — Rules of evidence which require a plaintiff to prove his claim are not abrogated because he is suing a successful claimant)]

12 (81) 4 Mad 191 (183)

13 (87) AIR 1937 Lah 320 (221) (Suit by

vi title))  
(But see (19) AIR 1919 Lah 900 (201) 1919 P D 2 "A" "

(35) AIR 1935 Mad 596 (597)

(26) AIR 1936 Mad 971 (973)

[See (38) AIR 1938 Rang 447 (447) (Property of company attached — Objection by transferee of property — Transfer by Board of Directors and not by general body of shareholders — Transferee's title not sufficient to entitle him to object under Rule 53 or to bring a suit under this rule)]

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under O 21 R 53 alleging mortgage to be a sine is maintainable)

(39) AIR 1939 Pat 430 (432) (In suit under this rule the justifiability or otherwise of the decree under execution is not a relevant question)

(37) AIR 1937 Rang 531 (533) (Question under S 52 O P C must be decided by executing Court and not by separate suit — Hence such question cannot be raised in suit by attaching creditor under O 21 R 63)

but Rule  
101 (EVIDENCE TAKEN IN CLAIM NOT PER SE EVIDENCE IN THE SUIT — Admissible for limited purpose)

[See also (29) AIR 1922 Lah 58 (59) (Defeated claimant filing suit cannot after dismissal of suit ask for stay of sale from the Appellate Court)]

the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor the suit must be brought in the form of a representative suit on behalf of or for the benefit of all the creditors of the transferor as provided in Section 53 of the Transfer of Property Act as amended in 1929 and the provisions of O 1 R 8 ante, would be applicable to such a suit<sup>1</sup> But where the decree holder's suit under this rule seeking to void a transfer in favour of the claimant is not based on such transfer having been made with intent to defeat or delay the creditors of the transferor the suit need not be a representative suit<sup>2</sup> The transferee and the judgment debtors as transferors will be necessary defendants in a suit under this rule by a decree holder attacking an alienation of property by the judgment debtor in favour of the successful claimant<sup>3</sup> It is not necessary to implead any transferee from the successful claimant after the order in the claim proceedings and before the institution of the suit as such transferee must be held to be an alienee *pendente lite*<sup>4</sup>

The right of suit of the decree holder ensures also to the benefit of the auction purchaser. He can thus file a suit to declare that the mortgage subject to which the attachment and sale took place is not true and valid<sup>5</sup>

Where a defeated claimant files a suit under this rule the judgment debtor is a necessary party especially if the objector seeks to establish his title both against the judgment debtor and the decree holder<sup>6</sup> If the properties are sold away in court auction it is not necessary to implead the decree holder. It is enough if the auction purchaser alone is impleaded<sup>7</sup> The right of suit under this rule is not personal to the

O. 21 R. 63  
Note 5

Note 8

3 (01) 1901 All W N 14 (14) (Obiter)

39)  
the successful claimant the judgment debtors his vendors through whom he holds are no necessary parties))

4 (15) AIR 1915 Mad 490 (498) 88 Mad 535  
(39) AIR 1939 Pat 183 (189) 17 Pat 588

(37) AIR 1937 Rang 219 (250) (Judgment debtors legal representatives are necessary parties)  
(But see (34) AIR 1931 Mad 587 (589) (Judgment debtor is not a necessary party))

7 (23) AIR 1923 Mad 59 (59)  
(35) AIR 1935 Pat 109 (30) (Auction purchaser

2 (33) AIR 1933 Bom 289 (290 291) I L R

Execution purchaser need not to join as party))

(But see (29) 1 Oudh Cas 63 (34)

(67) 8 South W R 40 (40)

(30) AIR 1936 Fesh 159 (190) ]

**O. 21 R. 63**  
**Notes 8-10**

claimant a transferee from the defeated claimant can also sue under this rule<sup>9</sup>

See also the undermentioned cases<sup>9</sup>

**■ Consequential relief, if and when should be asked** — As has been seen in Note 2 above this rule does not contain any limitation as regards the nature of the suit to be filed and does not exclude any particular prayer out of its scope<sup>1</sup>. The suit is of a comprehensive nature and the words to establish the right are wide enough to cover not only a mere declaratory suit but also one for consequential reliefs such as the recovery of the value of the property if it had been already sold<sup>2</sup> or for possession<sup>3</sup>. But the plaintiff is not bound to ask for a consequential relief. He may ask for a mere declaration and the suit cannot be dismissed as offending the proviso to Section 42 of the Specific Relief Act 1877<sup>4</sup>. If the defeated claimant asks for a mere declaration and succeeds a subsequent suit for possession is not barred under O. 2 R. 2<sup>5</sup>.

The Court can grant a temporary injunction to prevent the sale of the attached property in execution pending a suit by the defeated claimant under this rule<sup>6</sup>.

**10 Damages for wrongful attachment, if can be asked for under this Rule** — A defeated claimant can in a suit under this rule claim damages for wrongful attachment<sup>7</sup> or the value of the property if it had been already sold<sup>8</sup>. In order to sustain a claim for damages it is not necessary for the claimant to allege and prove malice or want of reasonable and probable cause on the part of the decree holder in resisting the claim<sup>9</sup>.

8 (04) 96 AH 89 (91)

9 (85) AIR 1935 Rang 483 (490) (Claim to attach property purchased in name of judgment debtor's wife as really bought by judgment debtor—Transferor not necessary party to suit by decree holder under O. 21 R. 63)

(86) AIR 1936 Rang 86 (57) (Suit by decree holder — Judgment debtor is proper though not necessary party)

**Note 9**

1 (18) AIR 1918 Nag 233 (233)

(19) AIR 1919 Mad 257 (258) 42 Mad 148

3 (74) 11 Bom H C R 174 (181)

(92) 16 Bom 608 (117)

4 (06) 29 Mad 151 (152) (FB) (Overruling 16 Mad 140)

(84) AIR 1934 Rang 332 (333) 12 Rang 670

(91) 14 Mad 23 (25)

(10) 8 Ind Cas 603 (609) (Low Bur)

(93) 1900 1893 1900 Low Bur Rul 481

(06) 4 Low Bur Rul 963 (264)

(04) 4 Low Bur Rul 83 (58)

(29) AIR 1929 Rang 104 (104) (Held a defeated claimant is not entitled to file a suit under S. 42 Specific Relief Act)

(26) AIR 1926 Rang 194 (125) 4 Rang 97 (Do)

(37) AIR 1937 Rang 249 (250)

(37) AIR 1937 Rang 133 (134)

(38) AIR 1938 Mad 741 (742)

[But see (93) 1 Oudh Civ S. 2 (279) (But when the property is released or sold and comes into the possession of private individuals a suit for a mere declaration without consequential relief is one brought in contravention of S. 42 Specific Relief Act and is not

here is a substantial question on in controversy between the

**Note 10**

1 (86) 19 Cal 696 (705)

2 (81) 7 Cal 603 (612)

(17) AIR 1917 Mad 393 (391 395) 40 Mad 733 (FB)

3 (JO) 17 Cal 436 (442) 17 Ind App 17 (PC)

(36) AIR 1936 Lah 504 (523) (Claimant need not prove his ownership of property in dispute—Possession is good as against wrongdoer)

In a suit for damages for wrongful attachment of property, the plaintiff is not entitled to recover the costs incurred by him as objector in the execution proceedings <sup>4</sup>

**11. Suit not necessary if property is released from attachment.** — When the attachment is withdrawn by the decree holder himself subsequent to the claim order, the object of a suit is gained and the defeated claimant is not obliged to bring a suit <sup>1</sup> As pointed out by Sir Charles Sargent, C J, in *Gopal Purushottam v Bai Divali* <sup>2</sup>

"When the plaintiff withdrew his attachment, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was as contemplated by S. 278, Civil Procedure Code, to obtain the removal of the attachment and when that attachment was removed by the judgment creditor's own act there was no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and therefore no necessity for bringing a suit to set aside the order."

Where the attachment comes to an end, <sup>3</sup> as where the decree is *satisfied* or *set aside* or *reversed* or the decretal amount is paid into Court under Rule 55, or where the attachment is voluntarily withdrawn by the decree-holder himself, <sup>4</sup> or the attachment is raised owing to the default of the decree-holder under Rule 57 of this Order, <sup>5</sup> the parties are put back in the same position as they were in before execution proceedings were lodged, and the defeated claimant is not compelled to institute a suit within a year from the date of the claim order. When the attachment is raised the cause of action for the claim petition or for any suit founded upon an order in that claim also falls to the ground <sup>6</sup>

But the withdrawal or raising of the attachment or the satisfaction of the decree should, according to the High Courts of Calcutta <sup>7</sup> and Madras <sup>8</sup> and the Judicial Commissioner's Court of Nagpur <sup>9</sup> have taken place within the period of one year prescribed by Art. 11, Limitation Act. The High Court of Lahore <sup>10</sup> has, on the other

4. ('39) AIR 1939 Lah 834 (835, 836) (Nor is the plaintiff entitled to damages for personal worry)

**Note 11**

(83) 9 Cal 10 (13)  
(82) 8 Cal 279 (282)  
(21) AIR 1921 Bom 85 (86) 45 Bom 561  
(89) 18 Bom 72 (74)  
(10) 8 Ind Cas 157 (158) 34 Mad 583  
(36) 40 Cal W N 146 (148) (Attachment withdrawn owing to subsequent satisfaction of decree)  
{See ('20) AIR 1920 Mad 167 (190)}  
{But see ('78) 1 All 541 (543)}

5. (81) AIR 1931 All 603 (608) 53 All 918  
(84) AIR 1934 All 267 (270 271) 56 All 537.  
(This principle applies also between representatives of decree holder and claimant)

(11) 12 Ind Cas 65 (67) (Cal)  
(70) 14 South W R 367 (368)  
(26) 91 Ind Cas 120 (120) (Cal)  
(22) AIR 1922 Lah 103 (111) 3 Lah 7  
{See ('25) AIR 1925 Mad 1113 (1114)}  
{See also [36] AIR 1936 Pesh 41 (43) (Once the attachment ceases to exist within one year provided by law for filing suit under R. 63 no duty is cast on the objector to proceed further)}

6. ('27) AIR 1927 Mad 891 (893)  
(34) AIR 1934 All 267 (270) 56 All 537  
7. ('24) AIR 1924 Cal 744 (751) 51 Cal 548  
8. (06) 29 Mad 225 (229 230)  
(37) AIR 1937 Mad 44 (46)  
9. (20) AIR 1926 Nag 423 (425) 22 Nag L R 91.  
10. (31) AIR 1931 Lah 74 (76)

2.  
3. (36) 40 Cal W N 146 (149) (Execution sale set aside — Attachment comes to an end)  
(36) AIR 1936 Lah 169 (170) (Attachment set

promised between the claimant and the decree holder)



fact that a suit has been filed against him within one year or that he has filed his defence within one year of the claim order does not affect the conclusiveness of the order.<sup>4</sup> It has been held in the undermentioned case<sup>5</sup> that a defeated claimant cannot also obstruct the auction purchaser in delivery proceedings under Rule 99 of this Order.

The dismissal of a claim is however no bar to the claimant applying to set aside the court auction sale after making the necessary deposit under Rule 89 of this Order as a person interested in the property sold.<sup>6</sup>

**14 Objector can plead invalidity of attachment** — A defeated claimant or an objector suing under this rule is entitled to plead that there was no attachment or that the attachment effected was not legal. For instance he can show that the executing Court had no jurisdiction to attach and therefore his rights are not affected in any way by the claim order.<sup>1</sup> In *Muthia Chetty v Palantappa Chetty*<sup>2</sup> their Lordships of the Judicial Committee held that for purposes of Article 11 of the Limitation Act the property to which a claim is made must be property which has been *de facto* attached. Unless there has been attachment there can be no order made on an objection lodged to it nor can any claim be made to the property so attached and without such an order there is no *terminus a quo* for the running of limitation and with this the limitation itself is non-existent.

But an objector cannot question the legality or validity of the decree against the judgment debtor on the ground that it is colourable or collusive.<sup>3</sup>

**15 Limitation for suits under this Rule** — Article 11 Schedule I of the Limitation Act IX of 1908 prescribes the period of one year from the date of the order as the time within which a suit has to be brought under this rule. The policy of the Act is to secure speedy settlement of questions of title raised in execution sales and for that reason a year is fixed as the time within which the suit is to be brought.<sup>1</sup> The Article applies to orders passed whether with or without investigation.<sup>2</sup> Where a claim is allowed *inter alia* on the ground that there was no proper attachment over

under O 21 R. 62 and if it is not set aside by a suit under Rule 63 the summary order becomes conclusive and the purchaser or the mortgagee cannot assert any right which that order denies.<sup>3</sup> [See (O) = Cal L Jour 599 (601) (Purchase

claim of title)]

**Note 15**

- I (88) 15 Cal 521 (526) 15 Ind App 193 (PC)  
(67) 7 Suth W R 456 (456) (Limitation runs from the date of the order)  
(73) 10 Bom M C R 19 (20) (Do)  
(74) 2<sup>o</sup> Suth W R 68 (68) (Do)  
(66) 3 Mad H C R 220 (221) (Do)  
(88) 1 C P L R 3 (4) (Do)  
(75) = N W P M C R 119 (115) (Do)  
(31) AIR 1931 Rang 183 (185) (Do)  
(91) 1 Mad L Jour 478 (479) (Order not dated—  
Extrinsic evidence can be adduced as to date)  
(81) 8 Cal L Rep 54 (55)  
(69) 12 Suth W R 83 (84) (Held Article does not apply)  
(74) 21 Suth W R 133 (134)  
(66) 3 Mad H C R 139 (140) (Case under the old Code)  
(1864) 1864 Suth W R Gap 371 (372) (Held S 14 does not apply)  
(08) 81 Mad 431 (435) (Limitation for wrongful

- 4 (18) AIR 1918 Mad 693 (693)  
(25) AIR 1925 Mad 868 (369)  
5 (12) 15 Ind Cas 683 (684) (Cal)  
(85) = Bom 35 (83)  
(70) 18 Suth W R 431 (431)  
(6) (23) AIR 1923 Mad 487 (488) (59)  
(6) AIR 1926 Nag 10 (18) 21 Nag L II 10<sup>2</sup>

**Note 14**

- 1 (27) AIR 19 7 Mad 450 (455)  
(89) 10 All 4 9 (481)  
[But see (1864) 4 Suth W R 99 (99)]  
2 (08) AIR 19 1 C 139 (141) 51 Mad 349  
55 Ind App 56 (IC) (Revering AIR 1929 Mad 417)  
3 (85) 1885 Bom I J 1 (710)  
(80) 10 Bom 359 (C1)  
[See also (7) 21 Suth W R 394 (395) (Nor has he right to set up any regularities in the execution as an answer to the execution creditor's

2

- (37) AIR 1937 Lah 516 (51)  
(00) AIR 19 7 Lah 60 (691)



IO 21 R 63  
Notes 15-16

the properties Article 11 does not apply to a suit by the decree holder to establish the title of his judgment debtor.<sup>3</sup> See also discussion in Note 14 *ante*. In the case of a minor however the period of limitation is subject to be modified by virtue of Section 6 of the Limitation Act and he can file a suit within one year after he attains majority.<sup>4</sup> As to whether this Article applies to orders on claims preferred in respect of attachments before judgment see Note 6 *ante*.

**16 Subject to the result of the suit the order is conclusive** — As has been seen in Note 13 *ante* an order passed in a claim proceeding is conclusive against the defeated party unless he brings a suit within one year from the date of the order. It is conclusive not only between the parties to the order<sup>1</sup> but binds also their representatives in interest.<sup>2</sup> Thus the auction purchaser is bound by an order against the decree holder made under Rule 63.<sup>3</sup> Conversely the auction purchaser is also entitled to plead in bar to a suit by the defeated claimant that the order rejecting his claim has become conclusive against him.<sup>4</sup>

But the conclusiveness of the order is *subject to the result of the suit*. In other words the order is only a *provisional* one and is liable to be set aside by the decision given in the suit filed under this rule.<sup>5</sup> The effect of such a suit is to keep the execution proceedings pending till the decision of the suit.<sup>6</sup> If the suit by the decree holder succeeds<sup>7</sup> or if the suit by the claimant fails<sup>8</sup> the proceedings continue. If the suit by the decree holder fails or the suit by the claimant succeeds<sup>9</sup> the proceeding fails simultaneously. If after a claim order the successful claimant transfers the property in dispute to a third person such transferee also takes it subject to the result of the suit by the decree holder.<sup>10</sup> If the decree holder succeeds in the suit the attachment is revived and the transferee cannot assert his right against him.<sup>11</sup> In other words the transfer is affected by the doctrine of *lis pendens*.<sup>12</sup> The same principle will apply where after the claim is rejected the properties are sold in court auction — the auction

3 (33) AIR 1933 Lah 419 (450) (Article 120) (The words in the rule the result of such suit will apply)

7 (P C)

#### Note III

- 1 (89) 17 Cal 260 (262)  
(18) 20 Ind Cas 815 (816) (Cal)  
(17) AIR 1917 Cal 669 (6 0) 44 Cal 698

- 3 (10) AIR 1919 Lah 125 (126)  
(10) 8 Ind Cas 117 (118) 35 Mad 35

order)

- (75) 98 South W R 183 (184)  
(76) 1 All 355 (357)  
8 (30) AIR 1930 Oudh 265 (266) 5 L ck 690  
9 (84) 7 Mad 167 (170)  
(30) AIR 1930 Oudh 463 (471)  
10 (96) 23 Cal 829 (834)  
(21) AIR 1921 Cal 101 (103 104)  
11 (18) AIR 1918 Oudh 275 (277)  
(29) AIR 1929 Cal 524 (525) 57 Cal 122  
(76) 1 All 355 (357 359)  
(22) AIR 1922 Mad 176 (178) 45 Mad 84  
(74) 21 South W R 435 (435)  
(21) AIR 1921 Cal 101 (103 104)  
(39) AIR 1939 Oudh 178 (179) 14 Luck 548  
(Transfer is void under Sect on 64)  
[See however (30) AIR 1930 Rang 217 (248)  
8 Rang 491 (In the case of moveables fresh  
seizure is necessary)]  
12 (15) AIR 1915 Mad 495 (497 493) 33 Ma 1  
535 (545 547)  
(09) 1 Ind Cas 951 (951) 31 All 367 (Al enst on  
by judgment debtor after a decree in a claim suit  
by the decree holder)  
(39) AIR 1939 Oudh 178 (179) 14 Luck 548  
(Order releasing property from attachment in

purchaser's right in such a case is subject to be defeated by the claimant succeeding in the suit<sup>11</sup>

O 21 R 53  
Notes 16-17

It has been seen in Note 23 to Rule 58 that where one of several decree holders obtains an order in his favour disallowing a claim it cannot be availed of by the other decree holders who are not parties to the claim. But where the same property is attached by different decree holders in execution and on objection by a third party the attachments under all the decrees are raised it has been held that the success obtained by a single decree holder in a suit under this rule enures also to the benefit of the other decree holders who have not filed suits<sup>14</sup>

A suit contemplated by this rule is a suit under the Civil Procedure Code which commences by the filing of a plaint. An application under Section 4 of the Provincial Insolvency Act is not a suit for purposes of this rule<sup>15</sup>

A decree is passed against a firm. In execution of the decree a certain property is attached. The attachment is raised on the objection of a person not coming within sub rule (1) of O 21 R 50 that it is his property. Proceedings are then taken under sub rule (2) of O 21 R 50 and leave is granted for the execution of the decree against such person as being a partner in the firm. The decree holder is entitled to attach the same property although he has not instituted a suit under this rule in respect of the previous order allowing the objection to the attachment under O 21 R 58. The reason<sup>16</sup> that the previous order was only a bar to the attachment of the property in execution of the decree as it stood and cannot stand in the way of the decree holder attaching the property after he has obtained an order under O 21 R 50 sub rule (2) permitting him to proceed against the person as being a partner in the firm<sup>16</sup>

See also Note 23 to Order 21 Rule 58

**17 Property in respect of which the order is conclusive** — The claim order is conclusive between the parties to the proceedings only as regards the *particular property* in dispute<sup>1</sup>. Thus where a claim was allowed and the decree holder filed a suit under this rule and after the dismissal thereof applied for the arrest of the judgment debtor or for the attachment of *other properties* of the judgment debtor more than three years after his original application for attachment it was held that the application for arrest was barred by limitation as it could not be considered to be a continuance or revival of the previous proceedings for attachment<sup>2</sup>. Where however the decree holder succeeds in the suit and applies thereafter for proceeding with the execution originally started by him *against the property* the application must be deemed to be a continuation of the previous proceedings and is not barred<sup>3</sup>.

claim proceeding under O 21 R 58— Transfer made after it and before disposal of suit under O 21 R 63 to set aside that order is affected by its contents

#### Note 17

1 (17) AIR 1917 Cal 669 (670) 44 Cal 605

(90) 14 Bo n 206 (209) 213

(86) 12 Cal 453 (457)

(39) AIR 1939 All 657 (659)

[See also (09) 1 Ind Cas 742 (743) 1909 Pan Re No 42

2 (83) 7 Bom 293 (296)

(90) 17 Cal 968 (971) (Other Property)

(78) 3 C 171F (770) (Do)

3 (91) 23 Cal 43 (440)

(34) AIR 1934 Pat 3 (533) (Subsequent application in respect of the same property is continuation of previous application and will not be barred under S 48)

(04) 23 Mad 50 (53) (F B) (10) Mad 22 Overruled

16 (35) AIR 1935 Pat 409 (411) 14 Pat 657.

O 21 R 63  
Notes 18-19

**18 Effect of decision in claim cases as to possession** — The claim order is conclusive as to the successful party's *right to possession*<sup>1</sup> But the effect of the decision as to possession in other proceedings in which the question may again arise is not the matter to which the words shall be conclusive are directly addressed Thus if attachment is removed subsequent to the claim order and later another attachment is made the question of possession is a question of possession at a different date<sup>2</sup>

It has been held that where a claimant prefers a claim on the basis of his being in adverse possession of the property against the judgment debtor and the claim is dismissed on the ground of his not being in possession at all he will not be precluded in a suit for possession by the auction purchaser from pleading that he has been in possession from a time anterior to the order against him although he has not brought a suit under this rule<sup>3</sup> The reason given is that in such a case the suit under this rule would have been futile as it would have been dismissed on the ground that the title to the property was in the judgment debtor

See also Note 24 *infra*

**19 Burden of proof in a suit under this Rule** — In a suit brought under this rule the burden of establishing the right claimed is upon the plaintiff<sup>1</sup> In *Jamahir v. Asharan*<sup>2</sup> it was observed by Sir Lawrence Jenkins C J that where the suit is by the defeated claimant he must show affirmatively that not only the ostensible but the real title also is in him The burden is not discharged by merely pointing to the innocent appearance of the instrument under which he claims He must show that they are as good as they look This principle has been accepted by the various High Courts and applied in a number of decisions<sup>3</sup> But in *V E A R V Firm v Maung*

- Note 18**
- 1 (34) AIR 1934 Nag 253 (254)  
(33) AIR 1933 Rang 211 (217)  
(33) AIR 1933 Rang 199 (180)  
(09) 20 All 321 (323)  
(96) 18 All 369 (370)  
(03) 5 All L Jour 938 (800)  
(87) 1897 All W N 71 (71)  
(90) 1899 All W N 20 (221)  
(75) T N W P H C R 85 (87)  
(93) 17 Bom 94 (99)
- from auction purchaser ]]
- 2 (24) AIR 1924 Cal 744 (748) 51 Cal 548
- 3 (30) AIR 1939 Mad 456 (461) ILR (1939) Mad 803 (S B) (D s entering from 8 Mad 506—  
In such cases the finding as to possession in the claim proceeding can only be taken as *prima facie* proof of want of possession)

- Note 19**
- 1 (39) AIR 1930 Pat 371 (372) (Suit by defeated claimant)
- (80) AIR 1939 Pat 81 (82) (Suit by decree holder—Onus to prove that sale in claimant's favour is colourable and without consideration is on decree holder)
- (39) AIR 1939 Lah 438 (439) (Suit by decree holder—Onus is on him to prove that transferee

should  
not only prove that there is an ostensible deed

- prove genuineness of gift even though defendant has not specifically pleaded that gift is collusive )
- (33) AIR 1933 Lah 855 (855)
- (18) AIR 1918 Mad 274 (275) 41 Mal 400  
(29) AIR 1929 Nag 121 (123)  
(26) AIR 1925 Nag 293 (295)  
(20) AIR 1920 Nag 83 (84)

*Ba Kym*, A I R 1927 Privy Council 237—I L R 5 Rangoon 852, their Lordships of the Judicial Committee made the following observation :

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Note 19

" They (the defeated claimants plaintiffs) being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach the property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case by showing utter inadequacy of consideration "

Their Lordships then proceeded to examine the various items of consideration and upheld the transaction in favour of the plaintiffs Does this observation change the law as regards the onus of proof? As pointed out by their Lordships of the High Courts of Madras,<sup>4</sup> Patna<sup>5</sup> and Rangoon<sup>6</sup> and the Judicial Commissioner's Court of Nagpur,<sup>7</sup> the Judicial Committee did not consider the question of the burden of proof as such in the above case and the observation should be understood as applying only to

- (12) 14 Ind Cas 618 (818) (Low Bur) (The plaintiff is entitled to prove his case out of the defendant's own mouth )  
(08) 2 Low Bur Rul 152 (157)

decision does not proceed on its acceptance of the above view as to onus of proof )

- ( 87) AIR 1937 Lah 847 (848)  
[See ( 38) AIR 1938 Lah 760 (762) (Held that the above rule as to onus of proof does not apply to cases where the objection to attachment has

sufficient to rebut or at least to considerably weaken the presumption that ostensible owner is the real purchaser ]

- ( '87) AIR 1937 Pat 76 (78) (Claim rejected on ground of claimant being benamidar of judgment-debtor—Suit by claimant under R 63 — Onus to prove that he is not benamidar but *bona fide* purchaser is upon claimant )

- ( '33) 40 Pnn L R 705 (707)

- ( 39) AIR 1939 Cal 578 (579) (Onus is on claimant to show that he has right which was denied to him by adverse order against him in claim proceedings under O 21 III 58—He must prove that

appear to be correct—See Note 1 to O 21 R 63 above )]

4. { . . . }

order made adversely to the plaintiff in execution, which order must be presumed to be correct until set aside )

- ( 36) AIR 1936 Mad 971 (973)

- ( '37) AIR 1937 Nag 1 (2) ILR (1937) Nag 291.

owner )

**O. 21 R. 63** observed that in cases under this rule the burden of proving the validity of the  
**Notes 19-20** alienation is on the plaintiff

'The defendant however cannot escape the burden at some stage or other. If the plaintiff produces his deed and swears that it is genuine and for full consideration, and the defendants have nothing to say to the contrary, the plaintiff will succeed, and where the burden of the plaintiff is so light, it is scarcely worth arguing whether it is more correct to say that the burden is originally upon the defendants or upon the plaintiff. But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall upon the plaintiff to establish the right which he claims.'

See also the undermentioned decisions \*

In *Mohammad Ismail v Hanuman Parshad*,<sup>10</sup> their Lordships of the Privy Council observed as follows

'Apparently it has been the settled practice of the Indian Courts, when objections to an attachment in execution have been disallowed, and a suit has been filed by the objector under O 21 R 63 of the Code, to put the onus of proving the *bona fides* of any transaction upon which the objector relies, upon him in his capacity of plaintiff. This is a matter which may possibly require further consideration when the question of onus is really material.'

In the case of a dismissal of a claim *without investigation* on the ground of delay, it has however, been held that the burden is upon the *defendant* to show that the registered deed of transfer in favour of the plaintiff (defeated claimant) is fraudulent.<sup>11</sup>

Where a decree holder who has attached property in the possession of his judgment debtor is unsuccessful in the claim proceedings and therefore brings a declaratory suit under this rule, he can rely, in such suit, on the presumption drawn from possession that the property attached belongs to the judgment debtor and the burden of proving the contrary is on the defendant.<sup>12</sup>

Where the facts are fully established and the inference from them is clear, the question of onus is not material.<sup>13</sup>

**20. Defence of fraudulent transfer by the judgment-debtor, if can be raised in the suit.**—In a suit by a defeated claimant under this rule, the decree-holder defendant can set up in defence that the transfer in favour of the claimant is voidable under Section 53 of the Transfer of Property Act. There is no bar to the setting up of such a plea in defence.<sup>1</sup>

[See also (33) AIR 1933 All 193 (200) 35 All 266  
 ('33) AIR 1933 Rang 91 (92) (Sale executed for consideration one month before suit — Onus is on plaintiff to show that sale is fraudulent or collusive)]

('33) AIR 1933 Rang 129 (131)]

9. (37) AIR 1937 Nag 8 (10) (Objection by purchaser to attachment of property purchased dismissed—Regular suit—Initial onus on plaintiff —But if he proves purchase by duly registered sale deed rectifying passing of consideration onus is shifted on to defendant to prove that sale was fraudulent.)

(37) AIR 1937 Nag 143 (146) ILR (1939) Nag 266 (Suit by defeated claimant — Claimant produce reg. registered sale deed and proving execution and valuable consideration and possess ion also —Burden is shifted to creditor to prove that sale is bogus.)

10. (38) AIR 1938 P C 590 (291) I L R (1939) Kar 31 (P C)

11. (31) AIR 1931 Mad 40 (41)

(28) AIR 1929 Pat 431 (436) 7 Pat 777

Kar 31 (P C)

Note 20

1. ('21) AIR 1921 All 293 (301)

('20) AIR 1920 Mad 749 (753) 43 Mad 760

(17) AIR 1917 Mad 519 (522)

(18) AIR 1918 Mad 491 (422) 41 Mad 612 (FB)

(12) 14 Ind Cas 715 (716) (Cal)

('14) AIR 1914 Cal 390 (392)

100 AIR 1920 Pat 10 (11)

R 3

(Suit

under Rule 63 by transferee of decree — Transfer may be impugned as being sham transaction or as a transfer made with a view to defraud creditors of transferor.)

(37) AIR 1936 Nag 166 (165) ILR (1936) Nag

69 (Objection to attachment by transferee—

**21 Jurisdiction** — In a suit brought under this rule where the sole question between the parties is whether the property attached is or is not liable to be attached and sold the value of the suit for purposes of jurisdiction is the *amount of the decree*, where the value of the property *exceeds* that amount. If however the value of the property is *less* than the decree amount then the value for purposes of jurisdiction is the *value of the property*.<sup>1</sup> It has been held that where the property has been sold in execution of the decree before the suit the value of the property will determine the value of the suit.<sup>2</sup>

If the judgment debtor is added as a party and a declaration of title as against him also is prayed for then the suit should be valued as on the value of the property attached.<sup>3</sup>

The rule says nothing of the nature of the suit or the Court in which the suit is to be brought, this question therefore depends on the nature of the claim and the right sought to be enforced. Article 20 Schedule II of the Provincial Small Cause Courts Act excludes a suit under this rule from the cognizance of the Court of Small Causes. Under Article 23 of that Act suits under Article 11 of the Limitation Act are also excepted from the cognizance of the Courts of Small Causes. Hence a suit under this rule cannot be filed in a Provincial Small Cause Court.<sup>4</sup> An order passed in a claim

Decree holder can rely on Section 53 T P Act without instituting suit to set aside transfer.)

#### Note 21

- 1 (37) 80 Mad 885 (388) (F B)
- (38) AIR 1933 All 249 (250) 55 All 315
- (34) AIR 1934 Ra g 802 (803) 12 Rang 666 (But the suit involves avoidance of a transfer of property—Value of property is value of jurisdiction—Otherwise the lesser value)
- (34) AIR 1934 Rang 332 (333) 12 Rang 670 (If a suit involves avoidance of transfer of property under S 53 of the T P Act then value of property is value of jurisdiction)
- (35) 27 All 440 (442 443)
- (36) 2 Ind Cas 621 (621) 5 Low Bur Rul 23
- (15) AIR 1915 All 436 (437) 33 All 72
- (18) AIR 1918 All 824 (825) 40 All 505
- (87) 9 All 140 (141)
- (78) 2 All 792 (800)
- (74) 11 Bom HC R 186 (189)
- (88) 15 Cal 104 (106)

value of land but value under S 7, cl 5 Court fees Act.)

[See also (37) AIR 1937 Rang 101 (102) (Suit with reference to property attached under O 21 R 46—Value of property attached is value of suit)]

2 (39) 43 Cal W N 609 (611) (The value of the suit to the plaintiff is the value of the property which he has lost by reason of the execution proceedings)

[But see (35) AIR 1935 Oudh 271 (272) 11 Luck 1 (Value of property more than decretal amount—Value of decree is value of suit)]

3 (90) 17 All 69 (74)

- (32) AIR 1932 Rang 20 (21)
- (16) AIR 1916 Mad 858 (859) 39 Mad 602
- (18) 18 Ind Cas 820 (822) 1313 Pun Re No 82
- (12) 17 Ind Cas 196 (197) 1913 Pun Re No 41

4 (81) 7 Cal 603 (611) (Whether a party is to sue in the Civil Court or in the Small Cause Court depends entirely upon the nature of the claim and the right which is sought to be enforced)

(71) 3 N W P H C R 156a (160) (No jurisdiction to entertain a suit to establish the title of the judgment debtor)

(2) 19 Suth W R 337 (339) (Or the title of the claimant)

(13) 13 Suth W R 99 (100) (Do)

(68) 10 Suth W R 141 (142) (Do)

(90) 1990 Pun Re No 51 page 133 (Do)

(89) 1899 Pun Re No 63 p. 204 (Do)

(5) 8 Oudh Cas 291 (292) (Do)

(27) 5 Oudh Cas 100 (101) (Do)

(11) 9 Ind Cas 537 (538) (11) (Attachment of crops—Objection to attachment struck off—Suit by claimant for recovery of price of crops—Small Cause Court has no jurisdiction to entertain the suit)

O.21 R.63  
Notes 19-20

observed that in cases under this rule the burden of proving the validity of the alienation is on the plaintiff

The defendant however cannot escape the burden at some stage or other. If the plaintiff produces his deed and swears that it is genuine and for full consideration and the defendants have nothing to say to the contrary the plaintiff will succeed, and where the burden of the plaintiff is so light it is scarcely worth arguing whether it is more correct to say that the burden is originally upon the defendants or upon the plaintiff. But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall upon the plaintiff to establish the right which he claims."

See also the undermentioned decisions<sup>9</sup>

In *Mohammad Ismail v Hanuman Parshad*,<sup>10</sup> their Lordships of the Privy Council observed as follows

Apparently it has been the settled practice of the Indian Courts when objections to an attachment in execution have been disallowed, and a suit has been filed by the objector under O. 21 R. 63 of the Code to put the onus of proving the *bona fides* of any transaction upon which the objector relies, upon him in his capacity of plaintiff. This is a matter which may possibly require further consideration when the question of onus is really material.

In the case of a dismissal of a claim without investigation on the ground of delay it has however been held that the burden is upon the defendant to show that the registered deed of transfer in favour of the plaintiff (defeated claimant) is fraudulent.<sup>11</sup>

Where a decree holder who has attached property in the possession of his judgment debtor is unsuccessful in the claim proceedings and therefore brings a declaratory suit under this rule, he can rely, in such suit, on the presumption drawn from possession that the property attached belongs to the judgment debtor and the burden of proving the contrary is on the defendant.<sup>12</sup>

Where the facts are fully established and the inference from them is clear, the question of onus is not material.<sup>13</sup>

**20. Defence of fraudulent transfer by the judgment-debtor, if can be raised in the suit.**—In a suit by a defeated claimant under this rule, the decree holder defendant can set up in defence that the transfer in favour of the claimant is voidable under Section 53 of the Transfer of Property Act. There is no bar to the setting up of such a plea in defence.<sup>1</sup>

(19) AIR 1910 N. 100 (1921)

on plaintiff to show that sale is fraudulent or collusive)

(33) AIR 1933 Rang 129 (131) ]

9 (37) AIR 1937 Nag 110 (10) (Objection by purchaser to attachment of property purchased dismissed—Regular suit—Initial onus on plaintiff—But if he proves purchase by duly registered sale deed reciting passing of consideration onus is shifted on to defendant to prove that sale was fraudulent.)

(37) AIR 1937 Nag 143 (146) ILR (1939) Nag 266 (Suit by defeated claimant—Claimant producing registered sale deed and proving execution and valuable consideration and possession also—Burden is shifted to creditor to prove that sale is bogus.)

10 (35) AIR 1933 P C 590 (291) I L R (1939) Kar 31 (P C)

11 (31) AIR 1931 Mad 40 (41)

(28) AIR 1928 Pat 431 (436) 1 Pat 777

Kar 31 (P C)

Note 20

1 (21) AIR 1921 All 213 (301)

(20) AIR 1920 Mad 743 (753) 43 Mad 760

(17) AIR 1917 Mad 519 (522)

(18) AIR 1918 Mad 421 (422) 41 Mad 612 (P C)

may be impugned as being sham transaction or as a transfer made with a view to defraud creditors of transferor.)

(36) AIR 1936 Nag 166 (163) ILR (1936) Nag

69 (Objection to attachment by transferee—

**O. 21 R. 63** rule is, however, appealable under Section 96

**Notes 25-27**

**27. Revision.** — See Note 25 to Rule 58, *ante*

### Local Amendments

#### CALCUTTA

*Add the following as Rule 63A*

**O. 21 R. 63A**  
(Calcutta)

' 63A When an attachment of moveable property ceases, the Court may order the restoration of the attached property to the person in whose possession it was before the attachment '

#### LAHORE

*Add the following Rule\**

**O. 21 R. 63A**  
(Lahore)

"63A (1) Where the property attached is a debt, the Court executing the decree shall investigate the claims of the judgment debtor against the garnishee in respect thereto and may order the garnishee to pay the amount of the debt to the Court

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of Section 47, and subject to the provisions of that Section the orders passed by the Court as a result of such investigation shall be conclusive between the judgment debtor and the garnishee and no separate suit relating thereto shall lie "

*Note* — The Court must investigate the claims of the judgment debtor against the garnishee even if he denies the debt <sup>1</sup>

The remedy of a party aggrieved by an order under Rule 63A is to appeal against the order <sup>2</sup> and a separate suit to set it aside is incompetent <sup>3</sup>

See also the undermentioned cases <sup>4</sup>

#### PATNA

*Add the following heading and Rules 63A to 63H*

### GARNISHEE ORDERS

**O. 21 R. 63A**  
(Patna)

' 63A Where a debt (other than a debt secured by a mortgage or a debt recoverable only in a Revenue Court or a debt the amount of which exceeds the pecuniary jurisdiction of the Court) has been attached under Rule 46 and the debtor

**O. 21 R. 63B**  
(Patna)

63B (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment debtor, and if he does not appear in answer to the notice issued under Rule 63A, or does not dispute his liability to pay such debt to the judgment debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him

4. (36) 17 Lah 467 (169) (Application by debt holder for adjudication under R. 63A—Court of Re. 1 is payable and not *ad valorem* fee)  
(37) AIR 1937 Lah 255 (256) (Attachment)

gaging his property to plaintiff and part of consideration left with plaintiff to be paid to decree holder of defendant.— On plaintiff failing to pay amount attached by decree holder.— Objection of plaintiff rejected.—Remedy is appeal.—Separate suit is barred under O. 21 R. 63A)

does not apply)



insolvency of the judgment debtor does not require the leave of the Insolvency Court under Section 28 of the Provincial Insolvency Act<sup>1</sup>

O.21 R.63  
Notes 23-26

**24. Effect of attachment on adverse possession.** — An attachment does not arrest the running of limitation in favour of a person holding adversely to the judgment debtor<sup>1</sup> It has been held that the fact that such person prefers a claim under Rule 58 before the expiry of the statutory period of twelve years does not prevent him from pleading successfully that on the *date of the suit* he has acquired a right by prescription<sup>2</sup> But the contrary view has been taken in the undermentioned decisions,<sup>3</sup> the reason given being that in such cases the rights of the parties should be determined as they were at the time of the *attachment*

See also Note 18, *supra*

**25. Costs.** — According to the High Courts of Calcutta<sup>1</sup> and Madras,<sup>2</sup> the Court cannot in a suit under this rule, order the payment of costs incurred in the claim proceedings, in favour of the successful party The High Court of Rangoon<sup>3</sup> has, on the other hand held that the successful party in the suit is entitled to the costs incurred in the claim proceedings The reason given is that the defeated party has no right of appeal against the order and the suit under this rule being in the nature of an appeal, success in the suit will entitle him also to the costs of the miscellaneous proceedings under Rule 58

It has been held that where a claim preferred under Rule 58 is rejected with costs and a suit by the defeated claimant under this rule is decreed, the prior order in the claim proceeding including the order as to costs, is superseded<sup>4</sup>

**25a. Decree-holder's suit under this Rule, whether step-in-aid of execution.** — See the Authors Commentaries on the Limitation Act, Article 182, Note 104 and the undermentioned cases<sup>1</sup>

**26. Appeal.** — No appeal lies from an order on a claim or an objection preferred under Rule 58 See Note 24 to Rule 58 A decree passed in a suit under this

**Note 23**

1. { 29) AIR 1920 Mad 323 (326 328)  
{See also ( 23) AIR 1928 All 158 (159) }  
{But see ('22) AIR 1922 Nag 108 (109) 19 Nag  
L R 126 (Held leave of Insolvency Court  
necessary )  
( 33) AIR 1933 Nag 217 (217) }

**Note 24**

- 1 { 26) AIR 1920 Mad 42 (43)  
{ 01) 11 Mad L Jour 344 (345)  
( 39) AIR 1939 Mad 456 (458) I L R (1939) Mad  
803(SB)

on Letters Patent Appeal in AIR 1939 Mad  
456 (SB) ]]

- 3 { 39) AIR 1933 Mad 857 (858) (Suit by defeated  
claimant—Title by adverse possession perfected  
after attachment and before suit cannot be relied  
upon by him )  
( 94) 18 Bom 260 (263)  
( '18) AIR 1918 Mad 572 (573)  
( '11) 35 Bom 79 (83)

**Note 25**

4. ( 33) AIR 1933 Nag 376 (377)

**Note 25a**

suit )  
{See also ( 37) AIR 1937 Mad 44 (46) (Confirmed

cannot be treated as an application within  
Article 182, clause 5 )

O. 21 R. 63 rule is, however, appealable under Section 96.  
Notes 26-27

27. Revision. — See Note 25 to Rule 58, *ante*

### Local Amendments

#### CALCUTTA

Add the following as Rule 63A

O. 21 R. 63A "63A When an attachment of moveable property ceases, the Court may order  
(Calcutta) the restoration of the attached property to the person in whose possession it was before  
the attachment "

#### LAHORE

Add the following Rule\*

O. 21 R. 63A "63A (1) Where the property attached is a debt, the Court executing the  
(Lahore) decrees shall investigate the claims of the judgment debtor against the garnishee in  
respect thereto and may order the garnishee to pay the amount of the debt to the Court

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of Section 47, and subject to the provisions of that Section the orders passed by the Court as a result of such investigation shall be conclusive between the judgment debtor and the garnishee and no separate suit relating thereto shall lie "

Note The Court must investigate the claims of the judgment debtor against the garnishee even if he denies the debt <sup>1</sup>

The remedy of a party aggrieved by an order under Rule 63A is to appeal against the order<sup>2</sup> and a separate suit to set it aside is incompetent <sup>3</sup>

See also the undermentioned cases <sup>4</sup>

#### PATNA

Add the following heading and Rules 63A to 63H

#### GARNISHEE ORDERS

O. 21 R. 63A "63A Where a debt (other than a debt secured by a mortgage or a debt  
(Patna) recoverable only in a Revenue Court or a debt the amount of which exceeds the pecuniary jurisdiction of the Court) has been attached under Rule 46 and the debtor prohibited under clause (1) of sub rule (1) of Rule 46 (hereinafter called the garnishee) does not pay the amount of the debt into Court in accordance with Rule 46, sub rule (3), the Court on the application of the decree holder may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment debtor. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment debtor

O. 21 R. 63B 63B (1) If the garnishee does not pay into Court the amount of the debt due  
(Patna) from him to the judgment debtor, and if he does not appear in answer to the notice issued under Rule 63A, or does not dispute his liability to pay such debt to the judgment debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though

consideration left with plaintiff to be paid to decree holder of defendant—On plaintiff failing to pay, amount attached by decree holder—Objection of plaintiff rejected—Remedy is appeal—Separate suit is barred under O. 21 R. 63A )

does not apply )

(2) If the garnishee appears in answer to the notice issued under Rule 63A and disputes his liability to pay the debt attached, the Court instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

0.21 R. 63B  
(Patina)

63C Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt, and prove the same if necessary.

O. 21 R. 63C  
(Patna)

63D After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable

O. 21 R. 63D  
(Patna)

63E Payment made by, or levied by execution upon, the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment debtor, and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or reversed.

O. 21 R. 63E  
(Patna)

63F The costs of any application for the attachment of a debt or under the foregoing rules and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree holder shall, unless otherwise directed be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree.

O. 21 R, 83F  
(Patn.)

63G Out of the amount recovered under the garnishee order the Court shall deduct a sum equal to the court-fee payable under the Indian Court fees Act on a plaint in a suit for recovery of the money and credit the same to the Government

O. 21 R. 63G  
(Patn.)

69H (1) Where the liability of any garnishee has been tried and determined under these rules the order shall have the same force and be subject to the same conditions as to appeals or otherwise as if it were a decree

O. 21 R. 63H  
(Patna)

(2) Orders not covered by clause (1) shall be appealable as orders made in execution<sup>3</sup>

## RANGOON

*Add the following Rules 63A to 63G:*

## GARNISHEE ORDERS

63A Where a debt has been attached under Rule 46, the debtor prohibited under clause (1) of sub rule (1) of Rule 46 (hereinafter called the garnishee) may pay the amount of the debt due from him to the judgment debtor into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same

O. 21 R. 63A  
(Rangoon)

63B Where a debt has been attached under Rule 46, and the garnishee does not pay the amount of the debt into Court in accordance with the foregoing rule, the Court, on the application of the decree holder, may order a notice to issue calling upon the garnishee to show cause against payment into Court.

O. 21 R. 63B  
(Rangoon)

A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment debtor.

**O. 21 R. 63C**  
(Rangoon)

**63C** (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the costs of execution and if he does not appear in answer to the notice issued under Rule 63B, or does not dispute his liability to pay such debt to the judgment debtor, then the Court may order the garnishee to comply with the terms of such notice and on such order execution may issue against the garnishee as though such order were a decree against him

(2) If the garnishee appears in answer to the notice issued under Rule 63B and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just

*Note* See the undermentioned decision on the above rule of the Rangoon High Court<sup>1</sup>

**O. 21 R. 63D**  
(Rangoon)

**63D** Whenever in

Procedure when third person claims an interest in the attached debt

and state the nature and particulars of his claim, if any, upon such debt and prove the same if necessary

**O. 21 R. 63E**  
(Rangoon)

**63E** After hearing such third person and any other person who may subsequently Order of Court after hearing all interested persons be ordered to appear or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien charge or interest, if any, of such third or other person as shall seem just and reasonable

**O. 21 R. 63F**  
(Rangoon)

**63F** Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment debtor, and any other person ordered to appear under these rules, for the amount paid or levied although such order or the judgment may be set aside or reversed

**O. 21 R. 63G**  
(Rangoon)

**63G** The costs of any application for the attachment of a debt or under the foregoing rules, and of any proceedings arising from incidental to such application, shall be in the discretion of the Court Costs awarded to the decree holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree

**SALE GENERALLY****O. 21 R. 64**

**R. 64. [S. 284.]** Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold,

Power to order property attached to be sold and proceeds to be paid to person entitled.

**O. 21 R. 63C (Rangoon)**

1. (35) AIR 1935 Rang 211 (212) (Person named in policy to whom payment due under policy is to be made has no right under policy merely by his name being mentioned — He should get administration or succession certificate — No certificate obtained — Such money in hands of insurance company cannot be attached as belonging to person mentioned in policy)

and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

O. 21 R. 64  
Notes 1-3

[ Cf. R. S. C., O. 43 R. 2. ]

### Local Amendment

#### PATNA

For the words "attached by it" substitute the words "in respect of which it has made an order of attachment"

Insert the words "which is" between the words "and" and "liable"

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. "Any Court executing a decree"</li> <li>2. "May order"</li> <li>3. "Attached by it."</li> <li>4. Sale without attachment.</li> <li>5. "Liable to sale."</li> </ol> | <ol style="list-style-type: none"> <li>6. Sale of property not belonging to the judgment-debtor</li> <li>7. Such portion thereof as may be found necessary.</li> <li>8. "Party entitled under the decree."</li> </ol> |
|--|---|

1. "Any Court executing a decree." — As to the power of an executing Court to order the sale of property situated outside the local limits of its jurisdiction, see Section 38, Note 6 and the undermentioned case<sup>1</sup>

Where the same property is under attachment in execution of decrees of several Courts the sale thereof must be ordered by the Court of the highest grade. But a sale by a Court of inferior grade is not a nullity. See Section 63 and the Notes thereunder.

Rules 64 to 73 are applicable to the Chota Nagpur Tenancy Act. See Section 210, sub section (3), clause (b) of that Act.

2. "May order." — The term "may" in this rule does not confer a discretion on the Court to order or refuse to order a sale, it is obligatory on it to do so when a valid application for such order and a valid attachment have been made.<sup>1</sup>

Where a sale in execution is set aside (for instance on the ground of fraud) and the purchaser who is not a party to the decree is dispossessed, he is entitled to compensation for the improvements made by him on the property. It is not necessary in such a case to inquire whether the auction purchaser believed in good faith that he was entitled to the property, the order of the Court under which the sale was held being itself a sufficient protection. At any rate, the "good faith" required does not go beyond an honest belief (though it may be negligent) on the purchaser's part in the validity of his title. See General Clauses Act, Section 3 (20).<sup>2</sup>

As to the effect of a reversal, or the setting aside of a decree, on the title of the auction purchaser at a sale in execution of such decree, see Note 13 to Section 144.

3. "Attached by it." — The rule contemplates that the property should be under attachment before its sale is ordered. Where a property has been attached, the attachment cannot be said to have come to an end by the mere fact that an order is passed releasing the property from the attachment, so long as the order is liable to be

#### Order 21 Rule 64 — Note 1

1. (13) 18 Ind Cas 493 (493) (Mad) (Sale of property outside jurisdiction — Judgment-debtor failing to take objection in time — stopped)

#### Note 2

1. (15) AIR 1915 Mad 655 (5-6)  
(8) 12 Cal 317 (322)  
2. (11) 12 L.C. 444 (447, 448, 449) 4-5-11

**O. 21 R. 64**  
**Notes 3-5**

set aside in appeal or otherwise See Section 64, Note 9 and the undermentioned cases<sup>1</sup>

Though the rule contains the words *attached by it* it has been held by the Madras High Court<sup>2</sup> that it does not forbid a sale where the attachment has been made by another Court

**4. Sale without attachment.**—A property must be *attached* before it can be ordered to be sold under this rule<sup>1</sup> If, however, it is sold in execution without there being a prior attachment, what is the effect? There is a conflict of decisions as to whether the sale in such a case is one without jurisdiction or whether the absence of attachment amounts only to an irregularity As to this, see Section 51, Note 4 and the undermentioned cases<sup>2</sup>

**5. "Liable to sale."**—A Court has no jurisdiction under this rule to order a sale unless the property is "liable to sale" The Court is therefore bound to hear objections to the saleability of a property before it orders its sale<sup>1</sup> A decree for money though capable of being attached is not liable to sale<sup>2</sup> (See O 21 R 53) But a *debt* can be sold under this rule<sup>3</sup> It has been held that a preliminary decree in a mortgage suit is attachable property of the judgment debtor and that the procedure for realizing such a decree is for the Court to *sell* it under this rule<sup>4</sup> (See Notes to O 21 R 53)

Suppose, in execution of a decree held by *A* against *B*, certain property belonging to *B* is sold and subsequently *O*, the holder of another money decree against *B*, seeks to attach and sell the same property *O* is not entitled to do so, because, when the property is sold under *A*'s decree, the title to the property passes to the auction-purchaser and it ceases to be liable to sale under any other decree against *B*<sup>5</sup> Suppose in the above illustration *O* had already attached the property at the time of its sale

[See also (75) 23 Suth W R 393 (394)]

**Note 3**

- 1 (18) AIR 1918 Oudh 275 (278) (Order raising attachment set aside by suit under O 21 R 63—Attachment is revived)
- [See (88) 6 Mad 93 (99) (Sale pending appeal from decision which set aside the order raising attachment is valid)]

2. (29) AIR 1923 Mad 852 (853 to 856)

**Note 4**

1. (80) AIR 1930 Mad 414 (417) (1902) 1 Hyde 158 (158)
2. Case of Calcutta High Court that want of attachment affects jurisdiction to sell (19) AIR 1918 Cal 89 (40) 45 Cal 780

(13) 18 Ind Cas 498 (499) (Mad)

*Rangoon view* absence of attachment = only irregularity

(134) AIR 1934 Rang 188 (189)

(See also (31) AIR 1931 Cal 35 (36) 57 Cal 1208

(91) 15 Bom 222 (223) 18 Ind App 22 (PC) (Property already under attachment—No second order for attachment necessary before sale))

**Note 5**

1 (16) AIR 1916 Cal 959 (959)

*Lahore view* sale of property without attachment is not nullity

(37) AIR 1937 Lah 237 (238)

*Nagpur view* want of attachment is only irregularity

(20) AIR 1922 Nag 267 (271) 18 Nag L R 182

(37) AIR 1937 Nag 149 (149) I L R (1939) Nag 450

*Madras view* absence of attachment = only irregularity

(18) AIR 1918 Mad 1262 (1263)

under *A's* decree and that this attachment was even prior to that under *A's* decree, still *C* cannot sell the property but can only claim a rateable distribution of the sale proceeds under Section 73 of the Code.<sup>6</sup> See also the undermentioned cases<sup>7</sup>

O. 21 R. 64  
Notes 5-8

**6. Sale of property not belonging to the judgment-debtor.** — In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested, for the illegal seizure of goods which do not belong to the judgment debtor. But in India warrants for attachment are issued on the application of the creditor *who is bound to specify the property which he desires to attach* and its estimated value. Hence, the English doctrine that a judgment creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt,<sup>1</sup> does not apply in India. Where the decree-holder is liable to pay damages to the third party whose goods he has illegally brought to sale in execution of his decree,<sup>2</sup> these damages will include not only the price realized at the sale but also the amount by which such price falls short of the market value of the property on the date of the attachment.<sup>3</sup> Where on the application of a decree-holder and through his mistake his own property is sold in execution of his decree, as that of the judgment-debtor, it has been held by the High Court of Madras<sup>4</sup> that the decree holder will be estopped from claiming back the property from the auction purchaser unless it is found that the latter was not in fact misled by such mistake. The High Court of Calcutta has held a contrary view.<sup>5</sup>

**7. Such portion thereof as may be found necessary.** — It is permissible under this rule to order the sale of a *portion* of the attached property.<sup>1</sup> Compare proviso to Rule 17, *ante*

**8. "Party entitled under the decree."** — Under this rule, the sale proceeds should be paid to the "party entitled under the decree to receive the same." The decree holder is such a person. But the Court is not bound to order the payment of

6. ('86) 12 Cal 317 (321)

quent conveyance to *K* is not affected—Property cannot be sold in execution of *A's* decree)

Note 6

3),  
12,

to attachment by *A* because at time of attachment he had no interest but can object to sale by *A* under the prior attachment and Court has inherent power to recognize such objection)

(35) AIR 1935 Nag 171 (172) 31 Nag L R 301  
(Attachment of property — Subsequent sale of property in execution of another decree—Execution purchaser though not entitled to object to prior attachment can object to sale and Court has inherent power to recognize such objection)]

loss—Measure of damages)

(78) 3 Cal 806 (816) 5 Ind App 116 (PC) (Sale by sheriff under writ of *fieri facias*—Liability

7

be given to the decree holder on ground of mistake)

See also Note 71 to Section 47, *ante*

Note 7

(35) AIR 1935 Mad 872 (873) 59 Mad 1 (A attaching property of *B* in execution — Prior agreement by *B* to sell property to *K* — Subse-

L. (09) 3 Ind Cas 81 (81) (Cal)  
(75) 23 Suth W R 1 (4)

**O. 21 R. 64** the purchase money to the decree holder *before the confirmation of the sale*, though  
**Note 8** it may order such payment if it considers fit to do so <sup>1</sup>

Where the Government has a claim against the judgment debtor for court fees under a decree in a pauper suit it is entitled to be paid the amount of the court fees out of the sale proceeds in preference to the decree holder. The reason is that the claim for the court fees is a Crown debt and is entitled to precedence over all other creditors. The Government in such a case is "a party entitled under the decree to receive the money within the meaning of Rule 64, it need not attach the money before it can receive it" (Of Order 33 Rule 10)

**O. 21 R. 65**

**R. 65. [S. 286]** Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

*Sales by whom conducted and how made*

[1877, S. 286; 1859, S. 248 See Rule 76]

#### Local Amendments

#### NAGPUR

The following sentence shall be *added*

'Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in or within the precincts of the court house, no such declaration shall be made without the leave of the Court'

#### RANGOON

*Substitute the following rule*

"R. 65 (1) Sales shall be conducted by the Bailiff or Deputy Bailiff but the duty may be entrusted to a process server when the property is moveable property not exceeding Rs 50 in value, and when in the opinion of the Court, for reasons recorded in the diary of the case the Bailiff or Deputy Bailiff cannot personally conduct the sale

(2) Subject to the terms of the proviso to Rule 43 and of Rule 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decrees, and some well known place in the vicinity of the court house or the public bazaar shall be selected for the purpose

(3) Subject as aforesaid and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment debtor, all property whether moveable or immovable attached in execution of the decree, shall be sold at the time and place selected. The day to be set apart, and the place selected for holding the sales, and any changes therein, shall be reported for the information of the High Court

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission. When the proceeds of sale do not exceed Rs 500—5 per cent. Where they exceed Rs 500 and do not exceed Rs 5,000—5 per cent on

#### Note 8

1. { 86 } 12 Cal 252 (255)
2. { 06 } 33 Cal 1040 (1044 to 1046)



the first Rs 500 and 2 per cent on the remainder Where they exceed Rs 5,000—at the above rate on the first Rs 5,000 and one per cent on the remainder

O. 21 R. 68  
Notes 1-4

The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution

(5) Subject to the provisions of sub rule (13) of Rule 15B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale proceeds

(6) When a sale of immovable property is set aside under the provisions of Rule 92 (2) below, no commission shall be paid to the Bailiff for selling the property

(7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or in pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub rule (4) above

(b) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I, and shall be paid into the treasury "

Notes As regards the travelling allowance of Bailiffs going out to sell property on the spot, see Rule 119 of the Burma Travelling Allowance Rules

### Synopsis

- |                                    |                                     |
|------------------------------------|-------------------------------------|
| 1. "Save as otherwise prescribed " | 3. Sale to be by public auction.    |
| See Rule 76                        |                                     |
| 2. Sales, by whom to be conducted  | 4. Acceptance of bid. See O 21 R 84 |

1. "Save as otherwise prescribed." — See Rule 76 *infra*

2. Sales by whom to be conducted. — Sales in execution are to be conducted by — a) an officer of the Court, or

(b) any other person whom the Court may appoint

It is not, however, every officer that can conduct an execution sale, but only an officer who has been appointed for the purpose can do it <sup>1</sup> The rule enables the Court to appoint a person who is not an officer of the Court (e g, an auctioneer) to conduct an execution sale <sup>2</sup> Where the Court has directed a bailiff to hold a sale, the mere fact that the bids were recorded by another person does not show that the sale was not conducted by the bailiff <sup>3</sup>

3. Sale to be by public auction. — See Rule 76 *infra* It has been held by the Bombay High Court that the Court may, for good reason, order that the bidders shall be confined to a particular class or classes of persons <sup>1</sup>

4. Acceptance of bid. — See Order 21 Rule 84

## R. 66. [S. 287.] (1) Where any property is ordered to O. 21 R. 66

Proclamation of sales  
by public auction

be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

to officers of the Court—It is conceived that the rule

ent, viz any other person whom the Court may appoint " — The words ' whom the Court may appoint ' were construed as applicable also

Note 3

1. ( 27 ) AIR 1927 Bom 143 (145)

O. 21 R. 66

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold;
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
- (c) any incumbrance to which the property is liable;
- (d) the amount for the recovery of which the sale is ordered; and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

[ 1877, S. 287; 1859, S. 249. ]

#### Local Amendments

##### CALCUTTA

*After the word "property" in clause (e) in sub-rule (2) add the following proviso:*  
*"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property but the proclamation shall include the estimate, if any, given by either or both of the parties"*  
**LAHORE**

*Add the following words to clause (e) of sub-rule (2):*  
*"provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties"*

*After sub-rule (3) add the following as sub-rule (3) and re number the existing sub-rules (3) and (4) as (4) and (5), respectively :*

*"(3) Where the property to be sold is moveable property which has been made over to a custodian under sub-clauses (a) or (c) of clause (1) of Rule 43 of this Order, the Court shall also issue a process by way of notice to the custodian, directing him to*

produce the property at the place of sale, at a time to be specified therein with a warning; that if he fails to comply with the directions, he shall be liable to action under Section 115 of the Code of Civil Procedure

O. 21 R. 66

**MADRAS**

*Re number* the existing clause (e) to sub rule (2) as (f) and *add* the following as clause (e)

"(e) the value of the property is stated (i) by the decree-holder and (ii) by the judgment debtor."

**NAGPUR**

In clause (e) of sub rule (2), *after* the word "property" *insert* the words "including the decree holder's estimate of the approximate market price"

**N.-W. F. P.**

*Add* the following words to clause (e) of sub-rule (2)

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property, but the proclamation shall include the estimate, if any given by either or both of the parties<sup>1</sup>"

**PATNA**

*Omit* the words "shall be drawn up after notice to the decree holder and the judgment debtor and" from sub rule (2), and *add* the following proviso after sub-clause (e) of sub rule (2)

"Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale proclamation"<sup>2</sup>

**RANGOON**

*Add* the following at the end of sub rule (3) -

"Provided that no such notice shall be necessary in the case of moveable property not exceeding Rs 250 in value"

*Synopsis*

- |   |  |
|---|--|
| 1. Legislative changes.   | 14. Value of the property.   |
| 2. Object of proclamation.  | 15. Effect of an order under this Rule.  |
| 3. Nature of proceedings under this Rule.                           | 16. Non-compliance with the provisions of this Rule.                             |
| 4. Delegation of the power to settle proclamation.                  | 17. Verified statement to accompany application for order for sale—Sub-rule (3). |
| 5. "Such proclamation shall be drawn up after notice."              | 18. "Court may summon any person," etc.—Sub-rule (4).                            |
| 6. "Such proclamation shall state the time and place of sale."      | 19. Form of proclamation of sale. See Appendix D, Form No 29                     |
| 7. "As fairly and accurately as possible."                          | 20. Appeal.  |
| 8. Contents of sale proclamation.                                   | 21. Revision   |
| 9. Specification of property.                                       | 22. Applicability of the rule of res judicata to proceedings under this Rule.    |
| 10. Specification of revenue.                                       | 23. Judgment-debtor dying pending execution.                                     |
| 11. Encumbrances to which property is liable.                       | 24. Limitation—Step-in-aid of execution.   |
| 12. Amount to be recovered.   |  |
| 13. Everything which the Court considers material, etc.—Clause (e). |  |

**O 21 R. 66 (Local Amendments)**

1. (N.-W.F.P.). (39) AIR 1939 Pesh 9 (12)  
(Decree holder and judgment debtor giving separate estimate of value of property — Failure to give both estimates in proclamation = material irregularity)

# 0.21 R 66 Notes 1-3

## Other Topics (miscellaneous)

Court sales—Duty of sale officer See Note 11  
Failure to not in encumbrance—Whether in equity  
See Note 11  
Inconclusive—Specific on whether necessary See  
Note 13

Judgment debtor with notice of proclamation—  
Subsequent objection by See Note 16  
Mortgage decree holder not ment owing his mort-  
gage—Effect See Note 11

### 1 Legislative changes —

- 1 The provision as to notice to the decree holder and judgment debtor in sub rule (2) is new
- 2 Sub rule (3) is new

2 **Object of proclamation** — A proclamation of sale is meant for the information of intending purchasers and not of the judgment debtor<sup>1</sup>

3 **Nature of proceedings under this Rule** — Are proceedings under this rule administrative or judicial in character? On this question there is a conflict of decisions. Three views have been expressed on the matter —

(a) The proceedings under this rule are of an administrative and not of a judicial character. The leading case which lays down this view is *Sitaram Acharya v Subramania Ayyar*<sup>1</sup> a decision under the old Code. The cases under the present Code which fall within this group have held that the view laid down in the above case is good law even under the present Code notwithstanding the changes made therein<sup>2</sup>

(b) The proceedings under this rule are of a judicial and not of an administrative character<sup>3</sup>. These cases proceed on the view that the alterations in the rule under the new Code have the effect of making the action of the Court under the present rule a judicial one.

(c) So far as Rule 66 requires a decision as to matters which are purely administrative in nature such as fixing the upset price and details of the sale proclamation the matter is administrative. In other words where the order does not affect rights liabilities or

### Order 21 Rule 66 —

- 1 (19) 12 South W R 488 (489)
- (72) 18 South W R 55 (56)

#### Note 3

Appeal lies

[See also (24) AIR 1924 Mad 984 (285) (Oster)]

- 2 one of the terms of the sale proclamation is that the order in which the properties were to be sold

(11) 11 Ind Cas 749 (760) (Cal) (Order entered both valuations by decree holder and judgment debtor—No enquiry as to correct valuation—Order does not determine any question judicially)

- tion in sale proclamation)
- (2) AIR 1947 All 208 (209) (Estimate of the value)
- (35) AIR 1935 Mad 714 (713) (Party cannot have as of right properties sold in any particular order)
- 3 (17) AIR 1917 Pat 391 (391) 2 Pat L Jour 130 (PB) (Order refusing to hold enquiry as to value but merely giving value given by the parties)

questions merely related to procedure and not in themselves affect rights or liabilities of parties)]

But where the order affects the rights liabilities or equities of the parties it is a judicial and not an administrative order<sup>5</sup>

O. 21 R. 66  
Notes 3-8

Although apparently there is a conflict of decisions as set forth above if the views expressed in the various cases are taken into consideration, there does not seem to be any real conflict if the *actual decisions* are taken into account. The great majority of them fall within the principles stated in paragraph (c) above. Thus in all the cases cited as holding that proceedings under this rule are administrative and not judicial (paragraph (a) above) the orders in question did not affect the rights of the parties.

It must also be noted that the opinion expressed in *Kaveri Bai Ammal v B. Vehta and Sons*<sup>6</sup> suggesting that under the new Code proceedings under Rule 66 are judicial and not administrative was *obiter*.

**4. Delegation of the power to settle proclamation** — It is the duty of the Court to settle the proclamation of sale itself. It cannot depute a commissioner to do it and if it does so the sale will be invalid<sup>1</sup>.

**5. "Such proclamation shall be drawn up after notice"** — The sale proclamation should be settled only after notice to the judgment debtor<sup>1</sup>. It is the duty of the decree holder to apply for issue of notice under this rule and to take the necessary steps to have it served on the judgment debtor<sup>2</sup>. But such notice is required only where a proclamation of sale has to be *drawn up*. It need not be given where a fresh proclamation is ordered under Rule 69 (3) on an adjournment of sale<sup>3</sup>.

The absence of a notice under this rule does not by itself vitiate an execution sale. The defect is only an *irregularity* which may entitle the judgment debtor to have the sale set aside on satisfying the Court that he has sustained substantial injury by reason of the defect<sup>4</sup>. But where the Court has fixed a certain date for hearing the

5 {See ( '08) AIR 1928 Mad 1169 (1170) (29) AIR 1929 Mad 506 (508) }  
{See also ( '20) AIR 1920 Mad 834 (835) (Order directing properties to be sold in a particular order) }  
{ (25) AIR 1925 Cal 818 (319) (Determination of question arising upon application under R. 66 may also be ordered under S. 47 — The test in

(this failure to do so amounts to default within R. 57) }  
3 ( '26) AIR 1926 Oudh 76 (76-77) {See also ( '21) AIR 1921 Oudh 222 (223) 24 Oudh Cas. 891 (Necessary particulars ascertained in previous execution proceedings — Fresh notice not absolutely necessary before preparing proclamation again) }  
4 ( '27) AIR 1927 Lah 84 (84) ( '29) AIR 1929 Nag 180 (131) 25 Nag L R 58 (Such defect is an irregularity within the meaning of O. 21 R. 90) }  
( '23) AIR 1923 Lah 592 (593) 4 Lah 243

6 ( '24) AIR 1924 Mad 234 (235)  
Note 4

1 ( '26) AIR 1926 Mad 755 (755) 49 Mad 333  
Note 5

1 ( '32) AIR 1932 All 55 (57) (Date fixed for appearance of judgment debtor should be date when all necessary materials are before Court so that judgment debtor could inspect them and

( '38) AIR 1938 Lah 152 (154) (Auction price grossly inadequate — Substantial loss may be presumed) }  
( '39) AIR 1939 Pesh 9 (11) (Judgment-debtor, sued not as partners but as individuals — Failure to serve notice on any of them is material irre

( of  
ver  
ver  
has been ordered to be made a party to execution proceedings and been treated as a judgment debtor )  
2 ( '11) Ind Cas 558 (560-561) 38 Cal 482

O. 21 R. 66  
Notes 5-6

parties as to the valuation to be entered in a sale proclamation but fixes the valuation before such date, the Court acts without jurisdiction<sup>5</sup>

It has been held by the Lahore High Court that where notice has been given under Rule 66 and the execution proceedings are thus brought to the knowledge of the judgment debtor, they are not vitiated by the absence of a notice under Rule 22<sup>6</sup>

A notice under this rule is to be served in the same manner as a summons (Order 48 Rule 2)<sup>7</sup>

No notice is necessary before drawing up a sale proclamation in proceedings in execution of a rent decree under the Bengal Tenancy Act<sup>8</sup>

Where a judgment debtor applies to have the sale set aside on the ground that notice under this rule was not properly served upon him, the burden of proving it is on him<sup>9</sup>

6. "Such proclamation shall state the time and place of sale." — *Time of sale* — The omission to state in the proclamation the time of sale is a material irregularity within the meaning of Rule 90<sup>1</sup> It is not enough merely to mention the day of sale, the hour of sale should also be stated<sup>2</sup> Where a sale has been advertised to take place at a particular hour, but is actually held at an earlier hour, though on the same day, it has been held by the High Courts of Allahabad and Calcutta that no sale could be deemed to have taken place at all within the meaning of the Code<sup>3</sup> According to the Chief Courts of the Punjab and Burma, however, such a sale is not a nullity but only an irregularity which, if material, would entitle the party interested to set aside the sale<sup>4</sup> Where a sale was advertised to take place between 11 A. M. and 5 P. M. on a particular day, and actually took place at 3 P. M., it was held by the High Court of Bombay that there was no irregularity inasmuch as once the sale had begun, the Court could not be expected to keep it on till 5 P. M., even if the sale could be finished earlier<sup>5</sup> Where a sale is advertised to take place at a particular hour but is held a few hours later, it has been held by the High Court of Rangoon that the delay of a few hours is not a material irregularity within the meaning of Rule 90<sup>6</sup> Where the judgment debtor agreed to an adjournment of the sale without fresh proclamation, the failure to mention the time of sale in the order ceases to be a material irregularity<sup>7</sup>

In the absence of any rules to the contrary, a sale held on a public holiday is not illegal or irregular<sup>8</sup>

#### *Place of sale*

Court — Omission  
notices under O. 21 f  
thereafter does not amount to material irreg-  
ularity<sup>1</sup>  
[See also (28) AIR 1928 All 74 (76) 49 All 830]  
[But see (18) AIR 1918 Low Bur 114 (114)]

1 ('19) AIR 1919 Nag 123 (128, 129) 15 Nag L 125  
(15) AIR 1915 Oudh 124 (126) 18 Oudh Cas 1.  
(37) AIR 1937 All 407 (409)

judgment debtor cannot be taken advantage of  
for purposes of evading notice under R. 22<sup>1</sup>  
7. (See (25) AIR 1925 Cal 552 (554) (Personal  
service not possible—affixure to house door or

8 (81) 3 All 333 (334)  
(But see (1665) 3 Suth W R Misc 24 (24) ]  
9. (87) 3 All 511 (511, 512)

or the holding of a sale at a place different from that stated in the proclamation<sup>10</sup> is a material irregularity. The Code intends that a sale should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons ought to be shown for directing otherwise.<sup>11</sup>

O. 21 R. 66  
Notes 6-9

7 "As fairly and accurately as possible." — It is the duty of the Court to use all possible materials before it in drawing up a proclamation of sale which will give such information about the property to be sold as may be given and as fairly and as accurately as possible. Where the presiding Judge has not availed himself of the materials before him, they being such as would have enabled him to avoid the trouble afterwards occasioned the purchaser who has in fact been misled would have a remedy, either for a proportionate refund of the purchase money or for a cancellation of the sale.<sup>1</sup>

8 Contents of sale proclamation. — See Notes 9 to 14 below

Under the Bengal Tenancy Act (VIII of 1885) and the Orissa Tenancy Act (II of 1913) a sale proclamation should contain certain particulars in addition to those specified in this rule. See Sections 163 and 217 of the said Acts respectively.

9. Specification of property. — The Court is under a duty to ascertain definitely the property to be sold before entering it in the sale proclamation.<sup>1</sup> Where it erroneously directs the sale of the property of a stranger to the decree behind his back, he is entitled to sue to have the sale set aside.<sup>2</sup>

The rule requires that the property to be sold should be described in the sale proclamation as fairly and accurately as possible.<sup>3</sup> The description should be sufficient to identify the property.<sup>4</sup> Where two properties which have been amalgamated into

(27) AIR 1927 Rang 84 (88)

[See (77) 1 All 400 (402) (Place of sale not stated with sufficient distinctness—Material irregularity)]

(31) AIR 1921 Mad 484 (485 486) (Sale not to

described in the proclamation with reasonable accuracy)]

4 (69) 12 Suth W R 488 (488)

Cases where description was held sufficient  
(29) AIR 1929 Cal 409 (412) 55 Cal 902 (Mis

1

1

Note 7

1 (16) AIR 1916 Low Bur 11 (5) 8 Low Bur Rul

427

[See also (01) 1901 All W N 167 (167)]

1

is bound to satisfy itself under R. 66 that the alleged debt exists before proceeding to its sale)

injury was caused by the failure to specify them)

(29) AIR 1929 Oudh 263 (264 265) (Property described as share of mortgagor in *dharyachara* village)

(6) 25 Suth W R 326 (327) (Wrong pargana mentioned — Property identified — Sale not vitiated)

Cases in which description was held insufficient

(05) 1905 Pun Re No 47, page 168 (Khasra

permits inquiry into the title of the judgment.

**O. 21 R. 66**  
**Note 9**

one premises are stated as two premises the misdescription is not a material irregularity if the boundaries of the lots are given in the sale proclamation and no one has been misled.<sup>5</sup> The proclamation should also specify the *judgment debtor's interest* in the property.<sup>6</sup> (See O 21 R 13.) Where owing to the Court's failure to make use of the materials before it, the area actually sold is less than that mentioned in the sale proclamation, the auction purchaser is entitled to sue to have the sale set aside or to claim a refund of a proportionate part of the purchase money.<sup>7</sup> Where, subsequent to the issue of a sale proclamation, a portion of the property is released from attachment and consequently, only a portion of the property mentioned in the sale proclamation is to be actually sold it is necessary to issue a fresh proclamation.<sup>8</sup>

Where a question arises as to what was sold to the purchaser at a court sale the order of attachment, the sale proclamation and the sale certificate should be looked at.<sup>9</sup> In case of discrepancy between the sale proclamation and the certificate of sale the former will prevail.<sup>10</sup> At the sale in execution of a mortgage decree, the mortgagee's interest also passes to the purchaser, though the sale proclamation may expressly refer only to the right title and interest of the mortgagor.<sup>11</sup>

numbers stated—No indication as to what the properties were—Material irregularity)

(05) 32 Cal 542 (545 547 548) (Non specification of share of the property to be sold—Material irregularity)

(87) 1887 All W N 50 (51) (Several shares in different pattis sold—Shares not specifically described—Material irregularity)

5 (33) AIR 1938 Cal 662 (663)

[See (10) 7 Ind Cas 60 (62) 34 Mad 143 (Fraudulent misrepresentation of judgment debtor's interest—Auction purchaser held entitled to sue for setting aside sale)]

7 (16) AIR 1916 Low Bur 3 (5) 8 Low Bur Rail 427

8 ("8) 3 Cal 544 (545 546) (Omission to issue fresh proclamation is material irregularity)

[But compare (32) AIR 1932 All 664 (664) (In the case of zamindari property though the whole property has been proclaimed for sale a share in it may be sold without issuing a fresh proclamation)]

9 Cases bearing on the purchaser's right in under Court sale

(25) AIR 1925 Cal 1247 (1247) (Sale of estate with all moneys due from tenants in respect of arrears of rent—Arrears of rent include rent decrees)

(81) 6 Cal 243 (246) (PC) (Sale of decree partly executed only enables purchaser to execute the unexecuted portion)

(80) 5 Cal 144 (146) (Only in cases where it is manifest that judgment-debtor must have been sued as a representative a sale in terms of the interest of the judgment-debtor can be held to convey the interest of others apparently not parties to the suit)

(80) 6 Cal 219 (217, 218) (PC) (In obtaining a decree for possession and mesne profits of land comprised in a certain lease—B selling in execu-

tion of decree against A, A's interest in the lease—Purchaser does not get right to mesne profits)

(79) 4 Cal 814 (815) (Sale of under tenure for arrears of rent under S 6G of Landlords and Tenants Act of 1869—Growing crops pass to the purchaser except where it has been specifically excepted by sale notification)

Sale of property in hands of legal representative for decree debt due by judgment debtor—Latter's interest in the property passes to the purchaser

(73) 10 Beng L R 294 (300)

(1863) Marsh 614 (614)

(75) 24 Suth W R 388 (384)

(75) 24 Suth W R 109 (109)

(75) 24 Suth W R 3 (4)

(17) AIR 1917 P C 121 (123) 41 Mad 403 45

Ind App 54 (PC)

[See (85) 7 All 38 (40 41) (Property not man-

body of the document)]

10 (77) 1 Cal L Rep 460 (463)

it as it is not sold to him)

11 (81) 5 Low 5 (7) (Mortgagee is estopped from disputing that such is the effect of the sale)



**10. Specification of revenue.** — Where the property to be sold is an interest in an estate or part of an estate paying revenue to the Government, the revenue assessed upon the estate or part of the estate should be specified in the sale proclamation<sup>1</sup>

O. 21 R. 66  
Notes 10-11

An omission to state it<sup>2</sup> or an incorrect statement thereof<sup>3</sup> in the proclamation is a material irregularity within the meaning of Rule 90

The term 'part of an estate' in the rule means an *aliquot* part of an estate<sup>4</sup>

**11. Encumbrances to which property is liable.** — The proclamation of sale should specify, as fairly and accurately as possible, the encumbrances to which the property to be sold is liable<sup>1</sup> The amount due on the encumbrances notified should also be mentioned<sup>2</sup> The fact that any of the alleged mortgages is admitted or disputed may also be stated<sup>3</sup> But the decree holder is not required to inspect and peruse all the mortgage documents mentioned in the encumbrance certificate and notify any specially onerous conditions that may be included therein such as that the property cannot be redeemed without paying off mortgages on *other* properties of the debtor<sup>4</sup>

It is competent to the encumbrancer himself to apply to the Court under this rule praying that his encumbrance should be notified in the sale proclamation<sup>5</sup> But he is not bound to do so and the mere fact that his encumbrance is not mentioned in the sale proclamation and that he is present at the time of the sale but does not warn intending bidders about his encumbrance will not debar him from enforcing his encumbrance<sup>6</sup> A prior mortgagee who has been impleaded as a party to the suit on the pious mortgage in which the issue as to his priority was abandoned by him is not precluded from claiming under this rule that his mortgage should be notified in the sale proclamation<sup>7</sup>

The rule authorizes the Court to notify the alleged encumbrances on the property It does not empower it to order that the sale should be subject to the

{ 81 } 5 Bom 2 (5)  
{ See also { 81 } 5 Bom 614 (618) (Sale under money decree for mortgage debt) }

Note 10

{ 98 } 21 Mad 51 (58)  
{ 76 } 3 Ind App 230 (239) (PC)  
{ 15 } AIR 1915 Mad 98J (991) 21 Ind Cas 289

was one charge—Material irregularity }  
{ 36 } 63 Cal 621 (624) 164 Ind Cas 461 (462)  
(Arrars of rates are under the Calcutta Municipal Act a statutory charge on the property and therefore must be stated in the sale proclamation )  
{ 16 } AIR 1918 Oudh 169 (172 173)  
{ See also { 05 } 9 Cal WN 300n (300n) (Clause (c) of this Section covers cases of pious as well as

to

4 { 73 } 111 Suth W R 434 (436)  
Note 11  
1 { 03 } 30 Cal 599 (606 607) (FB)  
{ 18 } AIR 1918 Bom 59 (63) (Fact that property is to be sold subject to mortgage should be distinctly stated )  
{ 32 } AIR 1934 Nag 18 (20) 27 Nag L R 339  
(Fact that the property is in possession of a Mahomedan widow for her dower right and is sold subject to it should be mentioned in the

also  
subject to mortgage—Amount to be carefully stated )  
{ 87 } 10 Mad 57 (62) (Incorrect statement of amount due is material irregularity )  
{ See however { 34 } AIR 1934 Mad 260 (262) (Reasonable particulars of encumbrances given —Exact amount need not be given )  
3 { 19 } AIR 1919 Upp Bar 18 (19) 3 Upp Bur

two charges over property while in fact there

O. 21 R. 66  
Notes 11-13

An attachment is not an incumbrance within the meaning of this rule and hence need not be notified in the sale proclamation<sup>2</sup>

**12. Amount to be recovered.**—The amount for the recovery of which the sale is ordered should be entered in the proclamation of sale. The amount so entered should not be one exceeding that granted by the decree. Thus, where the decree does not grant interest, the proclamation of sale should not include it<sup>1</sup>. Where the decree awards future interest, the interest should be calculated up to the date fixed for the sale<sup>2</sup>. The fact that in the application for execution under O 21 R 11 (2) *arte* interest is calculated only up to the date of application is no bar to the interest being calculated in the sale proclamation up to the date fixed for sale<sup>3</sup>.

Where, at an execution sale, the decree holder himself purchases the property and is placed in possession, and the sale is subsequently set aside and a fresh proclamation of sale ordered, it has been held that the means profits which the judgment debtor is entitled to recover from the decree holder for the period of his possession may be deducted from the decretal amount entered in the sale proclamation and that the matter is one to be decided in execution proceedings.<sup>4</sup> (Vide Section 144 Note 34 *ante*)

When a sale is adjourned under Rule 69 *infra*, and a fresh proclamation of sale is waived by the judgment debtor, the sale on the adjourned date for the amount entered in the original proclamation is not irregular, although the decree was partly satisfied when the adjournment was obtained. The reason is that where a sale is adjourned and the judgment debtor waives a fresh proclamation, the amount due on the date to which the sale is adjourned is never shown in the proclamation<sup>5</sup>.

An incorrect statement in the sale proclamation as to the amount due under the decree does not affect the jurisdiction of the Court to sell the property and the sale held under a proclamation containing such incorrect statement is not *illegal*<sup>6</sup>.

But when objection is taken to the correctness of the amount entered in the sale proclamation, the sale should not be held before the objection is disposed of<sup>7</sup>.

**13 Everything which the Court considers material, etc.**—Clause (a) — This clause does not mean that the Court is to give a detailed account of all matters connected with the property<sup>1</sup>. Thus, it has been held that it is not necessary to specify the income from the property ordered to be sold<sup>2</sup>. But it is a material circumstance for the bidders to know that the property to be sold is the subject matter of a pending suit by a defeated claimant<sup>3</sup>. For other instances, see the undermentioned cases.<sup>4</sup>

statement creates no estoppel against the judgment creditor unless the judgment-debtor is prejudiced.)

7 (23) AIR 1923 111 503 (504)

Note 13

1 (99) 1899 Paa Re No 30 p 133

2 (29) AIR 1928 Lah 918 (918)

subsequently deny it)

28 (37) AIR 1937 Pat 50 (51-52)

Note 12

1 (78) 3 Cal 602 (610) 5 Ind App 78 (P C)

2. (32) AIR 1932 Cal 555 (557) (If the sale is adjourned further interest up to the date fixed again can also be realized at the time of the sale)

3 (32) AIR 1932 Cal 555 (557)

4 (14) AIR 1914 Low Bur 178 (179)

5 (29) AIR 1928 Pat 615 (621) 8 Pat 122

6 (72) AIR 1922 Cal 321 (327) 49 Cal 45

[See also (29) AIR 1929 Pat 615 (621) 8 Pat 122]

(11) 12 Ind Cas 97 (37) (Mad) (Such incorrect

erty is held by occupancy tenure)  
(32) AIR 1932 Nag 18 (90) 27 Nag L R 353

Where a landlord brings to sale the holding of his tenant in execution of his decree against the tenant, his failure to specify the *ordinary incidents* of the tenure will not estop him from claiming to enforce them against the auction-purchaser, but he will be estopped from enforcing any *unusual incidents* of the tenure, unless he has notified them in the sale proclamation.<sup>5</sup> The reason is that, in the former case the auction-purchaser may be presumed to have notice of the incidents, while in the latter case he cannot be held to have such notice. See Note 11 above

O. 21 R. 66  
Notes 13-14

**14. Value of the property.** — There is a conflict of decisions as to whether under this rule a Court is under a duty to state its own estimate of the value of the property to be sold in the sale proclamation. The High Courts of Madras<sup>1</sup> and Allahabad<sup>2</sup> have held that the Court is under no such obligation. On the other hand, it has been held by the High Courts of Patna,<sup>3</sup> Calcutta<sup>4</sup> and Rangoon<sup>5</sup> and the Chief Court of Lower Burma<sup>6</sup> that it is the duty of the Court to enter in the sale

(Widow's right to possession of property for dower debt to be stated)

(1900) 5 Cal W N 497 (502) (Sale of tenure — Arrears of rent should be stated)

(1920) A (Sale of father's minor may be notified)

(1909) 12 Suth W R 79 (79) (The fact that the property is under another attachment and is liable to be sold in satisfaction of another decree may be mentioned)

(38) 42 Cal W N 661 (663) (Sale of mining rights — Boundaries of the area stated but not the extent of the area and the nature of coal deposits — No sufficient description)

(37) AIR 1937 Nag 140 (143) (Decree-holder should specify claim of third party in possession of the property to be sold)

(1938) AIR 1938 Mad 720 (720) (It is incumbent on the Court to see that all the particulars required under O. 21 R. 66 are given properly, so that an intending bidder may know exactly what he is going in for)

(32) AIR 1932 Bom 210 (212) (Undivided share of a member of a joint family attached during partition proceedings and ordered to be sold — Subsequently final decree for partition passed — Court must take notice of partition and proclaim for sale ascertained share of the member)

(80) 4 Bom 323 (326) (Attachment of debt due to judgment debtor — Court receiving notice that the debt is discharged — Court should hold inquiry as to existence of debt)

*Unnecessary particulars*

(25) AIR 1925 Oudh 150 (150) (Plan of property not necessary)

(1865) 2 Suth W R 60 (61) (Sale of decrees — Omission to mention amount decreed)

#### Note 14

1. (1928) AIR 1928 Mad 503 (504) 51 Mad 655

(1927) AIR 1927 Mad 1009 (1009)

(See also (1927) AIR 1927 Mad 943 (943) (Court considering report of certain persons as sufficient commits no error))

2. (32) AIR 1932 All 664 (664)

3. (1917) AIR 1917 Pat 381 (382) 2 Pat L Jour 120 (1 B)

(1919) AIR 1919 Pat 373 (374) 4 Pat L Jour 37. (No valuation other than that fixed by Court should be inserted in proclamation)

(23) AIR 1923 Pat 445 (446) (Do)

(See also (1918) AIR 1918 Pat 536 (536) 8 Pat L Jour 580 (Direction that value be put at twenty times the revenue is not proper))

4. (1932) AIR 1932 Cal 141 (142)

(1933) AIR 1933 Cal 511 (513) 60 Cal 581

(1934) AIR 1934 Cal 205 (207) (Court should settle value of property sought to be sold as accurately as possible from materials available on

[But see (1904) 31 Cal 922 (926) (Court is not required to make an investigation into the question of the value of the property, to record evidence and to come to a decision on the material irregularity in the publication of the sale)]

6. (14) AIR 1914 Low Bur 178 (179) (Omission to state value is sufficient reason to stay sale)

**O.21 R.68**  
**Nota 14**

proclamation its own estimate of the value of the property. The Bombay High Court<sup>7</sup> has held in a recent decision that it is not necessary in every case to value the property to be sold and to state the value in the sale proclamation but the Court may, if it thinks fit do so. But in the undermentioned case<sup>8</sup> it was held by the same High Court that the Court is bound to hold an inquiry as to the value of the property and state the value in the sale proclamation. Opinion in the Nagpur Judicial Commissioner's Court is divided.<sup>9</sup> Though as seen above, the Calcutta High Court holds that it is the duty of the Court to enter in the sale proclamation its own valuation of the property to be sold, it has also been held by that Court that in *exceptional cases* the Court will be justified in not attempting to give a valuation of its own and in confining itself to stating the values given by the parties.<sup>10</sup> In any view, the omission of the Court to give an estimate of value is a mere irregularity and does not by itself vitiate the sale.<sup>11</sup>

Under the rule as amended by the High Courts of Calcutta, Lahore, Madras, Nagpur, N. W. F. Province and Patna the Court is not bound to give its own estimate of the value of the property, but is only required to state the value given by the parties (See Local Amendments). In view of this the decisions of the High Courts of Calcutta and Patna and the Judicial Commissioner's Court of Nagpur passed before the above amendments holding that the Court was under a duty to state its own estimate of the value of the property should be treated as no longer law.

An undervaluation in a sale proclamation which is calculated to mislead possible bidders and prevent them from offering adequate prices or from bidding at all is a material irregularity within the meaning of Rule 90 *infra*,<sup>12</sup> but the judgment debtor may by his conduct be estopped from raising this objection.<sup>13</sup>

The Court need not make an elaborate enquiry before fixing the value of the property.<sup>14</sup> The fact that the highest bid offered at the auction is far below the value

7 (89) AIR 1939 Bom 182 (189) I L R (1939) Bom 859

8 (35) AIR 1935 Bom 331 (332)

9 (30) AIR 1930 Nag 191 (192 193) (Court should state its valuation)

(28) AIR 1928 Nag 231 (282) (Court's valuation not necessary)

10 (32) AIR 1932 Cal 576 (578 579)

(33) AIR 1933 Cal 511 (513) CO Cal 581 (Exceptional circumstances to be pointed out by Court in its order)

(31) AIR 1931 Cal 520 (520) 58 Cal 577

(24) AIR 1924 Cal 589 (597)

(See also (26) AIR 1926 Cal 610 (611))

11 (31) AIR 1931 Cal 490 (491) 58 Cal 812 (But in a particular case omission may amount to material irregularity)

(30) AIR 1930 Lah 685 (686 687)

(22) AIR 1922 Cal 93 (94) (If it has a material effect upon the number of bidders and upon price it may amount to material irregularity)

12 (93) 20 All 417 (417 418) 25 Ind App 146 (PC)

(33) AIR 1933 All 546 (540) 55 All 519

(29) AIR 1929 Cal 818 (819) 57 Cal 67

(17) AIR 1917 Lat 72 (17 74)

(14) AIR 1919 Cal 350 (351)

(18) AIR 1918 Pat 766 (267)

(17) AIR 1917 Cal 461 (467)

(24) AIR 1924 Mad 767 (768)

(1900) 23 Mad 568 (570)

(13) 19 Mad Cas 296 (293) 40 Cal 635 40 Ind App 140 (PC)

(12) 13 Ind Cas 337 (341) (Cal)

(11) 10 Ind Cas 475 (4 6) (Cal)

(11) 9 Ind Cas 693 (701) (Cal)

(23) AIR 1923 Cal 328 (331) (But sale will not be set aside unless substantial loss is shown to have been caused by the undervaluation)

(-0) AIR 19 Cal 518 (519) (Do)

(39) AIR 1933 Mad 720 (720)

(34) AIR 1934 Pat 540 (541) (Where inclusion of two valuations in sale proclamation does not vitiate sale unless substantial loss is proved)

(35) AIR 1935 Mad 409 (402)

14 (32) AIR 1932 Cal 141 (147) (But the value of the property must be stated as fairly and accurately as possible)

stated in the proclamation is no evidence of fraud or material irregularity in publishing or conducting the sale<sup>15</sup> Where the highest bid offered at the auction falls below the value stated in the proclamation, the Court has no power to dismiss the execution petition<sup>16</sup> In fixing the value of the property, *abuse* (illegal cesses) should not be taken into consideration<sup>17</sup> A right to have a lease of a mill for 20 years should not be valued by capitalising the annual rent for 20 years<sup>18</sup> It is not a correct method of valuing heavily encumbered properties by taking their value in an unencumbered state and simply deducting from them the amount of the encumbrances<sup>19</sup>

It is the duty of the Court to group the lands (to be sold in execution) in small and convenient plots and offer them for sale so that it may be possible for men of ordinary means, especially the ryots in the locality, to purchase them at a fair value<sup>20</sup>

**15. Effect of an order under this Rule.** — There is a material difference between an order under Rule 63 and an order under the present rule In the former case, if the party affected does not sue within 13 months to set it aside, it becomes conclusive against the person against whom it is made In the latter case, it has no such effect<sup>1</sup>

Where property is sold to a *bona fide* third party purchaser in execution of a decree in force at the time, a subsequent reversal, variation or amendment of the decree does not affect the validity of the sale<sup>2</sup>

Where the property of a stranger is attached and sold, his failure to object thereto does not affect his rights inasmuch as, though the Code enables third parties to come in and object they are not bound to do so<sup>3</sup> See also Note 11 above

**16 Non-compliance with the provisions of this Rule.** — Non compliance with the provisions of this rule renders a court sale liable to be set aside on the ground of material irregularity<sup>4</sup> If objection is raised by the judgment debtor to anything stated in the sale proclamation, it is irregular for the Court to order the sale to be held

(17) AIR 1917 Pat 381 (382) 2 Pat L Jour 130 (FB)

Note 16

{See also (39) AIR 1939 Cal 369 (375) I L R (1939) 1 Cal 580 (Still value inserted in sale proclamation is an index of the value of such

1 (06) 3 Low Bur Rul 275 (277)  
(32) AIR 1932 All 55 (57) (Want of verified statement, etc)  
(28) AIR 1933 Lah 213 (216) (Omission to state time and place)  
(02) 29 Cal 73 (99) (FB) (Misdescription of property is material irregularity)  
(25) AIR 1925 All 459 (462, 464) 47 All 479 (Do)  
(37) AIR 1937 All 407 (409) (Omission to issue

1 Pat  
a made

15 (22) AIR 1922 Pat 550 (551, 552) 1 Pat 214

16 (26) AIR 1926 Pat 140 (141)

{26) AIR 1926 Pat 145 (146) (Auction purchaser cannot be compelled to bid higher than or up to the proclaimed price)

17 (02) 7 Cal W N 439 (439 440)

18 (34) AIR 1934 Lah 146 (146)

19 (35) AIR 1935 Cal 614 (618)

20 (39) AIR 1938 Mad 720 (720)

Note 15

as to proper valuation See also Note 14 to  
O 21 R 90)

rule is not conclusive)

2. (30) AIR 1930 All 578 (579)

3. (85) 9 Bom 86 (91, 93)

**21 R 66**  
**Note 16**

pending disposal of the objection<sup>2</sup> But the irregularity due to the non compliance with the provisions of this rule can be waived and the person who has waived the irregularity is estopped from subsequently raising any objection in respect thereof<sup>3</sup> Thus a judgment debtor who in spite of a notice under this rule or in spite of knowledge of the contents of a sale proclamation does not object at the proper time cannot subsequently raise the objection<sup>4</sup> But the judgment debtor is not estopped where he was not aware of the facts to which he was bound to object and where his failure to do so was due to a mistake for which he could not be held to blame<sup>5</sup> A person may be held to waive irregularities in the sale proclamation by bidding at the sale<sup>6</sup> But where the objection is to the *want of jurisdiction* to sell there can be no estoppel by waiver<sup>7</sup> Thus a failure to object on the ground that notice under O 21

2 (23) AIR 1923 All 503 (504) (Objection to amount stated in proclamation)

(18) AIR 1918 Cal 490 (490) (The proclamation may be issued before disposing of objections filed by judgment debtor)

[See (38) AIR 1938 Lah 65 (68) (Objection of judgment debtor dismissed on ground that he

afterwards raise objection that there was no personal decree under which property could be sold)

(36) AIR 1936 Bom 315 (317)

[See also (76) 3 Ind App 280 (240) (PC) (Petition for postponement of sale with a statement that the order of attachment and sale proclamation may be maintained is waiver)

(81) 7 Cal 613 (615) (Merely applying for postponement of sale is no waiver)

(34) AIR 1934 Mad 260 (261) (Property described as undivided share—Subsequent division among judgment debtor and his brothers—Judgment-debtor not applying for amendment of sale proclamation cannot object)

3

(

4 (59) 12 Mad 19 (25) 15 Ind App 171 (PC) (Objection to description of property—Following

any irregularities in the attachment)

(39) AIR 1939 Bom 526 (528) (Failure of judgment debtor to object that he was an agriculturist and that proceedings should be transferred to Collector—Judgment debtor cannot subsequently raise objection)

[But see (27) AIR 1927 Rang 84 (85) (No estoppel in case of omission to state place and time of sale)]

(28) AIR 1928 Cal 328 (331) (Objection as to valuation)

(25) AIR 1925 Cal 552 (555) (Do)

(24) AIR 1924 Pat 111 (112) 2 Pat 916 (Do)

(23) AIR 1923 Pat 134 (135) (Objection to notification of encumbrances)

(30) AIR 1930 Lah 685 (686) (Objection as to want of application under R 66 (3))

(12) 16 Ind Cas 235 (236) (Cal)

(29) AIR 1929 All 704 (704)

(30) AIR 1935 Cal 614 (618) (Object on after sale

obedience to the notice served upon him under R 66 for settling the terms of the proclamation)

5 (15) AIR 1915 Mad 989 (992 993) 33 Mad 387

[See also (03) 8 Cal W N 257 (263) (Case under

not comprised in mortgage are included is not maintainable)

(36) AIR 1936 Pat 663 (570) 15 Pat 345 (Sale of personal properties of mortgagor judgment-debtor—Judgment debtor getting adjournment of sale waiving fresh proclamation—He cannot

7 (31) AIR 1931 Oudh 393 (400) (Ancestral property—Sale of—Civil Court has no jurisdiction—Want of objection cannot operate as estoppel)

[See however (06) 28 All 273 (276) (Court deciding that property is not ancestral—Decision cannot be questioned subsequently)]



O. 21 R. 66  
Note 20

- (b) An order as to the sale of the properties in particular lots<sup>4</sup>
- (c) An order as to service of notice prescribed by the rule<sup>5</sup>
- (d) An order for the entry of certain encumbrances in the sale proclamation<sup>6</sup>
- (e) An order fixing the place of sale<sup>7</sup>
- (f) An order fixing the upset price<sup>8</sup>

For other instances, see the undermentioned cases<sup>9</sup>

But where the Court in addition to deciding matters which are purely administrative in nature such as fixing the upset price and the details of the sale proclamation decides questions affecting the *rights of the parties* the order will be a judicial order and will also amount to a determination of a question within Section 47 and an appeal with lie from that order<sup>10</sup>. Thus where there are several judgment debtors under a mortgage decree an order that the properties of some of them should be sold first and the properties of the others should be sold only in the case of a deficiency occurring on such a sale may be appealable as a decree as it determines the rights of the co judgment debtors *inter se*<sup>11</sup>. Similarly, an order relating to the boundaries or the area of the property to be sold comes within Section 47 and is appealable as a decree<sup>12</sup>. It has been held that an order as to whether a sale is to be held by the Court itself or by the Collector on the ground of the judgment debtor

- { 28 } AIR 1928 Bom 245 (246 247) 52 Bom 444
- { 26 } AIR 1926 Cal 610 (611)
- { 19 } AIR 1911 Cal 1094 (1095)
- { 14 } AIR 1914 Cal 488 (489) (Order accepting valuation of property)
- { 11 } 10 Ind Cas 371 (371 3+2) (Cal)
- { 11 } 11 Ind Cas 750 (760) (Cal)
- { 12 } 17 Ind Cas 88 (89) (Cal)
- { 04 } 27 Mad 259 (261) (F B)
- { 29 } AIR 1929 Mad 506 (508)
- { 24 } AIR 1924 Mad 767 (768)
- { 18 } AIR 1918 Mad 1264 (1264) (Order fixing

- { 29 } AIR 1929 Lah 815 (816)
- 5 { 26 } AIR 1926 Cal 1184 (1184)
- { 34 } AIR 1934 Cal 761 (762)
- 6 { 04 } 1894 Bom P J 48
- [Contra { 86 } 1886 All W N 167 (168) ]
- 7 { 04 } 27 Mad 259 (261) (F B)
- 8 { 23 } AIR 1923 Mad 619 (6 0 621)
- { 28 } AIR 1928 Mad 1169 (1170)
- { 18 } AIR 1918 Mad 1264 (1264)
- { 29 } AIR 1929 Mad 506 (508)
- 9 { 04 } 27 Mad 259 (261) (F B) (Order fixing the amount for which the sale is to be held—No appeal lies)
- { 21 } AIR 1921 Cal 629 (630 631) (Order directing proclamation to issue pending enquiry into judgment debtor's objections—No appeal lies)
- { 18 } AIR 1918 Cal 601 (601) (Refusal to enter that the judgment debtor had accepted the

re open valuation )

- { 80 } AIR 1930 Oudh 81 (81 82) 5 Luck 481 (Order rejecting objection to mis statement of value of property)
- { 34 } AIR 1934 Cal 761 (762) (Order disallowing objection that valuation was too low)
- { 89 } AIR 1939 F C 74 (80) (FC)
- { 37 } AIR 1939 Bom 182 (183) ILR (1939) Bom 389
- { 37 } AIR 1937 Rang 157 (158)

The following decisions to the contrary are not good law

- { 16 } AIR 1916 All 287 (289)
- { 10 } 11 Ind Cas 180 (181) (Cal)
- { 03 } 8 Cal W N 257 (262)
- { 03 } 30 Cal 617 (618)
- { 19 } AIR 1919 Lah 233 (234)
- [See { 25 } AIR 1925 Cal 318 (319) ]
- 4 { 04 } 27 Mad 259 (261) (F B)
- { 32 } AIR 1932 All 186 (187)
- { 29 } AIR 1929 Mad 506 (508)
- { 24 } AIR 1924 Mad 527 (529)

- { 38 } AIR 1933 Lah 333 (334) (Area)



being an agriculturist in a *judicial* order which is open to appeal<sup>11</sup> It has been held in some cases that irregularities in *drawing up* the sale proclamation are not irregularities in *publishing or conducting* the sale within O 21 R 90 and hence, an application by a judgment debtor to set aside an execution sale on the ground of such irregularities comes within Section 17 and not under O 21 R 90, and that therefore an order determining such an application is one under Section 17 and appealable as a decree<sup>14</sup>

O. 21 R. 68  
Notes 20-22

A question of waiver of irregularities in the sale proclamation by the judgment debtor on which the trial Court had found against him but which was not raised before the High Court on appeal cannot be raised by him before the Privy Council<sup>15</sup> (See Notes to Order 11 Rules 1 and 2)

**21. Revision** — It has been held by the High Court of Patna<sup>1</sup> that the action of the Court under this rule is a *judicial* one and hence subject to the revisional jurisdiction of the High Court It was further held by that Court that the High Court could interfere under Section 107 of the Government of India Act of 1915 even if the action of the lower Court in such cases be held to be *administrative*<sup>2</sup> But the High Court will not ordinarily interfere in revision in a discretionary matter<sup>3</sup> or where the applicant for revision has not been in any way damaged by the order complained against<sup>4</sup>

**22 Applicability of the rule of res judicata to proceedings under this Rule** — The principle of *res judicata* applies to execution proceedings<sup>1</sup> (See Section 11, Note 21) The question whether the principle applies to proceedings under this rule depends on whether the proceedings are administrative or judicial for unless they are held to be judicial the principle of *res judicata* cannot apply to them (See Section 11, Note 100) The answer to this question depends on the particular order in question in each case In so far as an order merely settles the details to be entered in a sale proclamation the proceeding is only administrative or ministerial and such an order cannot operate as *res judicata*<sup>2</sup> nor is such an order a *final* order so as to operate as *res judicata*<sup>3</sup> But if in proceedings under the rule a final order affecting the rights of the parties is passed such an order will be a final order of a judicial character and as such will operate as *res judicata*<sup>4</sup>

13 (89) AIR 1937 Bom 526 (528)

2 (24) AIR 1924 All 450 (480) (Order merely

appeal lies)

15 (07) 34 Cal 709 (710) 34 Ind App 164 (PC)  
(Question being one of fact)

Note 11

1 (17) AIR 1917 Pat 331 (381 382) 2 Pat L Jour 130 (FB)

[See also (23) AIR 1923 Pat 102 (102) (Fixing valuation before day fixed for hearing parties on the question is revivable)]

[Compare (16) AIR 1916 Mad 632 (632) (Under valuation is not material irregularity within Section 115)]

2 (17) AIR 1917 Pat 331 (382) 2 Pat L Jour 130 (FB)

3 (32) AIR 1932 Cal 576 (578 579)

4 (06) 3 Low Bar Rel 275 (278)

Note 22

1 (22) AIR 1922 All 27 (28) 44 All 350

3 (25) AIR 1925 Pat 500 (502) 4 Pat 731 (FB)  
(Order refusing to notify a lease — No *res judicata*)

[See also (89) AIR 1939 All 657 (659) (Mort

4 (24) AIR 1924 Pat 698 (628 629) (Decision that applicant was *pro forma* defendant and as such was not entitled to notice under Rule 66 operates as *res judicata*)

(33) AIR 1933 All 192 (195) (Property of judgment debtor stated by decree-holder to be ancestral and so found by Collector — Execution transferred to Collector — Contention by decree holder that property not ancestral — *Res judicata*)

**O. 21 R. 66**  
**Note 22**

The principle of *constructive res judicata* (Section 11, Explanation 4) also applies to execution proceedings<sup>6</sup> (See Section 11 Note 23) But it must be shown that the party sought to be barred has had clear notice of the nature of the claim made against him<sup>7</sup> (See Section 11 Note 23) Thus, it has been held by a Full Bench of the Madras High Court<sup>8</sup> that where a notice is for the settlement of the terms of a sale proclamation, the judgment debtor's legal representative cannot be deemed, by absenting himself to have attended and raised the question as to whether the property was that of the judgment debtor or belonged to himself. Further, where the last execution case was dismissed for default, the judgment debtor cannot be held to be barred by *constructive res judicata* from raising a contention which he failed to raise in such execution case<sup>9</sup>

The principle of *res judicata* will not apply if the Court had *no jurisdiction* to pass the order in question, as, for instance, where the order was by a Civil Court for the sale of ancestral property of the judgment debtor, which, under the law, could be sold only by the Collector<sup>10</sup>. But, where in such a case the judgment debtor to whom a notice is sent under this rule fails to appear and the Court upon the materials before it decides that the property is non ancestral and orders its sale, the judgment debtor cannot subsequently raise the objection as to jurisdiction,<sup>11</sup> for a decision as to jurisdiction is as much *res judicata* as a decision on any other point (See Section 11 Note 73)

A decision in the course of execution proceedings operates as *res judicata* even in a subsequent suit between the parties<sup>12</sup>

The principle of Section 11, Explanation 5 does not apply so as to preclude a Court executing a mortgage decree from directing that the properties should be sold in a particular order, merely because the Court trying the suit was asked to embody an order to this effect in its decree but did not do so<sup>13</sup>. The reason is it is conceived, that in such a case, the decree does not decide that the properties should be sold in any particular order and the executing Court has in the exercise of its power to sell the mortgaged property or a sufficient portion thereof," (see O 34 Rr 4 and 5) a discretion to direct the sale of the properties in any order it thinks fit (Of also Section 11, Note 125)

A decree holder ought not to be allowed to take up inconsistent positions to the prejudice of the judgment debtor. Thus, where in execution of a mortgage decree the decree holder has caused to be sold properties not comprised in the mortgage and has all along been acting on the basis that the properties sold were comprised in the mortgage, he cannot be allowed to contend that they were not comprised in the mortgage and to bring to sale the properties that were comprised in the mortgage<sup>14</sup>

7. (25) AIR 1925 Pat 589 (590)

8. (31) AIR 1931 Oudh 393 (400)

9. (66) 28 All 273 (276)

10. Section 11, Note 23

5. (22) AIR 1922 All 27 (28) 44 All 3-0

(30) AIR 1930 All 1016 (1018) 58 All 360  
(Objection by judgment debtor that he was agriculturist and that the property (house) was not liable to attachment and sale can be raised even after sale)]

[But see (25) AIR 1925 Nag 320 (320) 21 Nag L R 23]]

claimation]]

12. (69) 3 Ind Cas 22 (23) (All)

**23. Judgment-debtor dying pending execution.** — Where a decree-holder attaches the undivided interest of his judgment-debtor in (Hindu) joint family property, the latter's death before sale does not affect the decree-holder's right to proceed against his interest in the property in the hands of the surviving coparceners<sup>1</sup> (See also Section 64 Note 10) Where a judgment debtor dies before the proclamation of sale is drawn up and the proclamation is drawn up without notice to his legal representatives, the sale held on the basis of such proclamation is void<sup>2</sup> (See Notes under O 21 R 22) But when a sale proclamation has been legally drawn up after notice to the judgment debtors, and one of the judgment-debtors dies thereafter, it is not necessary that a fresh proclamation should be drawn up after notice to the legal representatives of the deceased judgment debtor<sup>3</sup>

O. 21 R. 66  
Notes 23-24

**24. Limitation—Step-in-aid of execution.**—An application for a proclamation of sale in respect of property under attachment is an application to take a step-in-aid of execution<sup>1</sup> See also the undermentioned cases<sup>2</sup>

**R. 67. [S. 289.]** (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

Mode of making  
proclamation.

O. 21 R. 67

(2) Where the Court so directs, such proclamation shall also be published in the *Official Gazette* or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

[1877, S. 289; 1859, S. 249.]

<sup>a</sup> Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "local Official Gazette"

**Note 23**

1. ('85) 7 All 731 (732) (Following 5 Cal 148 (PC))
2. ('28) AIR 1928 All 74 (76) 49 All 830
3. ('33) AIR 1933 All 654 (655)

**Note 24**

**execution)**

- (90) 17 Cal 53 (57) (Application for sale is application to take step in aid of execution)
- (31) 15 Bom 405 (407) (Do)
- (96) 23 Cal 374 (387) (Application paying process fees for service of a sale proclamation is

plication is time barred)

O. 21 R. 67  
Notes 1a-4

## MADRAS

## Local Amendments

Add the following as sub rule (4)

"(4) Unless the Court so directs it shall not be necessary to send a copy of the proclamation to the judgment debtor

## PATNA

Add the following words at the end of sub rule (1) after deleting the full stop at the end of the sub rule

"and may, if the Court so directs on the application of the decree holder, be proclaimed and published simultaneously with the order of attachment "

## Synopsis

## 1a Object of the Rule

## 1 Mode of making the proclamation

## 2 Publication in the gazette or newspaper

## 3 Division of property into lots — Sub-rule (3)

## 4 Non compliance with the Rule

**1a Object of the Rule.**—The provisions of Rules 67 and 68 have been designed for the protection of judgment debtors and for the purpose of ensuring that the properties of such persons shall not be put to sale unless due publicity is given to the fact that a sale is to be held and a proper opportunity is afforded to bidders to attend the sale after proper notice has been given <sup>1</sup>

**1. Mode of making the proclamation.** — The proclamation of sale should be made and published in the manner provided for by sub rule (2) of Rule 54 See Notes to Rule 54 and the undermentioned cases <sup>1</sup>

This rule applies to proceedings under the Orissa Tenancy Act, II of 1913 (see Sections 217 and 219) but not to proceedings under the Bengal Tenancy Act (VIII of 1885), (see Section 163, sub section (3) as amended by Act IV of 1928 Section 102 clause (c)

**2. Publication in the gazette or newspaper.** — The Court has a discretion under this rule to direct the publication either in the gazette or in a local newspaper or in both <sup>1</sup> The want of correspondence between the advertisement in the gazette, and the schedule of the attached property in the sale proclamation, constitutes an irregularity which might be cured if the sale was regular in other respects <sup>2</sup>

**3. Division of property into lots—Sub rule (3).**—Sub rule (3) is new and dispenses with the necessity of making separate proclamations for each separate lot where the property is divided into separate lots for being sold <sup>1</sup> If, however, the Court thinks that proper notice cannot otherwise be given, as for instance, where the lots are situate at such a distance from each other that there is no certainty of communication to persons interested in one of such lots of what is publicly done in the other, the Court can direct the issue of a separate proclamation for each lot <sup>2</sup>

**4. Non-compliance with the Rule.**—As already noticed under Rule 54 and Notes thereunder an omission to comply with the requirements of sub rule (2) thereof

## Order 21 Rule 67 — Note 1a

1. (38) AIR 1935 Cal 693 (700)

## Note 1

1. (81) 7 Cal 466 (463) (Proclamation to be affixed in some conspicuous part of the property)

(81) 7 Cal 34 (41) (Do)

## Note 2

1. (19) AIR 1919 Lah 60 (261)

(97) 1 Cal W N clv (clvi)

(68) 10 Suth W R 354 (354) (Case under the old

## Code)

[

App 38 (PC)

## Note 3

1. (30) AIR 1930 Lah 685 (637)

(88) 12 Bom 368 (370)

2 (88) 12 Bom 369 (370)

constitutes a *material irregularity* which would be a ground for setting aside the sale under Rule 90 provided substantial injury is also proved.<sup>1</sup> The High Court of Madras has held in the undermentioned case<sup>2</sup> that where the proclamation of sale was not published in the village where the lands were situate and the process server intimated at the village that the sale would be held at a place and by an officer different from those fixed in the proclamation the procedure was not merely irregular but *illegal*. See also Rule 90 *infra*.

O 21 R 67  
Note 4

## R. 68. [S 290] Sale in the case of property of the kind

O 21 R 68

*Time of sale* described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court house of the Judge ordering the sale

[1877, S 290]

### Local Amendments

#### ALLAHABAD

*For the words fifteen days read the words seven days*

#### LAHORE

*For the word thirty read fifteen and for the word fifteen read one week*

#### N W F P

*For the word thirty read fifteen and for the word fifteen read seven*

#### ODISH

*For the words fifteen days read the words seven days*

### Synopsis

1 Time of sale | 2 Non compliance with the Rule

**1 Time of sale** — The rule provides that there should be an interval of thirty days in the case of immovable property and fifteen days in the case of moveable property between the date of sale and the date of affixing the copy of the proclamation in the court house. The fifteen days rule does not however apply to a sale of moveables subject to speedy and natural decay (see proviso to Rule 43). It is also open to the judgment debtor to consent to have the sale before the prescribed time. But such consent should be express and in writing.<sup>1</sup>

(08) 12 Cal W N 757 (760)

(11) 9 Ind Cas 698 (701) (Cal)

(01) 6 Cal W N 44 (46) (Publication of proclamation on half a mile away from the property)

(23) AIR 1923 Lah 61 (671) (Failure to affix)

nullity)

[See also (23) AIR 1923 Lah 213 (216) (Direct evidence to connect omission with loss neces-

(59) IN Suth W R 468 (489)

**O. 21 R. 68**  
**Notes 1-2**

Suppose a sale takes place after thirty days from the date on which a copy of the sale proclamation was affixed on the court house but before thirty days from the date on which a copy was affixed on the property to be sold (It will be noted that under Rule 67 read with Rule 54 *ante*, affixing on both the places is necessary) The question arises whether such a sale is in accordance with law On this question there was a conflict of decisions under the old Code<sup>2</sup> But, under the present Code, Rule 54 has been amended and it has been made clear that the affixing on the court house is to be *after* a copy of the sale proclamation has been affixed on the property to be sold Hence under the present Code, the sale must be held after thirty days not only from the affixing of a copy of the proclamation of sale on the court house but also from its being affixed on the property

See Sections 68 and 69 of the Rangoon Small Cause Courts Act VII of 1920, and Section 163 sub section (4) of the Bengal Tenancy Act for special provisions as to time of sale under the said Acts

**2. Non-compliance with the Rule** — Omission to comply with the requirement of this rule is a material irregularity<sup>1</sup> But this alone will not render the execution sale a nullity It will not be set aside unless substantial injury is proved to have resulted therefrom<sup>2</sup>

**O. 21 R. 69**

**R. 69. [S 291] (1)** The Court<sup>2</sup> may, in its discretion,

adjourn<sup>3</sup> any sale hereunder to a specified day and hour,<sup>7</sup> and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment :

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation<sup>8</sup> under rule 67 shall be made, unless the judgment-debtor consents to waive<sup>9</sup> it

(80) 5 Cal 253 (263) (Application by judgment debtor that a portion of the property may be sold is not consent)

2 (81) 7 Cal 34 (39 40) (Sale must be after thirty days from affixing notices on property)

(82) 4 All 300 (301) (Sale within thirty days from proclamation of sale on property — No material irregularity)

**Note 2**

1 (33) AIR 1923 Lih 186 (166) (Sale within thirty days)

2 (94) 21 Cal 66 (69 70) 20 Ind App 176 (PC)

(33) AIR 1923 Lah 186 (186) (Substantial injury proved — Sale set aside)

(39) AIR 1923 Cal 699 (701)

(23) AIR 1923 Pat 45 (48) 2 Pat 207

(24) AIR 1924 Nag 293 (294)

(82) 8 Cal 932 (933)

(81) 7 Cal 34 (40)

*The following cases before the decision of the Privy Council in 21 Cal 66 cannot be considered good law*

(85) 11 Cal 200 (207) (FB)

(87) 14 Cal 1 (8)

(90) 17 Cal 769 (782)

for setting

to a sale)

(80) 11 All 333 (338) (Broadhurst, J dissenting

— see page 245)

(80) 5 Cal 878 (891) (FB)

(3) Every sale shall be stopped<sup>10</sup> if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered<sup>11</sup> to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

[*Cf.* Rules 55 and 89.]

### Local Amendments

#### ALLAHABAD

*For* sub rule (2) substitute the following

"Where a sale has been once adjourned under sub rule (1), a fresh proclamation under Rule 67 shall be made, unless the judgment-debtor consents to waive it

Provided that where the adjournment is for a period not longer than 14 days from the date originally fixed for sale, no fresh proclamation shall be necessary

Provided also that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

#### BOMBAY

In sub-rule (2) "thirty days" shall be substituted for "seven days"

#### CALCUTTA

*Substitute* the words "one calendar month" for the words "seven days" in sub rule (2)

#### LAHORE

In sub-rule (2) "thirty days" shall be substituted for "seven days."

#### MADRAS

In sub rule (2) *for* the words "seven days" *substitute* the words "thirty days."

#### NAGPUR

In sub rule (2) *for* the words "seven days" *substitute* the words "fifteen days."

#### N.-W. F. P.

In sub-rule (2) *for* the word "seven" *substitute* the word "thirty" and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment debtor who has failed to attend in answer to a notice issued under Rule 66"

#### OUDH

In sub-rule (2) *for* the word "seven" read the word "fourteen", and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

#### PATNA

In sub rule (2) *for* the word "seven" read "fourteen" and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings."

#### RANGOON

In sub rule (2) *for* the words "seven days" the words "thirty days" shall be substituted.

### Synopsis

1. Legislative changes.

2. Court, meaning of.

3. "May, in its discretion, adjourn any sale."

3a. Who can apply for adjournment.

3b. Imposition of terms on adjournment.

4. Any sale

5. Adjournment of sale of mortgaged property. See Notes i and 11

6. Adjournment after partial sale.

7. Omission to adjourn the sale to a specified day and hour.

**O. 21 R. 68**  
**Notes 1-2**

Suppose a sale takes place after thirty days from the date on which a copy of the sale proclamation was affixed on the court house but before thirty days from the date on which a copy was affixed on the property to be sold (It will be noted that under Rule 67 read with Rule 54 *ante*, affixing on both the places is necessary) The question arises whether such a sale is in accordance with law. On this question there was a conflict of decisions under the old Code<sup>2</sup> But, under the present Code, Rule 54 has been amended and it has been made clear that the affixing on the court house is to be *after* a copy of the sale proclamation has been affixed on the property to be sold Hence, under the present Code, the sale must be held after thirty days not only from the affixing of a copy of the proclamation of sale on the court-house but also from its being affixed on the property

See Sections 68 and 69 of the Rangoon Small Cause Courts Act, VII of 1920, and Section 163, sub section (4) of the Bengal Tenancy Act for special provisions as to time of sale under the said Acts.

**2. Non-compliance with the Rule.** — Omission to comply with the requirement of this rule is a material irregularity.<sup>1</sup> But this alone will not render the execution sale nullity. It will not be set aside unless substantial injury is proved to have resulted therefrom<sup>2</sup>

**O. 21 R. 69**

**R. 69.** [S. 291.] (1) The Court<sup>2</sup> may, in its discretion, adjourn<sup>3</sup> any sale hereunder to a specified day and hour,<sup>7</sup> and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment :

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation<sup>8</sup> under rule 67 shall be made, unless the judgment-debtor consents to waive<sup>9</sup> it.

(80) 5 Cal 259 (263) (Application by judgment-debtor that a portion of the property may be sold is not consent)

2. (81) 7 Cal 34 (39, 40) (Sale must be after thirty days from affixing notice on property)  
(82) 4 All 300 (301) (Sale within thirty days from proclamation of sale on property — No material irregularity)

**Note 2**

1. (33) AIR 1933 Lah 186 (186) (Sale within thirty days)

2. (91) 21 Cal 66 (69, 70) 20 Ind App 176 (PC)  
(33) AIR 1933 Lah 186 (186) (Substantial injury proved — Sale set aside)

(81) 7 Cal 34 (40)

*The following cases before the decision of the Privy Council in 21 Cal 66 cannot be considered good law*

(85) 11 Cal 200 (203) (FB)

(87) 14 Cal 1 (8)

(90) 17 Cal 763 (782)

for setting

to a sale)

(89) 11 All 333 (339) (Brodhurst, J dissenting)

— See page 315 )

(80) 5 Cal 278 (281) (FB)



(3) Every sale shall be stopped<sup>10</sup> if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered<sup>11</sup> to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

[*Cf.* Rules 55 and 89.]

### Local Amendments

#### ALLAHABAD

*For* sub rule (2) *substitute* the following

"Where a sale has been once adjourned under sub-rule (1), a fresh proclamation under Rule 67 shall be made, unless the judgment debtor consents to waive it."

Provided that where the adjournment is for a period not longer than 14 days from the date originally fixed for sale, no fresh proclamation shall be necessary.

Provided also that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

#### BOMBAY

In sub-rule (2) "thirty days" shall be substituted for "seven days"

#### CALCUTTA

*Substitute* the words "one calendar month" for the words "seven days" in sub-rule (2)

#### LAHORE

In sub rule (2) "thirty days" shall be substituted for "seven days"

#### MADRAS

In sub rule (2) *for* the words "seven days" *substitute* the words "thirty days"

#### NAGPUR

In sub rule (2) *for* the words "seven days" *substitute* the words "fifteen days"

#### N.-W. F. P.

In sub-rule (2) *for* the word "seven" *substitute* the word "thirty" and *add* the following proviso.

"Provided that the Court may dispense with the consent of any judgment debtor who has failed to attend in answer to a notice issued under Rule 66"

#### QUDH

In sub-rule (2) *for* the word "seven" read the word "fourteen", and *add* the following proviso.

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

#### PATNA

In sub rule (2) *for* the word "seven" read "fourteen" and *add* the following proviso.

"Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings."

#### RANGOON

In sub rule (2) *for* the words "seven days" the words "thirty days" shall be substituted.

### Synopsis

1. Legislative changes.

2. Court, meaning of.

3. "May, in its discretion, adjourn any sale."

3a. Who can apply for adjournment.

3b. Imposition of terms on adjournment.

4. Any sale

7. (

O. 21 R. 69  
Notes 1-3

- |   |  |
|---|--|
| <p>8. Fresh proclamation, when necessary.<br/>9. Waiver of proclamation.<br/>10 Stoppage of sale on deposit of debt and costs.<br/>11. Who can tender the amount.</p> | <p>12 Sale on a date other than the one to which it is adjourned.<br/>13 Withdrawal of bid.<br/>14 Rateable distribution<br/>15 Limitation — Acknowledgment.</p> |
|---|--|

*Other Topics (miscellaneous)*

Appeal See Note 3      Proviso See Note 3

**1. Legislative changes. —**

- (1) The words "under this Chapter" have been omitted under the present rule. The effect of the omission is to make the rule applicable also to sales under mortgage decrees. See Note 4.
- (2) The words "other than a sale by the Collector" have also been omitted as a separate provision has been made in Rule 70, *infra*.

**2. Court, meaning of. —** The "Court" means the Court executing the decree and not a Court to which such Court is subordinate<sup>1</sup>.

**3. "May, in its discretion, adjourn any sale." —** Under this rule the Court may, in its discretion, adjourn a sale to a specified day<sup>1</sup>. No hard and fast rule can be laid down as to when the Court should grant an adjournment. It depends upon the circumstances of each case. See the undermentioned cases<sup>2</sup>.

The High Courts of Allahabad<sup>3</sup> (dissenting from earlier decisions<sup>4</sup>) and Madras<sup>5</sup> have held that an execution sale after it has been stayed by the Appellate Court and before the order of stay is communicated to the officer holding the sale is not a nullity and that it would, at the worst, be an irregularity which will not *per se* invalidate the sale without proof of substantial injury. The Calcutta High Court has held a contrary view in the undermentioned case,<sup>6</sup> dissenting from an earlier decision of the same Court.<sup>7</sup> According to the Lahore High Court, where an executing Court makes an order postponing the sale but the sale is effected before the order reaches the officer

**Order 21 Rule 69 — Note 2**

- 1 (16) AIR 1916 Pat 397 (338)  
(09) 4 Ind Cas 373 (373) (Cal)  
(73) 5 N W P H C R 177 (177)  
(78) 1 Cal L Rep 534 (535)

**Note 3**

- 1 (24) AIR 1924 Mad 234 (235)  
(70) 5 Mad H C R 110 (412)  
(88) 1888 All W N 71 (72) (Not appealable)  
(85) 11 Cal 244 (249) 12 Ind App 7 (P C)  
(29) AIR 1929 All 948 (949) 52 All 115 (R 69 deals with adjournment on date of sale — Per P. N. R.)

- sale)  
(81) 7 Cal 733 (735) (Pendency of administration suit—No ground)

- 1 (70) 2 N W P H O R 1 (2) (Sale postponed under client)

to have a better sale)  
(73) 20 Suth W R 130 (131) (Or if it will benefit the judgment-debtor by enabling him to satisfy the decree)

(54) 5 Bom 532 (533) (Stranger in possession impeaching the decree — No ground for staying

- been issued)  
3 ('27) AIR 1927 All 401 (404, 405) 50 All 41 (F B) (But a stay order will operate against a decree-holder purchaser)  
4. (21) AIR 1921 All 102 (103)

7. (57) 1 Cal W N 226 (227, 225)

conducting the sale, the sale is illegal and not merely irregular <sup>8</sup>

The officer conducting the sale is also empowered under this rule to adjourn the sale except where the sale is held within the precincts of the court-house in which case leave of Court is necessary <sup>9</sup>

O. 21 R. 69  
Notes 3-7

**3a. Who can apply for adjournment.** — The rule does not specifically provide that a party to the proceeding alone can apply for adjournment under this rule. The rule being general in terms, there is nothing to prevent the Court from adjourning the sale on information from a third party or even on the application of such third party <sup>1</sup>

**3b. Imposition of terms on adjournment.** — The Court granting an adjournment of the sale has power to impose terms on the applicant as a condition of the adjournment <sup>1</sup>

**4. Any sale.** — This rule applies to the adjournment of any sale including a sale under a mortgage decree <sup>1</sup>

**5. Adjournment of sale of mortgaged property.** — See Notes 4 and 11

**6. Adjournment after partial sale.** — The provisions of this rule do not apply to a *continuous sale*. Thus, it does not apply where the sale is ordered to be continued from day to day and the property is kept on hammer in the hope of getting higher bids than those offered on the first day, no fresh proclamation is necessary in such a case even though the sale is adjourned and continued for more than seven days <sup>1</sup>. Similarly, where a sale was included in the sale list for a particular day and as the sales could not be finished on that day the nazir in charge continued them on the following day in accordance with the procedure prescribed by the Rules and Circular Orders of the High Court, it was held that there was no adjournment of the sale within the meaning of this rule <sup>2</sup>

**7. Omission to adjourn the sale to a specified day and hour.** — Where an execution sale is adjourned, the Court must specify the *day* and the *hour* to which it is adjourned <sup>1</sup>. Omission to do so may amount to a material irregularity <sup>2</sup>. It was held

8. (35) AIR 1935 Lah 604 (695, 696)

Madras Rent Act — Officer not entitled to adjourn}}

**Note 3a**

1. (35) AIR 1935 Mad 295 (296)

**Note 3b**

1. (35) AIR 1935 Mad 295 (296)

on the prior date)  
{See (76) 25 Sath W R 328 (329)}

2. (04) 31 Cal 815 (818)  
(12) 13 Ind Cas 337 (313) (Cal)  
(01) 6 Cal W N 48 (40 51)  
(97) 21 Cal 291 (292 293)

**Note 8**

1. (27) AIR 1927 Pat 312 (313) 6 Pat 432  
(10) 8 Ind Cas 564 (563) (Mad)  
(00) 17 Cal 152 (154)

O 21 H 69  
Notes 7-9

in the undermentioned case<sup>3</sup> that the failure to mention the exact hour ceased to be a material irregularity where the judgment debtor had agreed that there should be no fresh proclamation of sale

See also the undermentioned case<sup>4</sup>

It has been held by the High Court of Allahabad<sup>5</sup> that the specification of the day and hour is only necessary where the Court adjourns the sale and not when the officer conducting the sale adjourns it

**8 Fresh proclamation, when necessary.** — Fresh proclamation is necessary when the sale is adjourned for a longer period than seven days<sup>1</sup> It is however open to the judgment debtor to waive a fresh proclamation See Note 9 below

The omission to issue a fresh proclamation as required by the rule amounts to a mere irregularity and the sale will not be set aside in the absence of proof of substantial injury<sup>2</sup>

**9. Waiver of proclamation.** — The judgment debtor can waive the benefit of a fresh proclamation under this rule and if he does so he cannot, later on object to the sale being irregular on that ground<sup>1</sup> Such waiver does not, however estop him from objecting to other irregularities<sup>2</sup> as for instance the omission to specify the day and the hour of the sale<sup>3</sup> or the omission to proclaim properly<sup>4</sup> The waiver of a fresh proclamation implies a waiver of objection to any defect appearing on the face of the

(37) 1937 Mad W N 1223 (1923) (Failure to  
specify hour)

(Contd)]

11.

(Contd.)

necessary if portion of property is released after issue

1

20 39

3 (66) AIR 1935 A 1240 (1932) 10

4 (84) AIR 1934 Nag 250 (251)

5 (30) AIR 1935 All 182 (182)

#### Note 8

1 (07) 09 All 106 (002) 34 Ind app 37 (P C)

(76) 25 Suth W R 308 (329)

(1865) 3 Suth W R N 11 (11 10) (In cases  
of indefinite postponement fresh proclamation

Cal 96 (PC)

(72) 17 Suth W R 330 (329)

(23) AIR 1923 Pat 615 (621) 8 Pat 122

(80) 11 Cal 658 (660 661)

(29) AIR 1929 Mad 624 (624)

[But see (86) 1836 Pun Re No 45 p 45]

#### Note 9

1 (73) 19 Suth W R 227 (070)

(75) 03 Suth W R 256 (257)

(76) 25 Suth W R 31 (31)

(18) AIR 1918 Cal 293 (293 004)

(00) 11 Cal L Jour 631 (633 559)

(29) AIR 1929 Mad 617 (620) (Waiver by judg  
ment debtor a plea)

(30) AIR 1930 Mad 414 (417)

(00) 11 Cal L Jour 631 (633 559)

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of objection to sale)

(00) 11 Cal L Jour 631 (633 559)

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—Cc—

by co b

(24) 8

impending

(Objection  
and the  
judicially

50] pressed at decree holder's instance)]

sale proclamation but does not imply a waiver of the right to object to any irregularities in the attachment <sup>5</sup>

O. 21 R. 69  
Notes 9-13

A waiver of proclamation by *one* of several judgment debtors does not bind the other judgment debtors <sup>6</sup> Nor does the waiver of a fresh proclamation by the judgment debtor prevent an attaching decree holder from objecting to the sale on the ground of want of a fresh proclamation <sup>7</sup>

The guardian *ad litem* of a minor judgment debtor can waive a fresh proclamation on behalf of the minor under this rule <sup>8</sup>

**10. Stoppage of sale on deposit of debt and costs.** — Any sale including a sale under a mortgage decree can be stopped by the deposit of the decretal amount and the costs before the property is *actually knocked down* to the bidder <sup>1</sup> But the words 'debt and costs' mean the *entire amount* and not the balance of the decree debt and costs which would remain if by a legal fiction the sale of previous lots (not yet completed by the payment of the whole of the purchase money) were taken as completed by treating the whole of the purchase money as being actually paid up <sup>2</sup>

Under sub rule (3) it is the officer conducting the sale who has to be satisfied that the requisite amount has been paid into Court <sup>3</sup>

**11 Who can tender the amount.** — The judgment debtor or a transferee of the property from the judgment debtor is entitled to tender the amount under this rule <sup>1</sup> Where the sale is in execution of a mortgage decree any person holding the equity of redemption <sup>2</sup> such as a purchaser in execution of a decree on a puisne mortgage <sup>3</sup> can tender the amount and have the sale stopped

A payment made to prevent a sale in execution of a decree is not a *voluntary* payment whether made by the debtor or by a third person claiming the property <sup>4</sup>

**12. Sale on a date other than the one to which it is adjourned.** — The High Court of Calcutta has held in the undermentioned case <sup>1</sup> that if the execution sale does not take place on the adjourned date but is held on a subsequent date to which the sale has not been adjourned it amounts to a material *irregularity* But in a later decision <sup>2</sup> the same High Court has held that if the sale takes place on a day never fixed for it and of which the judgment debtor has no notice the sale is a *nullity*

**13 Withdrawal of bid.** — A bid may be withdrawn before the property is

5 (10) 6 Ind Cas 813 (815) 37 Cal 897  
(34) AIR 1934 Mad 260 (262)  
(01) 28 Cal 78 (76 77)

Note 10

1 (10) 6 Ind Cas 813 (815) 37 Cal 897  
2 (34) AIR 1934 Mad 260 (262)  
3 (01) 28 Cal 78 (76 77)

1

held on date fixed for it—No adjournment order passed—Subsequent sale is not nullity but merely irregular ]]

(39) AIR 1939 Cal 369 (374) ILR (1939) 1 Cal 530 (Order of Court directing property to be sold at monthly sale commencing from 5th August—Sale held by *Razvi* on 12th after postponing it from day to day—Sale is valid )]

2 (25) AIR 1925 Cal 201 (202)

Note 13

3 (33) AIR 1935 Lah 694 (695) (Collector's sale—Sale conducted by Revenue Assistant—Not on to the Collector's clerk as to payment into Court is not sufficient )

Note 11

1 (88) 10 All I (4)

O. 21 R. 69  
Notes 14-13

14. **Rateable distribution.** — Moneys paid into Court to stop a sale are as etc available for rateable distribution<sup>1</sup> See Section 73 Note 4, *ante*

15. **Limitation — Acknowledgment.** — A petition for adjournment of sale asking for time to pay the decretal amount signed by the judgment debtor's pleader constitutes an acknowledgment of the decree debt within the meaning of Section 19 of the Limitation Act<sup>1</sup>

O. 21 R. 70

**R. 70.** [S. 287, last para.] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

[1877, S. 287, last para. See Ss. 54, 68 to 72 and Third Schedule.]

1. **Execution of decrees by the Collector.** — The execution of decrees by the Collector is provided for by Sections 68 to 73 and Schedule III. This rule makes the provisions of Rules 66 to 69 inapplicable to a sale held by the Collector to whom the execution of a decree has been transferred<sup>1</sup>

O. 21 R. 71

**R. 71.** [S. 293.] Any deficiency of price which may happen on a re-sale<sup>3</sup> by reason of the purchaser's default,<sup>7</sup> and all expenses attending such re-sale, shall be certified<sup>4</sup> to the Court<sup>10</sup> or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor,<sup>6</sup> be recoverable from the defaulting purchaser<sup>5</sup> under the provisions<sup>8</sup> relating to the execution of a decree for the payment of money.

[1877, S. 293; 1859, S. 254, last para. See Rr. 77, 84 and 86 and Ss. 68 to 71.]

### Synopsis

- 1 Application of the Rule.
- 2 Failure of execution sale due to auction-purchaser's default — Rights of decree-holder and judgment debtor.
- 3 Re-sale.
- 4 Power to order recovery of deficiency.
- 5 Procedure under the Rule.

- 6 Who may apply under this Rule.
- 7 By reason of the purchaser's default.
- 8 Where defaulting purchaser is merely an agent.
- 9 Liability for interest on deficiency
- 10 Certificate.
- 11 Rateable distribution.

#### Note 14

1. (82) 6 Bom 588 (589) (Decision under the Code of 1882)

#### Note 15

1. (96) 23 Cal 374 (357)

(93) 22 Bom 722 (727)

(82) 8 Cal 716 (718)

#### Order 21 Rule 70 — Note 1

1. (29) AIR 1929 Oudh 235 (237, 239) 4 Luck 635.

- 12 Nature of defaulting purchaser's liability for deficiency See Note 13  
 13 Suit for deficiency on re-sale — Whether maintainable

- 14 Insolvency proceedings  
 15 Suit if lies to set aside order under this Rule  
 16 Appeal

O 21 R 71  
 Notes 1-3

**1. Application of the Rule** — The rule extends to all auction sales in execution whether of moveable or immovable property<sup>1</sup> It is a salutary provision intended to minimise the hardship resulting from the purchaser's default and Courts should give effect to it unless the defaulting purchaser would be substantially prejudiced<sup>2</sup> The rule applied to sales by the Collector under the Bengal Public Demands Recovery Act I of 1890<sup>3</sup> (see Section 8 of the Act) and applies to sales under the Agra Tenancy Act III of 1926 (see Section 169 thereof) and to sales of immovables under the Chota Nagpur Tenancy Act VI of 1920 (see Rule 54 Notes)

**2 Failure of execution sale due to auction purchaser's default — Rights of decree-holder and judgment-debtor.** — Where an execution sale fails owing to the auction purchaser's default the decree holder is entitled to a re sale of the property<sup>1</sup> See O 21 Rr 77 84 and 86 Where the price bid at the second sale is less than that bid at the first sale the purchaser at the first sale is liable to make good the difference and the present rule entitles the decree holder or the judgment debtor to apply to the Court to enforce such liability But the decree holder is not bound to proceed against the defaulting purchaser He may recover from the judgment debtor the judgment debt or the balance of it that may be due and leave him to pursue his remedies against the auction purchaser under this rule<sup>2</sup> The judgment debtor may also instead of proceeding against the auction purchaser to recover the deficiency in price apply under Rule 90 to set aside the second sale if he can make out a case under that rule<sup>3</sup> See also Note 13 *infra*

**3 Re-sale** — The rule applies to all re sales made in consequence of the default of the auction purchaser not only in the payment of the 25 per cent of the purchase money under Rule 84 or in the payment of the balance under Rule 85<sup>1</sup> but also in the payment of the poundage fee<sup>2</sup> But the re sale must be of the same property<sup>3</sup> and under the same decree<sup>4</sup> The property must also be sold under the same description and any substantial difference of description will disentitle the decree holder or the judgment debtor to recover the deficiency under this rule<sup>5</sup> Thus no

**Order 21 Rule 71 — Note 1**

- 1 { 81 } 7 Cal 337 (339)  
 2 { 19 } AIR 1919 Mad 1014 (1020) 41 Mad 474 (FB) (Per Wallis J)  
 { 25 } AIR 1925 Mad 631 (638) (Compare observations in 14 Ind Cas 777 (779) (Bom) and of Walsh J in A I R 1922 All 900)  
 3 { 19 } AIR 1919 Pat 102 (105) (Act I of 1895 has been repealed by Act III of 1913 (Bengal) and Act IV of 1914 Bihar & Orissa)

**Note 2**

- 1 { 09 } 11 Ind Cas 286 (287) (Cal) (Decree-holder auct on purchaser's default in paying poundage fee)  
 2 { 74 } 13 Beng L R 114 (118) (Distinguishing 7 Suth W R 110)  
 { 78 } 2 Bom 562 (563 564)  
 [See also { 82 } 8 Cal 291 (294)  
 { 81 } 8 Cal L Rep 41 (42)]  
 3 { 85 } 9 Cal 93 (97)

**Note 3**

- 1 { 22 } AIR 1922 All 900 (201) 44 All 268 (FB)  
 { 81 } 5 Bom 575 (577)  
 { 66 } 6 Suth W R Misc 126 (126 127) (Re sale on refusal to pay purchase-money)  
 { 98 } 2 Cal W N 411 (412)  
 { 81 } 7 Cal 337 (339)  
 { 88 } 9 Cal 93 (99) (Default in payment of 25 per cent)  
 { 89 } 12 Mad 454 (458) (Do)  
 { 19 } AIR 1919 Pat 102 (105) (Default in proper

**Code JJ**

- 2 { 09 } 3 Ind Cas 286 (287) (Cal)  
 3 { 89 } 16 Cal 535 (538)  
 { 98 } 25 Cal 99 (102)  
 4 { 71 } 16 Suth W R 14 (15)  
 5 { 89 } 16 Cal 535 (538)

**O. 21 R. 69**  
**Notes 14-15**

**14. Rateable distribution.** — Moneys paid into Court to stop a sale are as they are available for rateable distribution.<sup>1</sup> See Section 73 Note 4, *ante*

**15. Limitation — Acknowledgment.** — A petition for adjournment of sale asking for time to pay the decretal amount signed by the judgment-debtor's pleader constitutes an acknowledgment of the decree-debt within the meaning of Section 19 of the Limitation Act.<sup>1</sup>

**O. 21 R. 70**

**R. 70.** [S. 287, last para.] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

[1877, S. 287, last para. See Ss. 54, 68 to 72 and Third Schedule.]

**1. Execution of decrees by the Collector.** — The execution of decrees by the Collector is provided for by Sections 68 to 73 and Schedule III. This rule makes the provisions of Rules 66 to 69 inapplicable to a sale held by the Collector to whom the execution of a decree has been transferred.<sup>1</sup>

**O. 21 R. 71**

**R. 71.** [S. 293.] Any deficiency of price which may happen on a re-sale<sup>3</sup> by reason of the purchaser's default,<sup>7</sup> and all expenses attending such re-sale, shall be certified<sup>4</sup> to the Court<sup>10</sup> or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor,<sup>6</sup> be recoverable from the defaulting purchaser<sup>8</sup> under the provisions<sup>5</sup> relating to the execution of a decree for the payment of money.

[1877, S. 293; 1859, S. 254, last para. See Rr. 77, 84 and 86 and Ss. 68 to 71.]

### Synopsis

1. Application of the Rule.
2. Failure of execution sale due to auction-purchaser's default — Rights of decree-holder and judgment-debtor.

3. Re-sale.  
4. Certificate to order recovery of deficiency.  
5. Distribution under the Rule.

Note 14  
Vol 589 (589) (Decision under the  
32)

Note 15  
, 96) 23 Cal 374 (357)

6. an agent.
9. Liability for interest on deficiency.
10. Certificate.
11. Rateable distribution.

(93) 22 Bom 722 (727)  
(82) 8 Cal 716 (718).

Order 21 Rule 70 — Note 1  
1. ( 29) AIR 1929 Oudh 235 (237, 233) 4 Luck 635.



held that there is no re-sale of property if it is not knocked down to any bidder at the second sale and that Rule 71 cannot apply to such a case<sup>16</sup>

□ 21 R 71  
Notes 3-7

**4 Power to order recovery of deficiency** — The power of ordering the recovery of deficiency is vested in the Court. The officer conducting the sale has no power to order the recovery of the deficiency<sup>1</sup>. Even in cases where the execution of a decree has been transferred to a Collector and the property has been sold by him, the Civil Court has jurisdiction to order the recovery of deficiency under this rule<sup>2</sup>. See Section 70 Note 2.

**5 Procedure under the Rule** — The Court may pass an order that the defaulting purchaser is liable for the deficiency, but there is nothing in the rule which compels the decree holder or the judgment debtor to obtain such an order before asking for execution against the auction purchaser. The opinion expressed in the undermentioned case<sup>3</sup> that without such an order execution cannot issue against the auction purchaser seems to be not warranted by the terms of the rule. The rule does not expressly provide for notice to the defaulting purchaser, but it is the duty of the Court under general principles of law to give him notice and hear and decide on his objections before it orders execution to issue against him<sup>4</sup>.

The proceedings under the rule are not more summary than proceedings to set aside an execution sale<sup>5</sup>.

An order against the auction purchaser under this rule can be passed only when the sale has taken place. The Court has no power to order that a property should be re-sold and that the defaulting purchaser should pay the deficiency in price which may occur<sup>6</sup>. An order under this rule to the effect that the defaulting purchaser is liable for the deficiency passed in favour of the decree holder can be executed by the judgment debtor, because the rule enables either of them to apply under it<sup>6</sup>.

**6 Who may apply under this Rule** — This rule entitles either the judgment debtor or the decree holder to apply for the recovery of deficiency from the auction purchaser<sup>1</sup>. By the term 'decree holder' is meant the decree holder by whom the property was brought to sale. Other decree holders are not included in the term, although they may be entitled to rateable distribution under Section 73<sup>2</sup>. The decree holder is entitled to enforce the defaulting purchaser's liability for the whole amount of the deficiency and is not bound to confine his application to the decretal amount that may remain outstanding<sup>3</sup>. Where an order has been passed in favour of the decree holder to the effect that the auction purchaser was liable for the deficiency but the decree holder realizes the balance of the decretal amount from the judgment debtor and does not enforce the order passed in his favour, the judgment debtor can execute the same against the auction purchaser<sup>4</sup>. See also Note 10 below.

**7 By reason of the purchaser's default** — The default referred to in this rule includes default in paying the purchase money, the deposit required by

16 (86) 1886 Bom P J 263

Note 4

1 (31) AIR 1931 Bom 367 (368)

2 (31) AIR 1931 Bom 367 (368)

Note 5

(Per Kumaraswami Sastri J)

4 (39) AIR 1929 Lah 711 (745)

5 (31) AIR 1931 All 667 (668)

Note 6

1 (39) AIR 1939 Nag 269 (273)

2 (26) AIR 19 6 Mad 572 (574) 49 Mad 5

(36) AIR 1936 Oudh 277 (283) 12 Luck 720

3 (6) AIR 19 6 Mad 82 (93) 49 Mad 50

4 (31) AIR 1931 All 667 (668)

**O. 21 R. 71**  
**Notes 7-10**

Rule 84<sup>1</sup> or the poundage fee (see Note 3) The default must be that of a *purchaser*. Thus, a bid lapses on a higher bid being made and where the highest bidder dies before the acceptance of his bid, the next highest bidder cannot be treated as the highest bidder for the purposes of this rule<sup>2</sup> Similarly, a bid can be withdrawn at any time before the property is knocked down to the bidder<sup>3</sup> So also, it has been held that a bid lapses by too much delay in the acceptance thereof<sup>4</sup> But a bid cannot be withdrawn after the property is knocked down to the bidder<sup>5</sup> As to whether the Court's acceptance of the highest bid is necessary to complete the sale, see Notes to Rule 84

In an application under this rule, it is open to the auction-purchaser to raise any objections to the first sale which can be urged in an application to set aside a sale under Order 21,<sup>6</sup> because in such a case it is conceived his failure to complete the sale would be justified

Irregularities in connection with the re sale which are not shown to have been responsible for the comparative lowness of the price realized at the re sale, cannot be pleaded in defence to an application under this rule<sup>7</sup>

**8. Where defaulting purchaser is merely an agent.** — A person who bids at a sale merely as an agent of another person is not liable under this rule<sup>1</sup> See Contract Act, Section 230 But he will be liable if he bids without informing the officer conducting the sale that he is acting as agent of another See Contract Act, Section 230 In such a case the mere fact that the *judgment-debtor* knows that the bidder is acting as agent of another will not absolve him from liability The reason is that in court sales, the contract is between the bidder and the Court, which acts by virtue of a statutory authority and not as the agent of either the decree holder or of the judgment debtor<sup>2</sup> Where a person professes to bid as agent of another without the latter's authority, the latter is not liable under this rule,<sup>3</sup> while the alleged agent is liable for damages<sup>4</sup> See Section 235 of the Contract Act

**9. Liability for interest on deficiency.** — The defaulting purchaser is not liable to pay interest on the deficiency in price<sup>1</sup>

**10. Certificate.** — A *certificate* issued under this rule has the force and effect of a decree<sup>1</sup> But the deficiency may be recovered even though the certificate referred to in the rule has not been issued<sup>2</sup> An order passed to the effect that the auction purchaser is liable for the deficiency has the effect of a decree and can be attached as such, under O 21 R 53<sup>3</sup> See also

**Note 7**

1. . . . . 3. ( 67 ) 7 Suth W R 110 (111)  
2. . . . . 4. ( '73 ) 20 Suth W R 397 (398)  
: . . . . **Note 8**  
: . . . . 1. ( 68 ) 25 S. W R 500 (501)

- ( 29 ) AIR 1929 Oudh 294 (295) 4 Luck 684  
(Fraudulent suppression of encumbrances at both  
the sales—Purchaser not liable under R 71 )  
[See also ( 31 ) AIR 1931 Bom 367 (368) ]  
7. ( '25 ) AIR 1925 Mad 631 (633)

**Note 8**

1. ( 73 ) 20 Suth W R 397 (398) (Confirming

**Note 10**

3. ( 26 ) AIR 1926 All 379 (381, 382)

**11. Rateable distribution.**—Money realized from the defaulting purchaser under this rule amounts to "assets" within the meaning of Section 73, and is liable to rateable distribution<sup>1</sup> O. 21 R. 71  
Notes 11-14

**12. Nature of defaulting purchaser's liability for deficiency.**— See Note 13 below

13. Suit for deficiency on re-sale — Whether maintainable. — It has been seen in Note 69 to Section 9 *ante* that where two remedies are available under the law, one must not be taken as operating in derogation of the other, but that this general rule is subject to the qualification that where a right is created by statute and a method of enforcing the right, or of redressing the grievance caused in the exercise or enforcement of the right is pointed by the statute creating such right, the general remedy of suit will be impliedly barred. The question, therefore, whether the right to claim deficiency from a defaulting purchaser can be enforced by suit depends upon the question whether such right is a common law right or a right created by the statute. It was held in the undermentioned case<sup>1</sup> of the Bombay High Court that the right to recover the deficiency under this rule is one created by the statute relating to the procedure, but the question in that case did not arise as to the maintainability of a separate suit to recover such deficiency. In a later case,<sup>2</sup> however, the same High Court has expressed the opinion that but for this rule a suit would have to be filed to recover such deficiency and that this rule enables the party aggrieved to make an application for that purpose. It would seem to follow from this that the remedy under this rule is only an alternative remedy which does not bar a separate suit. In *Amir Baksh v Venkatachala*,<sup>3</sup> an opinion was expressed by the Madras High Court that a suit will not be maintainable in such a case. There was no discussion, however, of the principles and the question that actually arose in the case was not whether a suit would lie. But in the undermentioned case<sup>4</sup> Wallis, C J., observed as follows: "By his failure to complete his purchase the purchaser commits a breach of contract and is answerable in damages to the Court or the persons on whose behalf it sells, viz., the decree holder and the judgment debtor." In *Sitaram v Janaki Ram*,<sup>5</sup> Mr Justice Walsh of the Allahabad High Court expressed the view that the liability of the defaulting purchaser is not a contractual liability and that no suit would lie to enforce it. The Patna<sup>6</sup> and the Calcutta<sup>7</sup> High Courts have held that right to claim the deficiency is a common law right to recover the damages for a legal wrong done by the purchaser, that Rule 71 provides only a summary remedy for enforcing that right but that it does not bar the general remedy of suit. It is submitted that this last view is correct.

**14. Insolvency proceedings.**—The provisions of this rule apply to sales by the Court under the Provincial Insolvency Act, so that where a sale is held owing to the first purchaser's default and a deficiency occurs on such re sale, the deficiency is recoverable in execution<sup>1</sup> But the rule does not apply to sales by the receiver under that Act.<sup>2</sup>

Note 11

1 (26) AIR 1926 Mad 872 (873) 49 Mad 570

**Patm Regulation VIII of 1819 )**  
**[See also ( 89) 16 Cal 535 (538, 539) (Case not**  
**falling under R 71 as property had undergone**  
**changes due to natural causes—Suit main-**  
**tainable—Over 1)]**

১০. (৩৩) ১ ৬৬৬ ১৪ ১১ ১১১ (১১১) (১১১১ under Bengal of a suit—Per Walsh, J)

O. 21 R. 71  
Notes 15-16

**15. Suit, if lies to set aside order under this Rule.** — It has been seen that the position under this rule is, as if a decree has been passed against the defaulting purchaser for the amount of the deficiency which the decree holder or judgment debtor is entitled to execute under the provisions of the Code relating to the execution of money decrees. Hence, it follows that the remedy of a party aggrieved by an order under this rule is by way of appeal (see Note 16), and not by means of a separate suit to set aside the order<sup>1</sup>.

**16. Appeal.** — It is settled law that an appeal lies against an order deciding an application by a decree holder or judgment-debtor under this rule against a defaulting auction purchaser for the recovery of deficiency in price<sup>2</sup>. The reason is that inasmuch as this rule declares that the deficiency in price shall be recoverable from the defaulting purchaser under the provisions relating to the execution of decrees for the payment of money, the rule relating to appeals must be applied *mutatis mutandis* equally with any other of those rules<sup>3</sup>.

It has been held by the High Court of Bombay<sup>4</sup> that no second appeal lies from an order determining an application under this rule, where the amount of deficiency does not exceed Rs 500. The reason given is that no second appeal would have been maintainable if a decree had been actually passed for the deficiency in such a case and an order had been made determining an application for the execution of such decree. But the Calcutta High Court<sup>5</sup> has taken a contrary view. It is submitted that the Bombay view is correct.

As to the *forum* of appeal, see the undermentioned case<sup>6</sup>.

O. 21 R. 72

**R. 72. [S. 294] (1)** No holder of a decree in execution of which property is sold shall, without the express permission<sup>2</sup> of the Court, bid for or purchase the property.

Decree holder not to  
bid for or buy property  
without permission

No

1. (27) AIR 1927 Nag  
(Dismissing from 12 ft  
(22) AIR 1922 All 200 (202) 44 All 266 (FB)  
(Walsh J, *semble*)  
(25) AIR 1925 Oudh 360 (361) 29 Oudh Cas 18  
[Compare (97) 19 All 22 (24) (This case should  
be deemed as overruled by AIR 1922 All 200)]

Note 16

- 1 (22) AIR 1922 All 200 (202) 44 All 266 (FB)  
(75 78) 1 All 181 (190) (FB)  
(12) 14 Ind Cas 777 (779) 36 Bom 329  
(95) 2 Cal W N 411 (412)  
(J8) 25 Cal 93 (100)  
(80) 16 Cal 535 (536)  
(67) 7 Suth W R 110 (111)  
(66) 8 Suth W R 116 (127)  
(1500) 3 Suth W R 8 (9)  
(25) AIR 1923 Lah 249 (249)  
(30) 13 Mad 439 (443)  
(7) AIR 1927 Nag 112 (112) 23 Nag L R 14  
(3) AIR 1925 Oudh 397 (397) 23 Oudh Cas 3-7  
(59) 12 Mad 454 (457)

purchase the property at two a ...  
... ..

3. (21) AIR 1921 Bom 229 (230) 45 Bom 223  
4 (1) Cal W N 113 (113)  
5

(2) Where a decree-holder purchases with such permission,<sup>3</sup> O. 21 R. 72

Where decree-holder purchases, amount of decree may be taken as payment

the purchase-money and the amount due on the decree<sup>6</sup> may, subject to the provisions of section 73, be set off<sup>5</sup> against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases, by himself or through another person,<sup>8</sup> without such permission,<sup>7</sup> the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale;<sup>9</sup> and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

[1877, S. 294. Cf. O. 21 R. 84.]

#### Local Amendments

##### ALLAHABAD

In sub rule (2) for the words "with such permission" read the words "the property sold," and re number this sub rule "72," and delete sub rules (1) and (3) N-W. F. P.

(1) For sub rule (1), substitute the following

"72 (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for or purchase the property without express permission of the Court, provided that the Court may on application of the judgment debtor and for sufficient cause debar him from so bidding or purchasing"

(2) In sub rule (2) for the words "with such permission" substitute the words "the property"

(3) Cancel sub rule (3)

##### OUDH

(1) For sub rule (1) substitute the following

"72 (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for, or purchase the property, provided that the judgment debtor may, by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property, and the Court may, on such application, either debar the decree holder from purchasing the property, or grant permission to do so on such terms as may seem just"

(2) In sub rule (2) for the words "with such permission" read the words "the property sold"

(3) Delete sub rule (3)

##### PATNA

(1) Substitute the following for sub rule (1)

of which property is sold \_\_\_\_\_  
property unless an express order \_\_\_\_\_

(2) In sub rule (2) for the words "with such permission" substitute \_\_\_\_\_  
"the property"

(3) Substitute the following for sub rule (3)

"(3) Where notwithstanding an order made under sub rule (1) a \_\_\_\_\_

O. 21 R. 72  
Notes 1-2

purchases the property by himself or through another person the Court shall on the application of the judgment debtor or any other person whose interests are affected by the sale by order set aside the sale and the cost of such application and order and any deficiency of price which may happen on the re sale and all expenses attending it shall be in the discretion of the Court

### RANGOON

(1) In sub rule (2) for the words 'with such permission' the words the property shall be substituted

(2) Sub rules (1) and (3) shall be cancelled and the figure and brackets (3)' occurring at the beginning of sub rule (2) shall be deleted

### Synopsis

- |  |  |
|--|--|
| 1 Legislative changes  | 8 By himself or through another person   |
| 1a Applicability of the Rule   | 9 The Court may, if it thinks fit, set aside the sale  |
| 2 Permission to bid  | 10 Separate suit, if lies to set aside sale without permission   |
| 3 "Where decree holder purchases with such permission                          | 11 Judgment debtor, if can raise the question of no permission in suit for possession by decree holder |
| 4 Leave obtained by misrepresentation  | 12 Interest  |
| 5 Setting off decretal amount against purchase money and rateable distribution | 13 Appeal  |
| 6 Amount due on the decree   | 14 Limitation and step in aid of execution   |
| 7 Purchase without permission  |  |

### Other Topics (miscellaneous)

Decretal sales See Note 6

Granting of leave subject to conditions See Note 2

Persons entitled to object See Notes 7 8 and 9  
Persons prohibited under this Rule See Notes 2 and 8

#### 1. Legislative changes. —

(1) The words 'subject to the provisions of section 73 in sub rule (2) did not appear in the corresponding Section of the old Code See Note 6 below

(2) The words 'if he so desires which occurred in the old Code have now been omitted

**1a. Applicability of the Rule.** — The holder of a decree for rent under the Bengal Tenancy Act VIII of 1885,<sup>1</sup> or the Orissa Tenancy Act II of 1913,<sup>2</sup> need not obtain permission of the Court under this rule. As to proceedings under the Chota Nagpur Tenancy Act, see Notes under Rule 54 *ante*

**2. Permission to bid** — A decree holder cannot under this rule purchase property sold in execution of his own decree without the express permission of the executing Court.<sup>1</sup> But the prohibition under this rule applies only to the decree holder and not to the judgment debtor,<sup>2</sup> or to a holder of a decree other than that under which the sale is to take place.<sup>3</sup> An assignee of the decree under an oral assignment has no *locus standi* to apply for execution and he is not the holder of a decree within the meaning of Rule 72, hence he need not obtain the permission of the Court under this rule.<sup>4</sup> The decree holder cannot get round the condition imposed by this rule by

#### Order 21 Rule 72 — Note 1a

1 See S 173 (1) of the Bengal Tenancy Act

2 See S 227 (1) of the Orissa Tenancy Act

#### Note 2

1 (60) 3 Beng L R 1 G 390 (322)

(80) 5 Cal 303 (310) (A sale without permission is invalid)

(96) 165 Ind Cas 544 (544) (Pesh) (Rules amended)

1 N W T P Court allows decree-holder to bid

unless debarred by the Court)

[See also (27) AIR 1927 All 681 (681 Col) 20

All 173 (Suit by liquidator of company—

Decree in favour of liquidator—Execution—

Permission to bid to be given by executing

C

2

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4 (1000) 4 Cal W N 474 (474)

bidding jointly with a stranger,\* or by valuing himself of the bid of another \*

Leave to bid should be very cautiously granted <sup>7</sup> In granting such leave the Court can impose any fit and proper conditions for the purpose of safeguarding the interests of the judgment debtor <sup>8</sup> But the conditions imposed should not be too stringent <sup>9</sup> and should not be construed too narrowly <sup>10</sup> The main question for the Court to consider is whether it is to the advantage of every one concerned in order to obtain the highest price that the plaintiff should be allowed to bid or not <sup>11</sup> The executing Court can refuse to accept the bid when the condition attached to the permission to bid is not fulfilled but it cannot for that reason dismiss the execution application <sup>12</sup>

The principle of this rule governs also sales held by the Collector under the Code <sup>13</sup> But where the Collector is empowered under rules to grant only permission to bid but not to order a set off the decree holder desiring a set off should apply to the Court under this rule <sup>14</sup>

Leave granted under this rule is binding on a superior Court acting under Section 63 of the Code <sup>15</sup> Consequently sale proceeds validly set off against the decretal amount cannot be ordered to be refunded and sent to the superior Court See Note 5 to Section 63 *ante*

Where a decree holder filed a petition asking for permission to bid and no order

5 (12) 15 Ind Cas 888 (889) 16 Oudh Cas 86 (Permission to bid granted on condition that the decree holder not to bid less than the decretal amount—Decree holder cannot evade the condition by joining with stranger)

6 [See (18) AIR 1918 Oudh 439 (440) 21 Oudh

has no power to impose a condition as to minimum bid — A case after Mahabadi High

9

5000)

(26) AIR 1926 Pat 140 (141) (Court cannot fix a too heavy upset price when the highest bid is far below)

10 (29) AIR 1929 Oudh 26 (28) 4 Luck 93 (Sale in several lots — Leave to bid for not less

7 (89) 16 Cal 182 (187) (The Court must be satisfied that no purchaser at an adequate price can be found and that the sale proclamation has been duly published)

(81) 7 Cal 346 (347) (Where a decree holder was joint in family with the manager of an infant defendant whose property was to be sold the decree holder should not be granted leave)

[See also (25) AIR 1925 Cal 1139 (1144) (Decree holder a trustee of property of judgment debtor — His purchase of it in auction set aside in a suit as invalid)]

8 (12) 15 Ind Cas 888 (889) 16 Oudh Cas 86 (Eq that his lowest bid should be the amount of the decree)

(38) AIR 1933 Rang 151 (152) (Decree holder allowed to bid up to decretal amount—Condition must be read to mean exactly what it says—Decree holder need not offer decretal amount and

1\*

that in a previous auction the property was valued at a high figure and that there was no dispute about title of judgment debtor filed not to affect the question of leave to bid)

12 (37) 168 Ind Cas 258 (259) 68 Cal 84

such  
adding  
asking

(37) 168 Ind Cas 258 (259) 68 Cal 84 (The power to impose a condition follows from the power to refuse permission)

[But see (29) AIR 1929 All 85 (85) (Court

O. 21 R. 72  
Notes 2-5

was passed thereon, but the decree holder was allowed to bid throughout the course of the sale, it was held by the High Court of Patna<sup>16</sup> that it can be taken that the Court gave the required permission inasmuch as the failure to pass an order in writing was a mistake of the Court

Where the decree holder is the receiver of the property sold in execution, permission obtained under O 21 R 72 without informing the Court that he is such receiver is not enough. A sale in his favour under such circumstances is liable to be set aside.<sup>17</sup> Where permission was given to a decree holder to bid under this rule but subsequently he was appointed receiver of the property, it was held that the permission would not entitle him to buy the property when he had thus been appointed receiver of the property and that the sale in his favour should be set aside.<sup>18</sup>

Where permission to bid is granted but the decree holder did not bid up to amount of upset price fixed by the Court, the Court cannot dismiss the execution on that ground inasmuch as the decree holder cannot be compelled to bid for any particular amount.<sup>19</sup>

3. "Where decree-holder purchases with such permission." — Leave to bid puts a decree holder in the same position as an independent purchaser and the judgment debtor is not entitled to demand a higher standard of fairness from the former than from the latter.<sup>1</sup> A decree holder purchaser accordingly is not bound to disclose circumstances within his knowledge and bearing on the sale any more than an independent purchaser.<sup>2</sup> The principle is the same with regard to the decree holder-purchaser in a mortgage suit also. He does not stand in any fiduciary position to the mortgagor.<sup>3</sup> He is entitled to credit the judgment debtor only with the purchase money at the auction and not the real market value of the property and may proceed to execute for the balance, if any, of the decree amount.<sup>4</sup>

4. Leave obtained by misrepresentation. — The Court has an inherent power to refuse to allow a sale to be confirmed if it is satisfied that the Court has been misled in granting leave to the decree holder to bid.<sup>1</sup> But allegations of fraud of this character must be specific and the issue must be decided on a trial.<sup>2</sup>

5. Setting off decretal amount against purchase-money and rateable distribution. — For the sale of convenience, sub rule (2) allows the decree holder, ordinarily, to set off the purchase money.

16 (27) AIR 1927 Pat 312 (312) 6 Pat 4

17 (32) AIR 1932 Cal 672 (673, 674) 5

956 (Following *Nugent v Nugent*, (1903, ... 546))

18 (30) AIR 1935 Mad 421 (422) (Receiver being in fiduciary position should not be permitted to buy as his interest as buyer would conflict with his duties as receiver)

19 (31) AIR 1934 Pat 345 (346)  
[See also (37) 168 Ind Cas 258 (259) 63 Cal 184]

## Note 3

1. (1900) 23 Mad 227 (233) 27 Ind App 17 (P C)  
(23) AIR 1933 Oudh 124 (126) 8 Luck 233  
(1,000) 4 Cal W N 474 (476)

[But see (81) 7 Cal 346 (347) (The observation in this case that a decree holder purchaser is bound to exercise the most scrupulous fairness has been held by the Privy Council in 23 Mad 227 to be too sweeping in its terms)]

2. (1900) 23 Mad 227 (237) 27 Ind App 17 (P C)

ment to dissuade bidders held not fraud under O 21 R 90)

(09) 1 Ind Cas 153 (160) 36 Cal 226 (Do)

3. (83) 16 Cal 632 (632) 16 Ind App 107 (P C)

(89) 16 Cal 132 (136)

(92) 19 Cal 4 (7)

[See also (99) 26 Bom 83 (102)]

4. (36) 18 All 31 (33)

(89) 16 Cal 132 (135)

(92) 19 Cal 4 (7) (11 Cal 781, Dissented from)

[But see (85) 11 Cal 718 (730)]

## Note 4

1. (22) AIR 1922 Pat 511 (511) 1 Pat 5  
(Leave obtained on mis-statement of material fact)

(23) AIR 1923 Mad 635 (636) 46 Mad 533

2. (1,000) 23 Mad 227 (233) 27 Ind App 17 (P C)



money into Court and drawing it out again.<sup>1</sup> But this fact does not alter the substantial nature of the transaction, and the nominal receipt of the sale-proceeds, in cases where set-off is allowed, must be held to amount to the holding of assets by the Court, where the rights of rival decree-holders to share in such proceeds are concerned.<sup>2</sup> Sub-rule (2) accordingly provides that the right to set off is subject to any claims for rateable distribution under Section 73 of the Code.<sup>3</sup> The claims for rateable distribution in such cases must, however, have been made before the conclusion of the sale inasmuch as on the date of the sale, the assets would be deemed to have been realized by the Court.<sup>4</sup> If, however, the amount of the bid exceeds the decree-amount, the claims under Section 73 may be made before the realization of the excess amount by the Court.<sup>5</sup> The existence of other decree-holders who are entitled to rateable distribution does not oblige the decree-holder-purchaser to bring into Court the entire purchase-money. He is only bound to pay into Court the proportionate amounts due to the other decree-holders.<sup>6</sup> In the undermentioned case<sup>7</sup> it was held that it was irregular for a Court to allow a decree holder purchaser to set off the decretal amount for the purchase-money when the property had been attached by another decree-holder also. This view does not seem to be sound. Where the decree-holder-purchaser who is liable to share rateably with rival decree-holders in the sale proceeds fails to furnish the proportionate amount to the Court for distribution, a refund may be enforced by a

**O. 21 R. 72**  
**Note 5**

**Note 5**

**I** ('38) 40 Pun L R 544 (544)  
(35) AIR 1935 Mad 893 (894) 59 Mad 842 (The decree holder who has been permitted to pur

(Dissenting from A I R 1920 Mad 781.)

(31) AIR 1931 Mad 103 (105) (Where the amount of bid is equivalent to or less than decretal amount assets deemed to be realized on date of sale though set-off ordered before sale)

(31) AIR 1931 Bom 252 (254, 255). (Assets deemed to be realized on date of sale though set off ordered before sale — Per Broomfield, J. — Order for a set off can be properly made only after sale — An order before sale is futile and misleading)

(37) AIR 1937 Cal 55 (56)

(25) AIR 1935 Mad 893 (894, 895) 59 Mad 842

[See also (30) AIR 1930 Cal 761 (762) (Application under S 73 may be in a Court of a higher grade)]

(35) AIR 1935 Lah 690 (691) (Decretal amount must be deemed to have been realized on date of sale)]

[See however (36) AIR 1936 Pesh 164 (166). (Assets must be deemed as received by Court on date of confirmation of sale)]

(36) AIR 1936 Mad 437 (439) (There can be no set off except subject to the right of rateable distribution and in such cases the assets cannot be deemed to have been realized by the Court till the amount has actually been deposited under orders of the Court)]

5. [See (31) AIR 1931 Mad 103 (105)]

6. (35) AIR 1935 Mad 893 (895) . 59 Mad 842 (Decree holder purchaser need pay only amounts due to such of the other decree holders as have

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off is granted when there are rival decree-holders proceeding simultaneously against the same judgment debtor in execution)]

466  
[See also (36) AIR 1936 Mad 797 (799) 59 Mad 1028 (Set off allowed to decree holder purchaser—Application for rateable distribution by another decree holder — Former may have re sale or deposit so much price as is due to rival decree-holder on rateable distribution)]

(32) 5 Mad 123 (124)  
(36) AIR 1936 Mad 437 (438).  
(36) AIR 1936 Mad 797 (798) 59 Mad 1028

4. (25) AIR 1925 Oudh 287 (288) (Assets deemed to be realized on date of sale though order to set off made later)  
(33) AIR 1933 Mad 804 (805) ; 57 Mad 38.

0.21 R. 72  
Notes 5-8

summary process in execution instead of in a separate suit<sup>8</sup> A and B two creditors of C had both applied for execution and A was allowed to purchase and set off his decree amount towards the purchase money. The Court subsequently discovered the fact that B had applied for execution even before the sale, but found that A was unable or unwilling to pay the purchase money into Court. It was held that the proper order to be passed in such a case was to set aside the sale or order re-sale<sup>9</sup>

Under this rule, no order of Court is necessary prior to sale granting permission to set off<sup>10</sup> An application for set off may be made even after fifteen days of sale<sup>11</sup> Where permission has been given to the decree-holder to bid and set off, the set-off takes place automatically on the sale being held and the decree-holder purchasing at such sale. An order of the Court setting off the two amounts is not necessary<sup>12</sup>

Where permission to bid has been granted on condition that there should be no set off, the Court cannot subsequently allow a set off<sup>13</sup> Similarly, where the Court has granted permission to set off and the decree holder has bid at the sale relying on such permission, the Court cannot go back upon its previous order and call on the decree holder to pay the purchase money<sup>14</sup>

As to the exemption from making the deposit into Court of purchase-money by a decree holder-purchaser, see Order 21 Rules 84 and 85 and Notes thereon

**6. Amount due on the decree.** — Where a decree holder is allowed to purchase the property ordered to be sold on condition that he would purchase it in full satisfaction of the decree, he is not entitled to recover from the judgment-debtor any money that he, as a decree holder, has to pay by way of poundage<sup>1</sup>

**7. Purchase without permission.** — Although the leave of the Court is a condition precedent to the decree holder bidding for, or purchasing the property, a purchase by him without such permission is not *ipso facto* void. It is valid until set aside in the manner provided by sub rule (3)<sup>1</sup> A stranger or a person other than such as is specified in sub rule (3) has no right to apply to have such a sale set aside<sup>2</sup>

**8. By himself or through another person.** — A purchase by the decree-holder through another person on his behalf is not void, but is only voidable at the

8. (18) AIR 1918 Cal 400 (401)

(88) 11 Mad 356 (359)

(31) AIR 1931 Pat 859 (361), 10 Pat 830

(31) AIR 1931 Pat 405 (407, 403) (32 Mad 334,

Bom 570, Followed)

(37) AIR 1937 Nag 363 (334) I L R (1937) Nag

466

9. (33) AIR 1933 All 337 (338, 339)

10. (20) AIR 1929 Lah 492 (493)

(35) AIR 1935 Lah 690 (691) (The decretal amount is set off against the purchase price automatically by operation of law—The Court executing the decree has only to enter up satisfaction of the decree in whole or in part after

money — Held that this could not be done — Held also that the sale in favour of the decree-holder was a nullity)

Note 8

1. (29) AIR 1929 All 266 (266)

Note 7

1

14. (35) AIR 1935 Cal 907 (908) (Decree holder

should be ordered to pay to him the purchase-

(Sale with-

instance of the judgment debtor or any other person interested in the sale.<sup>1</sup> But where a decree holder was *refused* permission to bid, a purchase by him *benami* in the name of another was held to be an *abuse of process of Court*, and the sale was held invalid.<sup>2</sup> Similarly, a purchase by the decree holder in the name of another for a price lower than that at which the decree holder was allowed permission to bid, was held liable to be set aside for fraud.<sup>3</sup> A purchase by the decree holder's undivided son<sup>4</sup> or undivided brother<sup>5</sup> is presumably with joint funds and as such the purchase is for the decree-holder. A purchase by the decree holder's pleader for himself is not invalid.<sup>6</sup>

O. 21 R. 72  
Notes 8-11

**9. The Court may, if it thinks fit, set aside the sale.**—A purchase by the decree holder in contravention of this rule being only voidable, it is within the discretion of the Court to set aside the sale on an application under sub rule (3).<sup>1</sup> Where the conduct of the decree holder in purchasing the property amounts to fraud,<sup>2</sup> or to an abuse of the process of the Court,<sup>3</sup> the sale will be set aside. Where the purchase has been *benami* and for an inadequate price, the burden of proving that the sale is to be upheld is clearly on the decree holder and it will not be a valid ground of objection that the judgment debtor did not plead fraud or substantial injury.<sup>4</sup> In order that a sale may be set aside under this rule on account of the decree holder's failure to obtain permission to bid, it is not necessary to find that the judgment debtor sustained substantial loss by the sale.<sup>5</sup>

An application to set aside a sale, under sub rule (3), can only be made by the judgment debtor or any other person whose interests are affected by the sale. A decree holder entitled to rateable distribution is a person whose interests are so affected but the sons of a judgment debtor who were not parties to the suit and on whom the decree would not be binding are not persons interested in the sale.<sup>6</sup> The fact of the confirmation of the sale is no bar for setting it aside under sub rule (3).<sup>7</sup>

See also Note 8 above

**10. Separate suit, if lies, to set aside sale without permission.**—See Note 62 to Section 47 *supra* and the cases cited thereunder

**11. Judgment-debtor, if can raise the question of no permission in suit for possession by decree-holder.**—It has been held by the High Court of Madras<sup>1</sup> that in a suit for possession by the decree-holder purchaser who has taken the property in auction in contravention of the provisions of this rule, the judgment debtor may raise the question of want of leave by way of answer to the plaintiff's claim under

#### Note 8

1. { 20 } AIR 1920 Bom 90 (92) . 44 Bom 352  
{ 98 } 22 Bom 624 (625)
- { 88 } 1888 Bom P J 205, Re No 110 (110)  
[ See { 23 } AIR 1923 Cal 802 (802)  
{ 09 } 1 Ind Cas 221 (224, 225) 32 Mad 242 ]
2. { 84 } 10 Cal 757 (760) (Suit by decree holder-purchaser for possession successfully resisted on ground of the abuse of the process of the Court)

(Semble Pleading so purchasing may be guilty of misconduct under rules)

#### Note 9

1. { 85 } 11 Cal 731 (733).  
[ See { 03 } 13 Mad L Jour 231 (235) { *Dona fide* purchaser from the decree holder purchaser — Restitution impracticable — Sale cannot be set aside } ]
2. { 09 } 32 Mad 242 (253) 1 Ind Cas 221 (227)
3. { 84 } 10 Cal 757 (760).
4. { 09 } 1 Ind Cas 221 (227) 32 Mad 242.
5. { 21 } AIR 1921 Mad 402 (402)
6. { 03 } 13 Mad L Jour 231 (234)
7. { 09 } 1 Ind Cas 221 (226) 32 Mad 242

#### Note 11

1. { 09 } 32 Mad 242 (244, 245, 252) (Abdur Rahim, J. dissenting)

4. { 80 } 5 Bom 130 (131)
5. { 84 } 1884 Bom P J 74, Re No 111 (32)
6. { 29 } AIR 1929 Oudh 235 (237) 4 Luck 635

**O. 21 R. 72** the sale, neither Section 47 nor the want of an application under sub rule (3) being a  
**Notes 11-14** bar thereto

**12. Interest.** — A decree is not satisfied until the sale in execution of it is confirmed,<sup>1</sup> and the decree holder is entitled to claim interest, if the decree awards it, between the date of sale and the date of its confirmation<sup>2</sup>

**13. Appeal.** — Under O 43 R 1 (j), an appeal lies from an order setting aside or refusing to set aside a sale under this rule<sup>1</sup> But there is no right of second appeal<sup>2</sup> But an order granting<sup>3</sup> or refusing<sup>4</sup> leave to bid to the decree holder is not appealable

**14. Limitation and step-in-aid of execution.** — The effect of a decree holder purchasing at an execution sale without the leave of the Court is to render the sale voidable and not void. Consequently, a suit to set aside the sale under Article 13 (a) of the Limitation Act must be brought within one year of confirmation of sale<sup>1</sup>

On the question whether an application for leave to bid is a step in aid of execution see Article 183 clause (5) of the Limitation Act and the undermentioned cases<sup>2</sup>

### Local Amendment

#### BOMBAY

After Rule 72 the following shall be inserted, namely

'72A If leave to bid is granted to the mortgagee of immovable property a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid'

**Note** — Rule 72A framed by the Bombay mandatory provision for fixing in the case of a reserve price of not less than the amount of the was accordingly held<sup>1</sup> that an execution sale to the mortgagee decree holder without fixing the reserve price aforesaid and for less than the decree amount was vitiated by material irregularity. The rule has since been amended giving power to the Court if it thinks fit, to dispense with the condition relating to the reserve price

It has been held that Rule 72A has no application to the original side of the High Court of Bombay and a mortgagee decree holder purchasing for less than his decree amount is entitled to recover the balance from the mortgagor or otherwise<sup>2</sup>

#### Note 12

1. (09) 1 Ind Cas 106 (107) 33 Bom 311
2. (19) AIR 1919 All 253 (254) 41 All 576

#### Note 13

1. (15) AIR 1315 All 54 (55)
- { 83) 1683 All W N 104 (104)
- { 86) 13 Cal 174 (174)
- [See { 84) 10 Cal 368 (371) (Obster )]
2. { 94) 21 Cal 789 (791)
- { 15) AIR 1915 All 54 (56)
3. { 83) 1833 All W N 104 (104)
- { 29) AIR 1929 Mad 903 (905)
4. { 11) 11 Ind Cas 545 (545) 33 Cal 717 33
- Ind App 126 (P O)
- { 6) 13 Cal 174 (174)

**R. 73. [S. 292.] No officer or other person having any** **O. 21 R. 73**

Restriction on bidding  
or purchase by officers.

duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

[1877, S. 292.]

### Synopsis

- 1 Legislative changes.
- 2 "No officer or other person"
- 3 Transfer of Property Act, Section 136

**1. Legislative changes.** — The words "or other person" are now

**2. "No officer or other person."** — The introduction of the words "or other person" in the present rule extends the scope of the prohibition in the rule to all those, besides officers who have anything to do with the machinery of the sale or have, directly or indirectly, any interest in the result of the sale<sup>1</sup>. A pleader engaged by a party to a suit<sup>2</sup> or the pleader's clerk<sup>3</sup> cannot be said to have a duty to perform in connexion with the sale and is not therefore within the prohibition, and the introduction of the words "or other person" in the present Code does not change the law in this respect<sup>4</sup>. Judicial opinion has, however, been uniform that the conduct of a pleader engaged in the suit, in purchasing the property for himself, is open to grave censure, especially when the purchase is detrimental to the interests of his client<sup>5</sup>. In fact, the pleader will be guilty of professional misconduct in such cases<sup>6</sup>. A receiver appointed by the Court under O 40 R 1 cannot purchase at an auction sale, as a decree holder, property of which he is the receiver<sup>7</sup>. See also Note 3 below.

**3. Transfer of Property Act, Section 136.** — Under Section 136 of the Transfer of Property Act (IV of 1882), as it originally stood, "no Judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions"<sup>1</sup>. The Section as it now stands is wider in its scope and prohibits such a purchase, whether the claim is within the jurisdiction of the Court with which the Judge, pleader or other persons referred to is connected or of any other Court<sup>2</sup>.

#### Order 21 Rule 11 — Note 2

1. (27) AIR 1927 All 76 (77) 49 All 292
2. (86) 10 Mad 111 (112)
3. (24) 15 Mad 389 (398) (But onus lies on a pleader to prove that the transaction is bona fide)
4. (27) AIR 1927 All 76 (77) 10 All 292
4. (229) AIR 1929 Oudh 235 (237) 4 Luck 635  
[But see (29) AIR 1929 Nag 305 (309, 310, 311)]
5. (70) 2 N W P H C R 46 (47)
- (70) 13 Suth W R 209 (214) (Judgment-debtor a pleader joining decree holder in purchasing at court sale)
- (72) 17 Suth W R 480 (483) (Do)
- (6) 23 Cal 805 (817)

- (12) 17 Ind Cas 539 (540) (All) (FB)  
See also cases in foot notes 3 and 4
6. (12) 17 Ind Cas 539 (539, 540) (All) (FB)  
(R 20 of Chap. 15, High Court Rules and R 37 of Chap. 21 of Civil Courts Rules)
- (70) 2 N W P H C R 46 (47) (Circular Orders of the N W F. P.)
7. (32) AIR 1932 Cal 672 (673) 59 Cal 906
- (35) AIR 1935 Mad 421 (422) (Decree holder obtaining permission to bid subsequently appointed as receiver—Decree holder cannot bid)

#### Note 3

1. (88) 11 Mad 498 (499)
- (68) 11 Mad 56 (61)
2. (See (13) 19 Ind Cas 129 (129, 137) 40 Cal 650 (FB))

O. 21 R. 74

## SALE OF MOVEABLE PROPERTY

Sale of agricultural produce

**R. 74.** [New ] (1) Where the property to be sold is agricultural produce, the sale shall be held, —

- (a) if such produce is a growing crop, on or near the land on which such crop has grown, or,
- (b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage

(2) Where, on the produce being put up for sale, —

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it, and
- (b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce

[See Rule 75 and Section 61 ]

**1. Place of sale.** — This rule makes special provision for the sale of agricultural produce. In other cases of moveable properties attached in execution sales should ordinarily be held in some place within the jurisdiction of the Court ordering the sale<sup>1</sup> Where certain ornaments were attached in Belgaum and the judgment debtor urged that they should be directed to be sold at Bombay on the ground that they would probably fetch a better price and it was found by the Court that a fair price could be had on the spot it was held that there was no good and sufficient reason to depart from the usual practice<sup>2</sup>

O. 21 R. 75

**R. 75.** [New.] (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been

Special provisions relating to growing crops

stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

[See Rule 74.]

### Local Amendments

#### CALCUTTA

In sub rule (2) after the words "where the crop from its nature does not admit of being stored," *insert*

"or can be sold to greater advantage in an unripe state (e g , as green wheat) "

In sub rule (2) *cancel* the word "and" between the words "tending" and cutting" and *substitute* the word "or"

#### LAHORE

In sub-rule (2) after the word "stored" the following words were inserted  
"or can be sold to great advantage in an unripe state "

#### MADRAS

In sub rule (1), *after* the words "yet been stored" and *before* the words "the day of the sale," *add* the words "unless the Court decides to proceed under the provisions of sub-rule (2) hereunder "

In sub rule (2), *after* the words "being stored" and *before* the words "it may be sold . *insert* the words "or can be sold to greater advantage in an unripe state," and *after* the words "and gathered" and *before* the words "and the purchaser," *insert* the words "or in such unripe state "

#### NAGPUR

In sub rule (2) *after* the words "being stored" *insert* the words "or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state " N.-W.F.P.

In sub rule (2) *after* the words "being stored" *add* the words "or can be sold to greater advantage in an unripe state "

#### OUDH

In sub rule (2) *after* the words "being stored" *insert* the words "or where it appears to the Court that the crop can be sold to greater advantage in an unripe state "

#### PATNA

*Substitute* the following for Rule 75 :

"Where the property to be sold is a growing crop which can be sold to greater advantage in an unripe or unreaped state, it may be sold unreaped, and the purchaser shall be entitled to enter on the land to do all that is necessary for the purpose of tending and reaping it In all other cases the day of sale shall be so fixed as to admit of the crop ripening and being reaped before the sale "

**R. 76.** [S. 296.] Where the property to be sold is a negotiable instrument or a share in a corporation, O. 21 R. 76

Negotiable instruments and  
shares in corporations.

the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

[ 1877, S. 296; 1859, S. 248. See Rule 80. ]

O. 21 R. 76  
Nota 1

1. "May." — The rule is only permissive. A Court is not bound to authorize the sale of negotiable instrument or a share in a corporation through a broker.<sup>1</sup>

O. 21 R. 77

**R. 77. [S. 297.]** (1) Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

[1877, S. 297; 1859, S. 251. See Rules 71 and 88.]

### Synopsis

- |                               |  |
|-------------------------------|--|
| 1. Sale of moveable property. | 3. Re-sale and applicability of Rule 71. |
| 2. Payment of price.          | 4. Sub-rule (3).                         |

**1. Sale of moveable property.** — A sale of arms by a nazir of the Court in execution of a decree is a sale by a public servant in the discharge of his duty and is therefore excluded from the operation of the Arms Act (XI of 1878) by Section 1, clause (b) of that Act.<sup>1</sup>

**2. Payment of price.** — Though sales should be conducted strictly according to this rule, still where, in execution of a decree for a large amount the decree holder purchased some moveable property of small value without the leave of the Court and filed into Court a receipt setting off the amount towards his decree it was held in the undermentioned case<sup>2</sup> that it might be treated as a cash payment.

This rule gives the officer conducting the sale a discretion to allow the purchase to be made at any time after the sale.<sup>3</sup> The sale becomes absolute as soon as the purchase money is paid and no order of Court is necessary.<sup>4</sup>

**of Rule 71.** — A purchaser who has defaulted



4. Sub-Rule (3). — Sub-rule (3) is new and is framed on the analogy of Rule 88 which relates to sale of immovable properties

O. 21 R. 77  
Note 4

**R. 78.** [S. 298.] No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

O. 21 R. 78

Irregularity not to vitiate sale, but any person injured may sue.

[1877, S. 298; 1859, S. 252. See R. 77. Cf. R. 90.]

### Synopsis

1. Irregularity in publishing and conducting sale of moveable property.
2. Person injured may, however, sue for compensation.
3. Money-decree is not moveable property.

### Other Topics (miscellaneous)

"At the hand of any other person" See Notes 1 and 2  
Scope of the Rule See Note 1  
What are not irregularities See Note 2

#### 1. Irregularity in publishing and conducting sale of moveable property. —

Rule 77, *ante*, provides that on payment of the purchase-money the sale of *moveable* property shall become absolute<sup>1</sup> This rule provides that a sale of *moveable* property in execution of a decree cannot be set aside on the ground of irregularity in publishing or conducting the sale<sup>2</sup> But it does not provide that a sale of moveable property shall in no case be set aside Thus, if there is an *express* assertion in the proclamation of sale that the goods sold are the property of the judgment debtor, then the purchaser, if he has not got that for which he paid the price, is entitled to have the sale set aside and to recover the purchase-money from the hands of the Sheriff or the execution creditor<sup>3</sup> Where a judgment debtor died after the issue of the sale proclamation and before sale and the sale was held without bringing on record his legal representatives, it was held that it was not a case of mere irregularity but that the sale was void and could be set aside under Section 47<sup>4</sup> On this question, however, there is a conflict of decisions, for which see Note 12 to Section 50, *ante*

In a sale of moveable property in execution of a decree, there is no warranty of title and all that is sold is the right, title and interest of the judgment debtor The right, title and interest of the real owner remain unaffected and he is, therefore, entitled to recover the property or damages<sup>5</sup>

#### Order 21 Rule 78 — Note 1

1. (30) AIR 1930 Lah 236 (236) (An order confirming a sale is not appealable as O. 43 R. 1

3. (78) 2 Bom 258 (266) (Though there is no provision corresponding to R. 93 purchase-money in case of moveable property also can be recovered back under general principles of law)  
[See (09) 3 Ind Cas 672 (677, 679) ■ Low Bur Rul 53 (FB) (In the absence of such assertion

O. 21 R. 78  
Notes 2-3

**2. Person injured may, however, sue for compensation.**— Any person sustaining any injury by reason of an irregularity in conducting or publishing the sale may sue the person by whom the injury was caused, for compensation<sup>1</sup>

Though this rule would enable a judgment debtor also to sue for compensation, it must be read with Section 47 which bars a separate suit regarding any question arising between the parties in execution.<sup>2</sup>

**3. Money decree is not moveable property.**— A money decree is not moveable property within the meaning of this rule and therefore where such a decree is sold contrary to the procedure laid down in Rule 53 *ante*, the sale can be set aside on the ground of irregularities in the conduct of the sale<sup>1</sup>

O. 21 R. 79

**R. 79.** [Ss. 299, 300, 301.] (1) Where the property sold

Delivery of moveable property, debts and shares

is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer

#### Note 2

(1903-03) 2 Upp Bur Rul Civ Pro 9 (Lien of a third party on the moveables destroyed by sale — Decree holder liable to him for loss)

(34) AIR 1934 Oudh 94 (95) (Sale officer dishonestly sending away decree-holder to prevent raising bid — Decree holder may sue for damages)

(20) AIR 1920 Nag 34 (35) (Goods sold not

{ value is not irregularity )  
(67) 8 Suth W R 415 (420) (Omission to mention number, value, etc., of Government Promissory Notes is not such irregularity as would affect sale)

#### Note 3

1. (24) AIR 1924 Rang 21 (21) 1 Rang 360

of the corporation from permitting any such transfer or making any such payment to any person except the purchaser

O. 21 R. 79  
Notes 1-3

[1877, § 299; 1859, Ss 261, 266 See Rr 43, 51 and 80.  
Cf. Rules 95 and 56.]

### Synopsis

1 Delivery of debts

2 Shares

3 Forms See appendix E, Form Nos 32 33 and 34

1. **Delivery of debts.** — Where a debt is sold the method of delivery is as provided in sub rule (3) by a *prohibitory order* of the Court resembling that made on attachment and the purchaser cannot apply for possession under Rule 95 *infra* <sup>1</sup>

2. **Shares.** — In the case of sale of shares in a company, when an order is issued under sub rule (3) there is nothing further to be done by the transferee or by the Court and the company cannot permit the transfer of the shares to anybody else <sup>1</sup>

What passes to the purchaser of shares at a court sale is the right to the property and not an absolute *right to have the transfers registered*. Therefore the company has still a discretion to recognize such purchasers or not, as in the case of private purchasers <sup>2</sup>

3 **Forms** — See appendix E Form Nos 32 33 and 34

## R. 80. [S 302 ] (1) Where the execution of a document O. 21 R. 80

Transfer of negotiable  
instruments and shares.

or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely.—

A B. by C. D., Judge of the Court of (or as the case may be), in a suit by E F. against A B

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest

Order 21 Rule 79 — Note 1

Mad 537

1 ( 32 ) AIR 1932 Mad 283 (284)  
[See also ( 17 ) AIR 1317 Low Bur 134 (135) ]

2 ( 16 ) AIR 1916 Bom 147 (140) 41 Bom 76

( 23 ) AIR 1923 Mad 241 (242) 45 Mad 537

Note 2

1 ( 23 ) AIR 1923 Mad 241 (244, 245) 45

[But see ( 66 ) 1 Ind Jur (N) 253 ]

O. 21 R. 80  
Note 1

or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

[1877, S. 302; 1859, S. 267. See Rr. 34 and 51.]

**1. Execution of deed of transfer.**—This rule is only permissive and, therefore, in order to effectuate the transfer of ownership of a share or of a negotiable instrument a deed of transfer of the share or an endorsement of the negotiable instrument is not required by law <sup>1</sup>

This rule also empowers a Court to cancel a previous endorsement made by the judgment debtor in order to enable the auction purchaser of a promissory note to realize the amount due under it <sup>2</sup>

O. 21 R. 81

Vesting order in case  
of other property

**R. 81.** [S. 303.] In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

[1877, S. 303 See Rr. 74 to 77, 79 and 80. Cf. Rr. 92 and 94.]

**1. Rights of mortgagees against purchaser.** — A mortgagee of moveable property cannot follow the property in the hands of an auction purchaser <sup>1</sup>

#### Local Amendment

#### RANGOON

The following shall be inserted as Rule 81A

O 21 R. 81A  
(Rangoon)

Sale of arms

"81A Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act"

#### SALE OF IMMOVABLE PROPERTY

O. 21 R. 82

What Courts may  
order sales

**R. 82.** [S. 304.] Sales of immovable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

[1877, S. 304. See Ss. 7 (a) (iii), 8 and O. 50 R. 1 (a) (ii), and O. 51 R. 1.]

Order 21 Rule 80 — Note 1

1. (28) AIR 1928 Mad 571 (578)

(10) 8 Ind Cas 17 (17) (Mad)

**1 What Courts may order sales** — As to sale of immovable property in execution of small cause decrees see Note 10 to Section 39 and the undermentioned cases <sup>1</sup>

**O 21 R 82**  
**Notes 1**

As to execution against property outside a Court's jurisdiction see Note 8 to Section 17 Note 6 to Section 38 and Note 7 to Section 39

**R. 83. [S 305 ] (1)** Where an order for the sale of

**O 21 R 83**

Postponement of sale to enable judgment debtor to raise amount of decree

immovable property has been made, if the judgment debtor can satisfy the Court that there is reason to believe that the amount of

the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment debtor, the Court may, on his application, postpone the sale<sup>2</sup> of the property comprised in the order for sale on such terms and for such period as it thinks proper,<sup>3</sup> to enable him to raise the amount

(2) In such case the Court shall grant a certificate<sup>4</sup> to the judgment debtor authorizing him<sup>5</sup> within a period to be mentioned therein, and notwithstanding anything contained in section 64,<sup>6</sup> to make the proposed mortgage, lease or sale

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court<sup>5</sup>

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court <sup>7</sup>

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage<sup>10</sup> of, or charge on, such property

[ 1877, S 305, 1889, S 243 ]

*Synopsis*

- 1 Legislative changes
- 2 Postponement of sale
- 3 For such period as it thinks proper
- 4 Shall grant a certificate
- 5 Shall be paid into Court
- 6 Effect of private sale

- 7 Confirmation of sale by Court
- 8 Permission under Section III of the Guardians and Wards Act
- 9 Rateable distri but on
- 10 Mortgage decrees — Sub rule (3)
- 11 Appeal and revision

**Order 21 Rule 82 — Notes 1**

- 1 ( 72 ) 17 South W R 303 (311) (FB) (Purchaser cause does not file)  
of immovable property in execution of a small ( 84 ) 7 Mad 592 (594 95)

**O. 21 R. 83**  
**Notes 1-5**

*Other Topics (miscellaneous)*

"Authorizing him" See Notes 2 and 6  
"Notwithstanding anything contained in § 64,"  
See Note 3

Scope of rule See Note 3  
"The amount of the decree may be raised" See  
Note 2

**1. Legislative changes. —**

(1) The words "save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72" in the first proviso to sub-rule (2) have been newly added See also similar saving clauses in Rule 84, sub-rule (2) and Rule 85, *infra*

(2) Sub-rule (3) is new See Note 10, *infra*

**2. Postponement of sale. —** A Court has to exercise its discretion in making an order for postponement of the sale to enable the judgment debtor to raise money by private alienations<sup>1</sup> It will not be exercising its discretion properly in making an order for postponement, where the judgment debtor has had sufficient time to pay the decree amount,<sup>2</sup> or where there is no sufficient reason to believe that the amount due under the decree could be raised by any of the methods mentioned in the rule<sup>3</sup> Where the sale *has taken place* in execution of the decree, the executing Court has no power to grant an application under this rule and is bound to confirm the sale subject to the provisions of Rule 92, *infra*<sup>4</sup>

This rule only authorizes the Court to grant time to the judgment debtor and does not give any authority to the Court to grant a lease or mortgage.<sup>5</sup>

This rule and Rules 84 to 88 (inclusive) are applicable to proceedings under the Chota Nagpur Tenancy Act<sup>6</sup> but not to proceedings under the Acts noted below<sup>7</sup>

**3. "For such period as it thinks proper." —** The postponement of the sale should be for a reasonable period and not unreasonably long<sup>1</sup>

**4. "Shall grant a certificate." —** A mere order of the Court postponing the sale of the property and permitting the judgment-debtor to alienate the property privately is not sufficient to entitle the judgment-debtor to do so The issue of a certificate to him under sub rule (2) is an essential step in the procedure, and in the absence of such a certificate the transferee can get no title<sup>1</sup>

**5. "Shall be paid into Court." —** Payment to the decree-holder's pleader under the orders of the Court is payment into Court, the pleader in such a case becoming the agent of the Court<sup>1</sup> See also the undermentioned case<sup>2</sup>

**Order 21 Rule 83 — Note 2**

1. ('25) AIR 1925 Rang 271 (272) 3 Rang 132 (1864) 1 Suth W R Misc 15 (15)

2. ('21) AIR 1921 Lah 394 (385)

3. ('66) 1 Agra Misc App 11 (12)

(91) 14 Mad 277 (280, 284) (Cannot be postponed unless whole amount of decree can be raised)

amended by Bihar and Orissa Act, VI of 1920,  
§ 64 (1)

7

**Note 3**

1.

(

('14) 14 BULL W R 146 (146)

('73) 21 Suth W R 146 (146)

**Note 4**

1. ('82) 1882 All W N 243 (244) (Transferee can not maintain suit for possession)

(34) AIR 1934 Mad 727 (729) 58 Mad 392

**Note 5**

1. ('13) 21 Ind Cas 210 (211) (Cal)

2. ('35) AIR 1935 Lah 481 (481) (Part of purchase money paid to decree holder as per order

[See also (10) 7 Ind Cas 718 (719) 1910 Pun  
Re No 72]

5. (1864) 1864 Suth W R Gap Misc 5 (5)

6. See S 210 (3) (b) of Bengal Act, VI of 1908, as

**6. Effect of private sale.** — This rule qualifies the prohibition in Section 64 and on compliance with the conditions of this rule a private alienation, notwithstanding Section 64, becomes absolute even against all claims enforceable under the attachment<sup>1</sup> Where, on 15th January 1911, a Court granted a certificate to a judgment debtor under this rule for private sale of his properties, and on 24th January 1911 the properties were attached in execution of another decree, and on the 31st of January the Court confirmed the sale, it was held that the purchaser got an absolute title and the subsequent attachment was of no avail<sup>2</sup> But the Madras High Court has held in the undermentioned case<sup>3</sup> that sub rule (2) refers only to attachments in existence at the date of the certificate and does not apply to subsequent attachments so that an alienation made after such an attachment will not be protected

In authorizing a sale under this rule, a Court cannot empower a judgment debtor to transfer any higher interest than he has and bind the interests of others in the property<sup>4</sup> A private alienation made after obtaining the sanction of the Court cannot affect a prior encumbrance already existing on the properties<sup>5</sup>

An alienation effected by a judgment debtor by virtue of a certificate granted under this rule is a private alienation, even though it does not become absolute unless it is confirmed by the Court and therefore it cannot be said that it is not liable to pre-emption under the provisions of the Punjab Pre-emption Act (I of 1913)<sup>6</sup>

**7. Confirmation of sale by Court.**—A sale effected privately is not a completed transaction until it is sanctioned and confirmed by the Court<sup>1</sup> Until this is done, it would not be operative against claims enforceable under the attachment, but would be defeasible to that extent<sup>2</sup> Where the sanction for private sale has been granted by two Courts executing different decrees, it is enough if the sale is confirmed by one Court<sup>3</sup>

It is not necessary that any formal application should be made for the purpose of obtaining the Court's confirmation of a private transfer: nor is there any provision under which a formal order declaring such confirmation should be recorded<sup>4</sup> It has been held in the undermentioned case<sup>5</sup> that it is extremely doubtful whether a private sale under this rule comes within the purview of Rule 92 *infra*, and that, even if Rule 92 governs this rule, there is no legal bar to the confirmation of a sale before the expiry of thirty days from the date of sale

Where the approval of the Court has been obtained by misrepresentation or by the withholding of the material information, the Court will treat such misrepresentation

of Court and balance paid to judgment debtor—Purchaser cannot be ordered to pay over again the amount paid to the decree holder but may be required to pay the amount paid to the judgment debtor }

#### Note 6

1. ( 06 ) 80 Bom 337 (340).
2. ( '13 ) 21 Ind Cas 210 (211) (Cal)
3. ( 34 ) AIR 1934 Mad 727 (728) ■ Mad 392 (Distinguishing 21 Ind Cas 210 on the ground that probably in that case the alienation had taken place before the subsequent attachment )
4. ( 02 ) 26 Bom 379 (383 384)
- ( 20 ) AIR 1920 Mad 231 (232)
5. ( 24 ) AIR 1924 Loh 133 (135).
- ( 12 ) 16 Ind Cas 102 (103) (All)
6. ( '19 ) AIR 1919 Loh 868 (369)

#### Note 7

1. ( 34 ) AIR 1934 Pesh 76 (76)
- ( 82 ) 1882 All W N 243 (344)
- ( 34 ) AIR 1934 Mad 727 (729) 58 Mad 392 (Property attached in execution of another decree against judgment debtor after issue of certificate — Alienation after such attachment

into Court by the alienor )

2. ( 06 ) 80 Bom 337 (340)
3. ( 95 ) 19 Bom 539 (544) (In this case the certificate was given by a Court of higher grade — Held that it had concurrent jurisdiction to do so )
4. ( 13 ) 21 Ind Cas 210 (211) (Cal)
5. ( 13 ) 21 Ind Cas 210 (211) (Cal)

**O. 21 R. 83**  
**Notes 7-11**

or withholding of information as a fraud and will refuse to give effect to the private transfer as against claims enforceable under the attachment <sup>6</sup>

**8. Permission under Section 29 of the Guardians and Wards Act.** — Where the judgment debtor is a minor for whom a guardian has been appointed under the Guardians and Wards Act 1890, the certificate of the executing Court is not sufficient to validate a transfer under this rule, it is also necessary that the guardian should obtain the sanction of the Court that appointed him as guardian <sup>1</sup> The reason is that the matter for inquiry under this rule is the protection of the execution creditor, while under Section 29 of the Guardians and Wards Act the matter to be considered is the benefit of the minor and therefore compliance with this rule should not render unnecessary the fulfilment of the requirements of Section 29 of the Guardians and Wards Act

**9. Rateable distribution.** — Money paid into Court under sub rule (2) is money paid under a pending execution application and is therefore liable to rateable distribution under Section 73 *ante* <sup>1</sup> Where property is attached at the instance of several decree holders, permission should not be granted under this rule to satisfy one of the decrees <sup>2</sup>

**10. Mortgage decrees — Sub-Rule (3).** — This rule does not apply to cases in which property is directed to be sold in execution of a decree on a mortgage <sup>1</sup> The reason is that the creditor's right of sale rests on the mortgage decree and not on the attachment in execution The undermentioned cases <sup>2</sup> under the old Code holding that Section 305 corresponding to this rule applied to mortgage decrees also are no longer law under this Code in view of the specific enactment of sub rule (3)

**11. Appeal and revision** — No appeal lies against an order under this rule postponing or refusing to postpone a sale <sup>1</sup> Such an order is however open to revision <sup>2</sup>

**O. 21 R. 84**

**R. 84. [S. 306.] (1)** On every sale of immoveable property

Deposit by purchaser  
and re sale on default

the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re sold

6 (05) 29 Bom 615 (620 621) (Principle of applied to sales of immovable property subject to mortgage decrees)  
(1884) 27 Ch D 424 followed)

Note 8

1 (00) 31 All 878 (378)

(90) 23 Bom 287 (290)

(22) AIR 1922 Cal 150 (151) 49 Cal 911

ad 616

ad 616

Note 10

1 (04) 31 Cal 373 (3 8)

(78) 11 Cal 335 (336)

(21) AIR 1921 Lah 384 (385)

(24) AIR 1924 Mad 234 (235)

(96) 6 Mad L Jour 187 (188)

2 (01) 25 Bom 104 (106 107) (Provisions of Ss 304 to 319 (old) s e Rr 92 to 96 and 56

(1900) 3 Oudh Cas 42 (47)  
(05) 2 All L Jour 353 (355) (So assumed)

ng 132

(37) AIR 1937 Pesh 64 (64)

[See (1864) 1 Suth W R Misc 11 (11)]

[But see (1865) 2 Suth W R Misc 49 (50)

(1900) 3 Oudh Cas 42 (43 44) (Is a question under S 241 (now S 47) and therefore appealable)]

2 (25) AIR 1925 Rang 271 (273) 3 Rang 132

[See however (37) AIR 1937 Pesh 64 (64) (Order refusing to postpone sale is not decision of case within S 115 and no revision lies)]



(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under rule 72, the Court may dispense with the requirements of this rule. O.21 R.84 Notes 1-2

[1877, S. 306 ; 1859, S. 253. Cf. Rule 77. See Rr. 71, 85 and 86.]

### Local Amendment

ODUH

To sub-rule (2), add the following

"The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets"

### Synopsis

- |  |  |
|--|--|
| 1. "Declared to be purchaser."                               | 4. Non-payment of deposit — Effect of. |
| 2. Acceptance by Court, if necessary for completion of sale. | 5. Re sale                             |
| 3. Deposit, payment of.                                      | 6. Sub-rule (2).                       |
|  | 7. Interest.                           |
|  | 8. Appeal.                             |

### Other Topics (miscellaneous)

' Shall pay immediately ' See Note 4 ' The property shall forthwith be re sold ' See Note 5

1. "Declared to be purchaser."—The person to be declared purchaser under this rule is the bidder whose bid has been accepted<sup>1</sup> There is no sale till the bid has been accepted by the competent authority<sup>2</sup>

A bidder can withdraw his bid at any time before the property is knocked down to him<sup>3</sup> A bid lapses by a higher bid being made<sup>4</sup> or by extraordinary delay in accepting it<sup>5</sup> As to whether the acceptance is to be by the Court or the officer conducting the sale, see Note 2 below

A person declared to be purchaser under this rule has, even before the confirmation of sale in his favour, sufficient interest in the property to prevent a forfeiture or preserve the title from destruction Thus, where the property sold is the right of the judgment debtor to obtain a re conveyance of certain properties on paying a certain sum by a certain date the person declared to be the purchaser under this rule can make a valid tender of such sum so as to prevent a forfeiture under the clause<sup>6</sup>

2 Acceptance by Court, if necessary for completion of sale — There is a conflict of opinion on this question and three different views have been expressed

(a) A court sale is not complete till the highest bid is accepted by the Court, though the officer conducting the sale may have knocked down the property in favour of a particular person as being the highest bidder<sup>1</sup>

#### Order 21 Rule 84 — Note 1

1 (18) AIR 1918 Oudh 439 (440) 21 Oudh Cas 212 (Bid of one cannot be treated as that of another and deposit received from latter — Sale to latter irregular and bad)

2 (12) 17 Ind Cas 783 (784) 35 All 65

#### Note 2

1. (25) AIR 1925 Mad 318 (319) (Court can refuse bid of highest bidder though accepted by sale officer)

5. (25) AIR 1925 Cal 557 (558)

6. (19) AIR 1919 Mad 1014 (1024) 41 Mad 474 return of 25 per cent)

O 21 R 84  
Notes 2-4

(b) The sale is complete as soon as the property is knocked down to the highest bidder by the officer conducting the sale<sup>2</sup>

(c) The Court has a *quasi* revisional jurisdiction in the matter<sup>3</sup>. According to this view the sale is complete *as against the purchaser* as soon as the property is knocked down to him, and he cannot withdraw his bid thereafter although the Court may in its discretion refuse to accept his bid and order a re sale.

It has been held that in a Collector's sale the acceptance of the bid by the Collector is necessary for the completion of the sale<sup>4</sup>.

**3 Deposit, payment of** — The payment of deposit under this rule cannot be insisted on before the property has been knocked down to the bidder<sup>1</sup>. But the officer conducting the sale may, if the circumstances justify such a course and in order to satisfy himself that he is a *bona fide* bidder ask any bidder if he has the deposit money ready<sup>2</sup>. The deposit under this rule should be paid though no demand is made for it<sup>3</sup>.

**4 Non-payment of deposit — Effect of.** — The deposit under this rule must be made immediately after the purchaser is declared and must cover 2½ per cent of the purchase money<sup>1</sup>. The officer conducting the sale has no authority to extend the time for the payment of the deposit<sup>2</sup>.

The failure to pay the deposit immediately as required by the rule does not render the sale void but only amounts to irregularity within O 21 R 90<sup>3</sup>. But a Court has no power to sell a property to a purchaser who does not pay for it. Thus where a decree holder purchaser does not pay the balance of the purchase money after deducting

- (28) AIR 1925 Cal 316 (316) (Court can refuse bid though same has been accepted by sale officer)  
(31) AIR 1931 Cal 553 (581) 58 Cal 785 (Do)  
(17) 13 Ind Cas 597 (597) (Cal) (Do)  
(28) AIR 19 6 Cal 57 (55) (Do)  
(23) AIR 1923 Pat 525 (527) 3 Pat 548 (Court can refuse bid of highest bidder though the same has been accepted by officer conducting

person who may be prepared to purchase it for higher amount)  
[See also (32) AIR 1932 Lah 500 (506) (In the circumstances of the case held that date of

(  
day of the auction)

Court purchaser not bound to pay deposit)

- (29) AIR 1929 Rang 12 (13) 6 Rang 609 (Bid can be withdrawn at any time before acceptance by Court)  
(35) AIR 1935 Oudh 131 (13) 10 Luck 557

to accept bid)  
4 (38) 1900 Nag L Jour 10 (1)

L

cc 3(3).

3

soon as a property is knocked down to his best bidder)

- (29) AIR 1929 Rang 311 (313) 7 Rang 45 (Bid cannot be withdrawn after sale officer has accepted the same)  
(39) AIR 1939 Nag 269 (1) (Officer conducting sale can declare highest bidder to be purchaser — He need not ask Judge to declare who is purchaser)  
(36) AIR 1936 Lah 555 (557) (It is not open to the Court thereafter to offer the property to any

(81) 5 Cal L Rep 181 (181 187) (Interest may be waived)

the decretal amount, the sale to him is void even though it may be confirmed by the Court<sup>4</sup>

O. 21 R. 84  
Notes 4-5

An auction purchaser who had not paid the deposit under the rule at all, professed to transfer the property to another and on the latter paying the purchase money the Court confirmed the sale in his favour. It was held by the Judicial Commissioner's Court of Oudh<sup>5</sup> that the Court had no power to recognize the transferee from an auction purchaser who had not paid the deposit at all.

It is submitted that the remark in the undermentioned case<sup>6</sup> that the date of sale is the date of deposit is not correct. The date of sale is the date on which the bid is accepted by the proper authority.<sup>7</sup> See Notes 1 and 2 above.

**5. Re-sale.** — On the failure of a purchaser to deposit 25 per cent of the purchase money under this rule, the property should be re sold<sup>1</sup>. The re sale should be held 'forthwith'<sup>2</sup> otherwise the defaulting purchaser will not be liable under Rule 71 for the deficiency in price that may occur on such re sale<sup>3</sup>. In the undermentioned Full Bench case,<sup>4</sup> the Madras High Court has held that 'forthwith' in this rule means 'as expeditiously as circumstances permit'. The same view has also been held by the Nagpur High Court<sup>5</sup>.

Rule 87 *infra* does not apply to a re sale under this rule and a fresh proclamation is not necessary for such a re sale<sup>6</sup>. But, if in the circumstances of a particular case, the issue of a fresh sale proclamation is to the advantage of the defaulting purchaser the fact that such proclamation is issued does not make the re sale one not held forthwith within the meaning of this rule<sup>7</sup>.

The officer conducting the re sale is not bound to commence it from the next highest bid below that made by the defaulter<sup>8</sup>. As to the procedure to be followed when objection is taken to the re sale on the ground that the deposit was tendered but refused by the sale officer, see the undermentioned case<sup>9</sup>.

- (29) AIR 1929 Lah 492 (498)  
(28) 110 Ind Cas 773 (774) (Lah)  
(91) 14 Mad 227 (228)  
(24) AIR 1924 Rang 81 (82)  
(03) 11 Low Bur Rul 225 (226, 227)  
(88) AIR 1985 Pesh 86 (87)  
[See also (28) AIR 1923 Lah 699 (700)]  
(22) AIR 1922 All 200 (201) 44 All 266 (FB)  
(Order 21 II 71 applies to re sales for failure to pay deposit under II 84 — This case should be held to overrule 5 All 316 and 30 All 273.)  
(81) 5 Bom 575 (577) (Order 21 B 71 applies to re sales for failure to deposit under II 84.)]  
4 (11) 9 Ind Cas 66 (67) (Cal)  
5 (15) AIR 1915 Oudh 140 (141)  
6 (19) AIR 1919 Lah 309 (310)  
7 [See (35) AIR 1935 Pesh 100 (161) (The fact that deposit was not made does not affect the date on which the sale took place for the purposes of Article 166.)]  
**Note 5**  
1 (67) 7 Suth W R 110 (110)  
2 (59) 16 Cal 33 (38)  
3 (2b) AIR 1923 Lah 249 (249)  
(08) 30 All 273 (276)  
(29) AIR 1929 Lah 744 (745)  
(16) AIR 1916 Lah 443 (446)

- (37) AIR 1937 Lah 924 (925) (Delay of more than 17 months)  
[But see (37) AIR 1937 All 556 (558)]  
4 (30) AIR 1930 Mad 761 (762) 53 Mad 900 (FB)  
[See also (19) AIR 1919 Pat 102 (104) (Sale held on the next day owing to the late hour—Held sale was held forthwith within the meaning of the rule.)]  
5 (39) AIR 1939 Nag 269 (273) (Officer conducting sale can hold re sale the same day as the default in payment of deposit if circumstances permit and if it is proper to do so—He need not wait for the payment of the deposit.)  
6 (16) AIR 1916 Lah 445 (446)  
(99) 2 Cal W N 411 (412)  
(89) 12 Mad 454 (459)  
7 (30) AIR 1930 Mad 761 (762) 53 Mad 900 (FB)  
[See also (31) AIR 1937 All 556 (557, 558)]  
(Where a decree holder auction purchaser fails to pay the 25 per cent of the purchase money and the property is sold again such second sale is a re sale within the meaning of O 21 R 84 C P C even though held six months after the first sale and on issue of fresh proclamation.)]  
8 (1564) 1 Suth W R Misc 11 (12)  
9 (83) 6 Mad 197 (199)

O. 21 R. 84  
Notes 6-8

6. Sub-rule (2). — Sub rule (2) is new<sup>1</sup> It provides for the exemption of the decree holder purchaser with the Court's permission from making the deposit under this rule The decree holder-purchaser is not exempt in *every* case from making the deposit the rule only gives the Court the power to exempt him from making the deposit Hence, the deposit *must* be made<sup>2</sup> unless dispensed with by the Court<sup>3</sup> The dispensation may be express or implied<sup>4</sup>

An order dispensing with the deposit of 25 per cent of the purchase money may be made *after* the auction<sup>5</sup> Where the decree holder's application for being allowed to set off his decree amount towards the purchase money is pending, a failure to deposit the 25 per cent does not render the sale a nullity<sup>6</sup>

7. Interest. — Notwithstanding the deposit of 25 per cent of the purchase money under this rule, the decree holder is entitled to interest on the *entire* decretal amount till the confirmation of the sale, because the decree holder is not bound to withdraw the money before the sale is confirmed<sup>1</sup>

8. Appeal. — An order of the Court directing the property to be re sold on default of the auction purchaser to deposit the 25 per cent of the purchase money under this rule is not appealable<sup>1</sup> It has been held that in this respect it makes no difference that the auction purchaser is the decree holder<sup>2</sup>

O. 21 R. 85

**R. 85. [S. 307.]** The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

[1877, S. 307; 1859, S. 254. See R. 84.]

**Note 6**

1 Under the old Code, even the decree-holder purchasing with the permission of the Court was not exempt from making the deposit — See the

the deposit of the requisite 25 per cent ]

3 (29) AIR 1929 Lah 492 (493)

4. (29) AIR 1929 Lah 492 (493) (Dispensation was inferred from the circumstances under which the permission to bid was granted)

10 AIR 1929 Cal 210 (212)

strued in such a way as to be consistent with R 72 sub rule (2) and with the proviso to R 85

5

6

**Note 7**

1 (14) AIR 1914 Cal 210 (212)

**Note 8**

1

2

as regards the balance of the purchase money it has no such option and cannot compel him to bring it into Court ]

[But see (31) AIR 1931 Lah 78 (78) (When permission is accorded under O 21 R 72 to a decree holder to bid for or purchase the property such permission impliedly dispenses with

## Local Amendments

## MADRAS

Between the words "purchase-money payable" and "shall be paid" *add* the following words.

"and the amount required for the general stamp for the certificate under Rule 94"

## NAGPUR

The following Explanation shall be *added*

"*Explanation.* — When an amount is tendered on any day after 1 P M but paid into Court on the next working day between 11 A M and 1 P M the payment shall be deemed to have been made on the day on which the tender is made"

## PATNA

For the portion beginning with the words "the full amount" and ending with the words "sale of the property," *substitute* the following

"The purchaser shall pay into Court the full amount of the purchase money and shall also tender the stamp necessary for the certificate referred to in Rule 94 before the Court closes on the fifteenth day from the sale of the property"

## Synopsis

- |  |   |
|--|---|
| 1. Applicability of the Rule.                            | 4. Proviso.   |
| 2. "On the fifteenth day from the sale."                 | 5. Extension of time for payment—Material irregularity. |
| 3. Where Court or office is closed on the fifteenth day. |   |

1. *Applicability of the Rule.* — Where on an execution sale being confirmed in appeal the purchaser who had withdrawn the purchase money on the sale being set aside in the lower Court is ordered to re pay it, the time limit of fifteen days provided by this rule does not apply <sup>1</sup>

2. "On the fifteenth day from the sale." — In calculating the period of fifteen days, the day of sale should be excluded <sup>1</sup>

Payment into Government Treasury is equivalent to payment into Court for the purposes of this rule <sup>2</sup> But where the money is sent through the Post Office, it will not be sufficient compliance with this rule if it does not reach the Court in time, for the Post Office is not an agent of the Court <sup>3</sup>

Where a purchaser tendered the balance of the purchase money on the last day with the *chalan* to the officer of the Court for the signature of the Judge and the *chalan* was returned only the next day when the amount was duly paid, it was held that there was sufficient compliance with the provisions of this rule <sup>4</sup>

3. *Where Court or office is closed on the fifteenth day.* — If the Court and the office are closed on the fifteenth day from the sale on account of holiday, the purchaser can deposit the balance of purchase-money on the next re opening day <sup>1</sup>

4. *Proviso.* — Where a decree holder is given permission to bid at the sale and set off the amount towards his decree, then if the amount of the bid *minus* the

4. (32) AIR 1932 Pat 342 (343) 13 Pat L Tim 559 (560)  
(34) AIR 1934 All 817 (817)

Withdrawn it on the sale being set aside ]]

## Note 2

1. ('65) 3 Agra 204 (205)  
2. ('84) 7 Mad 211 (213)  
3. ('93) 22 Bom 415 (416)

done )

**O. 21 R. 85**  
**Notes 4-5**

poundage is less than the decree amount, the whole of the amount must be deemed to have been received *eo instanti* the sale is made, and there is no necessity for the purchaser to pay into Court any amount<sup>1</sup> But if the amount of the bid is greater than the decree amount, he may be excused from depositing the twenty five per cent on the date of sale, but will have to deposit the balance within fifteen days from the sale<sup>2</sup> Where a decree holder is permitted to bid subject to certain conditions and those conditions are not fulfilled, the Court can, either under Rule 86, *infra* or under its inherent powers, refuse to confirm the sale and may order a re sale<sup>3</sup>

I brought the properties of X to sale in court auction B who had attached the same properties in execution of his decree for Rs 14,000 against X purchased the properties for Rs 31,000 and deposited 25 per cent under Rule 85 He also applied that his decree amount should be allowed to be set off against the balance of the purchase money He was allowed to do so, and he therefore deposited Rs 10,000 on the fifteenth day It was held that there was no failure to deposit the balance within the meaning of this rule<sup>4</sup>

**5. Extension of time for payment — Material irregularity.** — The time for the payment of the balance of the purchase money under this rule can be extended with the consent of all the parties concerned<sup>1</sup> In the absence of such consent, the Court ought not to extend the time or accept a deposit made beyond time<sup>2</sup> But where the Court does so extend the time, it is only an irregularity within the meaning of Rule 90, *infra* and does not render the sale a nullity<sup>3</sup> If in such a case the sale is confirmed and the money is drawn by the decree holder without objection, the judgment debtor must be taken to have waived the irregularity, and the sale cannot be set aside by reason of such irregularity<sup>4</sup>

### Local Amendment

#### BOMBAY

The following shall be added as Rule 85A

**O. 21 R. 85A**  
**(Bombay)**

"85A In cases where execution has been transferred to the Collector, for the purposes of Rules 84 and 85, the purchaser shall be deemed to be entitled to a set off under Rule 72 if he produces a certificate to that effect from the Court executing the decree"

**O. 21 R. 86**

**R. 86. [S 308.]** In default of payment within the period

Procedure in default  
of payment.

mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the

1 (31) AIR

(93) 16 Mad

in such case

(1900) 3 Oudh Cas 240 (241)

2 (31) AIR 1931 Mad 103 (105)

3 (22) AIR 1922 Pat 511 (514) 1 Pat 235

4 (33) AIR 1933 Rang 104 (105)

#### Note 5

1. (27) AIR 1927 Lah 337 (338)

2 [See (35) AIR 1935 All 243 (244) 57 All 658

(The Court has no jurisdiction to extend the time when default is made in depositing the

in view of objections to the  
aside sale]

(24) AIR 1924 Rang 81 (82) (No loss caused to

(23) AIR 1923 Mad 48 (49)

property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

[1877, S. 308; 1859, S. 254. See Rr. 71, 84 and 15. Cf. R. 77.]

### Local Amendment

#### PATNA

*Insert the words "or tender of stamp" between the words "payment" and "within"*

### Synopsis

- |                           |                           |
|---------------------------|---------------------------|
| 1. Scope of the Rule.     | 3. Deficiency in re-sale. |
| 2. Forfeiture of deposit. | 4. Appeal.                |

**1. Scope of the Rule.** — Where the auction-purchaser fails to pay into Court the balance of purchase money as required by Rule 85, it is the imperative duty of the Court to have the property re sold<sup>1</sup> The discretion under this rule is confined to *forfeiture* and not to the *re sale* of the property<sup>2</sup> Anyone who is interested in having the property re sold may move the Court to do so, there is nothing to justify the view that the decree-holder alone can move the Court in the matter.<sup>3</sup>

The provisions of this rule do not apply to sales held in execution of decrees passed by the High Court of Calcutta in the exercise of its original jurisdiction, inasmuch as that Court has framed rules, under Section 199, regulating its own procedure<sup>4</sup>

**2. Forfeiture of deposit.** — Under Section 308 of the old Code, it was held that that Section was imperative and that on default by the purchaser at a court sale to deposit the purchase-money within fifteen days from the sale, the deposit made on the date of sale must be forfeited<sup>1</sup> The word "shall" in the old Section has been replaced by the words "may, if the Court thinks fit" Therefore, under this rule, the Court has got a discretion to forfeit the initial deposit or not<sup>2</sup> Where there is no question of re-sale, as where after the default by the purchaser the judgment debtor pays off the decree amount, it is not a proper case for ordering the forfeiture of the deposit<sup>3</sup>

Where an auction purchaser deposits a sum in excess of the twenty-five per cent on the date of sale, the Court has jurisdiction to forfeit only the twenty-five per cent<sup>4</sup>

#### Order 21 Rule 85 — Note 1

1. (32) AIR 1932 All 392 (392-393)  
 (19) AIR 1919 Pat 369 (370, 371)  
 (38) AIR 1938 Lah 198 (199, 200) I L R (1938)  
 Lah 97  
 (89) AIR 1939 Mad 57 (58)  
 [But see (26) AIR 1926 All 509 (509) (Sub-

decree-holder purchaser and judgment debtor adjust the matter)  
 (See also (02) 25 Mad 535 (537) (Even though decree holder and judgment debtor do not ask for re sale))  
 2. (10) 6 Ind Cas 564 (565) ■ All 880 (Purchaser did not pay on notice of judgment debtor's application to set aside sale — Sale set aside — Deposit not forfeited)  
 (21) AIR 1921 Nag 120 (121) 17 Nag L R 15  
 (38) AIR 1938 Mad 905 (905) (Failure to pay

in time—Practice is to order interest on purchase money))

#### Note 2

1. (1900) ■ Bom L R 901 (906) (Even though

O. 21 R. 86  
Notes 3-4

**3. Deficiency in re-sale.** — Where there is any deficiency in the amount of purchase-money on a re sale, the loss is recoverable from the defaulting purchaser under the provisions of Rule 71, *ante*<sup>1</sup>

**4. Appeal.** — No appeal lies against an order of forfeiture of the deposit of twenty-five per cent.<sup>1</sup> or against an order directing a re sale.<sup>2</sup>

O. 21 R. 87

Notification on  
re-sale.

**R. 87. [S. 309.]** Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

[1877, S. 309; 1859, S. 255. See Rr. 66 to 68 and 86.]

MADRAS

#### Local Amendment

For the words "of the purchase-money" substitute the words "of the amounts mentioned in Rule 85"

**1. Notification on re-sale.**—This rule applies only to a re-sale under Rule 66 and does not apply to a case where property is re-sold under Rule 84, *ante*<sup>1</sup>

Omission to mention the date of re-sale in its proper place in the sale proclamation is a material irregularity vitiating the sale<sup>2</sup>

O. 21 R. 88

Bid of co-sharer to  
have preference

**R. 88. [S. 310.]** Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

[1877, S. 310; 1861, S. 14. *Cf.* R. 77 (3).]

#### Synopsis

- |                                  |  |   |
|----------------------------------|--|---|
| 1. Scope and object of the Rule. |  | 4. Duty of officer conducting the sale. |
| 2. Co-sharer.                    |  | 5. Suit for pre-emption.                |
| 3. "Bid the same sum."           |  | 6. Appeal.                              |

#### Other Topics (miscellaneous)

Actual bid — Necessity of. See Note 3.

'Share of undivided immovable property' See Note 1

#### Note 3

1. ('22) AIR 1922 All 200 (201) 44 All 266 (FB)

('81) 5 Bom 573 (577)

('81) 7 Cal 337 (339)

(19) AIR 1919 Pat 102 (106)

[See also (25) AIR 1925 P C 61 (63) (P C) (Dacre-holder's application to attach deposit must be tried according to law)]



**1. Scope and object of the Rule.** — The object of this rule is to enable co sharers in undivided immovable property to keep out strangers if they so desire<sup>1</sup>. The rule provides, in substance, that a co sharer of the immovable property of which a share is sold, is entitled to pre-empt that share when the highest bid is made by a person who is not a co sharer<sup>2</sup>.

This rule does not apply when the property sold is not a share of undivided immovable property, but the right and interest of a mortgagee in such a share<sup>3</sup>. Nor does it apply to land sold in execution of the decree of a Revenue Court<sup>4</sup>.

This rule is applicable to sales under the Chota Nagpur Tenancy Act (see Rule 83 Notes), and is unaffected by the Agra Pre-emption Act, II of 1923 (see Section 6), or by the Punjab Pre-emption Act, I of 1913 [see Section 2 (2)].

**2. Co-sharer.** — There is no right of pre-emption in the case of involuntary sales except as provided in this rule and therefore a usufructuary mortgagee, not being a co sharer, is not entitled to claim the benefit of this rule<sup>1</sup>. A defeasible title to a share in immovable property acquired by a person does not give him the right to pre-empt another share in the same property as a co sharer<sup>2</sup>.

Where several properties are sold in one lot, and a person who is a co sharer in one of such properties only makes a bid, this rule does not apply<sup>3</sup>.

**3. "Bid the same sum."** — In order to enable a co sharer to claim the benefit of this rule, it is not enough if he merely asserts his claim and offers to pay, at the time the sale is knocked down, the sum equal to that bid by the stranger purchaser, but he must make a distinct bid in the ordinary manner of offering bids<sup>1</sup>.

**4. Duty of officer conducting the sale.** — It is the duty of the officer conducting the sale to take notice of a claim of pre-emption made by a co sharer under this rule and to receive the purchase money, subject of course to any question which may be raised by any party interested in the sale as to the claimant's title to advance the claim<sup>1</sup>. In the undermentioned case<sup>2</sup> where several properties had been ordered to be sold in one lot and a person claimed pre-emption in respect of one of such properties only, it was held that the sale officer had no jurisdiction to determine such claim and that if he did so the proceedings could be questioned by the Civil Court.

Where the claimant has deposited the purchase money and fulfilled the conditions of sale so far as he is concerned, the sale is not defeasible by reason of the failure of the bidder to complete the deposit of the purchase money<sup>3</sup>.

**5. Suit for pre-emption.** — Where a claim to preference is made under this rule by a co sharer as against a stranger and the Court declares one of them to be the

O. 21 R. 88  
Notes 1-3

**Order 21 Rule 88 — Note 1**

- 1 (14) AIR 1914 All 426 (427)
- 2 (14) AIR 1914 All 426 (427) (Cannot pre-empt as against another co sharer)
- (16) AIR 1916 Oudh 123 (124)
- (74) 6 N W P H C 248 (245, 246)
- (70) 2 N W P H C R 200 (202) (Where a co sharer purchases in the name of a benamidar another co sharer is entitled to pre-empt the benamidar)
- 3 (81) 11 All 15 (17)
- 4 (76) 1 All 277 (279)

**Note 2**

1. (19) AIR 1919 Mad 1173 (1175) 41 Mad 557 (71)
- (75) 7 N W P H C R 231 (233)
2. (19) 19 Ind Cas 953 (960) 35 All 236.

(See also (89) 3 Ind Cas 782 (784) 32 All 45)  
3. (33) AIR 1933 Oudh 401 (402, 403) 11 Luck 77

**Note 3**

- 1 (68) 1639 All W N 203 (209)
- (81) 3 All 897 (829)
- (80) 2 All 850 (851)
- (98) 1693 All W N 115 (115)
- (1863) Marsh 555
- (See also (81) 1881 Bom P J 50 (51))
- (68) 10 Suth W R 165 (166) ]

**Note 4**

- 1 ("1) 6 N W P H C R 272 (275)
- 2 (33) AIR 1933 Oudh 401 (402, 403) 9 Luck 77
- 3 (74) 6 N W P H C R 272 (275, 276)
- (74) 6 N W P H C R 259 (260)

O. 21 R. 88  
Notes 5-6

purchaser and confirms the sale, a suit by the person against whom the order is made to set it aside will, it is conceived, be barred by general principles of *res judicata*. The High Court of Allahabad seems to be of the opinion that a confirmation of an execution sale can be made only under Rule 92, that therefore, a confirmation of the sale under this rule is also one under Rule 92, and that a suit would consequently be barred by sub rule (3) of that rule.<sup>1</sup>

**6. Appeal.** — No appeal lies against an order under this rule confirming the sale in favour of a co sharer.<sup>1</sup>

O. 21 R. 89

**R. 89. [S. 310A.]** (1) Where immoveable property has been sold in execution of a decree,<sup>3</sup> any person,<sup>10</sup> either owning such property or holding an interest therein<sup>12</sup> by virtue of a title acquired before such sale,<sup>11</sup> may apply<sup>17</sup> to have the sale set aside on his depositing<sup>16</sup> in Court,<sup>9</sup>—

- (a) for payment to the purchaser, a sum equal to five per cent.<sup>21</sup> of the purchase-money, and  
(b) for payment to the decree-holder,<sup>23</sup> the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount<sup>22</sup> which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.<sup>24</sup>

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

#### Local Amendments

##### ALLAHABAD

In sub rule (1) of this rule for the words "any person . . . before such sale," read the words "the judgment-debtor, or any person deriving title through the judgment debtor, or any person holding an interest in the property"

##### CALCUTTA

In sub rule (1) cancel the words "either owning such property or holding an interest therein by virtue of a title acquired before such a sale" and substitute the words "whose interest is affected by such sale, (provided that such interest has not been voluntarily acquired by him after such sale)"

#### Note 5

1. ('23) AIR 1923 All 186 (187) 45 All 203 (FB)  
{Sale held by Collector under rules framed under  
S. 70, exactly corresponding to R. 92 of O. 21}  
{See also ('76) 1 All 272 (273, 274). (But he

should sue for a declaration that the claimant  
has no right to pre-empt.)  
[But see ('75) 7 S. W. P. H. C. R. 97 (95)]

#### Note 6

1. ('91) 3 All 674 (675)

## LAHORE

In sub rule (1) of this rule for the words "any person acquired before such sale," substitute the words "any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such person"

## MADRAS

In sub rule (1), for the words "any person, either owning before such sale," substitute the words "the judgment debtor, or any person deriving title from the judgment debtor, or any person holding an interest in the property"

At the end of sub rule (1), insert the following proviso

"Provided that where the immovable property sold is liable to discharge a portion of the decree debt, the payment under clause (b) of this sub rule need not exceed such amount as under the decree the owner of the property sold is liable to pay"

## NAGPUR

In sub rule (1), for the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," substitute the words "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for, or in the interest of, such person"

## N.W.F.P.

In sub rule (1), for the words "either owning before such sale," substitute the following words

"either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person"

## OUDH

In sub rule (1), for the words "any person before such sale," read the words "the judgment debtor or any person deriving title through the judgment debtor, or any person holding an interest in the property"

## PATNA

In sub rule (1), for the words "any person, either owning before such sale," substitute the words "the judgment debtor or any person deriving title through the judgment debtor, or any person holding an interest in the property at the date of the application under this rule"

## Synopsis

- |   |  |
|---|--|
| 1. Legislative changes  | 16 Deposit in Court.   |
| 2. Scope and object of the Rule                                     | 17. Deposit and application  |
| 3. Applicability of this Rule to sales under mortgage decrees       | 18 Failure to deposit full amount  |
| 4. Sales under decrees on award                                     | 19 Mistake in calculating the amount to be deposited                     |
| 5 Sales by receiver   | 20. Conditional deposit.   |
| 6 Sales under Rent Acts.  | 21. A sum equal to five per cent.  |
| 7. Applicability of Order 9 to proceedings under this Rule          | 22. Less any amount received   |
| 8 Immovable property.   | 23 "For payment to the decree holder"                                    |
| 9 Court, meaning of   | 24. Sub rule (2)   |
| 10 Who may apply under this Rule                                    | 25 Setting aside sale in respect of portion of property sold See Note 22 |
| 11 "By virtue of a title acquired before such sale"                 | 26 Necessary parties to application See Notes to O 21 II 92              |
| 12 "Any person owning such property or holding an interest therein" | 27 Notice See Notes to O 21 II 92  |
| 13 Transferee before court sale                                     | 28 Limitation  |
| 14 Transferee after court sale                                      | 29 Appeal  |
| 15 Other persons interested   | 30 Revision  |
|   | 31 Deposit — Suit for refund and contribution                            |

## O 21 R 89 (Nagpur)

1. (37) AIR 1237 Nag 161 (161) (The amended rule entitles a transferee of the property after the execution sale to apply for setting aside the sale under this rule)

O. 21 R 89  
Notes 1-2

## Other Topics (miscellaneous)

A decree See Note 3  
Application dismissed for default — Appeal See Note 29  
Apply to have the sale set aside See Note 17  
Claimant under R 58 — Whether can apply under this rule See Note 12  
Deposit by co judgment debtor — Whether the other judgment debtor can take advantage of it See Note 22

Persons entitled to apply See Notes 11 to 15  
Persons not entitled to apply See Note 15  
Sale by separate lots — Application to set aside one lot only — Effect See Note 22  
The amount specified in the proclamation of sale See Note 18  
Time for deposit See Note 23

## 1 Legislative changes —

(1) The words sold in execution of a decree in sub rule (1) have been substituted for the words sold under this Chapter See Note 3 below

(2) The words any person either owning such property or holding an interest therein by virtue of a title acquired before such sale in sub rule (1) have been substituted for the words any person whose immovable property has been sold under this Chapter See Notes 10 to 15 *infra*

(3) The words unless he withdraws his application and the words or prosecute in sub rule (2) are new See Note 24 *infra*

Section 3104 was introduced in the old Code for the first time by Act V of 1894. It was held in the undermentioned cases<sup>1</sup> that Section 3104 was applicable to execution proceedings pending on the date Act V of 1894 came into force.

**2 Scope and object of the Rule** — The provisions of this rule are in the nature of an indulgence to the judgment debtor. They give him a last chance of getting the sale set aside before confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction purchaser for the loss of bargain<sup>1</sup>. The object of the rule is not merely or not specifically to preserve the immovable property in the hands of the judgment debtor but to ensure so far as may be possible that immovable properties shall not at court sales be sold at inadequate prices<sup>2</sup>.

It has been already mentioned in Note 2 to O 21 R 2 that once a court sale has been duly effected in favour of a third person it is not competent to the decree holder and the judgment debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court. The only means by which the sale can be avoided is by an application under this rule accompanied by the required deposit in Court, where no such application is made within the time limited it is obligatory on the Court under Rule 92 to pass an order confirming the sale notwithstanding the circumstance that the decree holder had admitted satisfaction of the decree<sup>3</sup>. But if the decree holder and the auction purchaser agree and the decree is otherwise adjusted to the satisfaction of the decree holder the Court can set aside the sale under its inherent powers notwithstanding that the procedure prescribed by this rule has

## Order 21 Rule 89 — Note 1

1 (95) 2 Cal 67 (83) (FB) (Overruling 21 Cal 348)  
(95) 18 Mad 477 (478)

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not been followed<sup>4</sup>. This rule has no application to a sale under O 21 R 32 to compensate a decree holder for the disobedience by the judgment debtor of a decree against him for restitution of conjugal rights<sup>5</sup>.

**O.21 R.89**  
**Notes 2-6**

Under this rule, the Court is *bound* to set aside a sale when once the proper amount has been deposited in time by the person entitled to make the application<sup>6</sup>.

**3. Applicability of this Rule to sales under mortgage decrees.**—The words "sold under this Chapter" in Section 310A of the old Code gave rise to a conflict of opinion on the question whether that Section was applicable to sales under mortgage decrees. The High Courts of Allahabad, Bombay and Madras and the Judicial Commissioner's Court of Oudh held that though the mortgaged properties were sold by virtue of a power given by the Transfer of Property Act, still the properties were sold under Chapter XIX (Execution of Decrees) of the Code and that Section 310A therefore applied to such sales<sup>1</sup>. The High Court of Calcutta, however, held a contrary view<sup>2</sup>. This conflict has now been set at rest by the substitution of the words "sold in execution of a decree" for the words "sold under this Chapter" and by the incorporation in the Code of provisions relating to mortgage decrees. It is now clear that the rule applies to sales in execution of mortgage decrees also<sup>3</sup>.

The High Court of Calcutta has held that this rule applies to sales in execution of mortgage decrees passed on its original side<sup>4</sup>.

**4. Sales under decrees on award.**—Where an award in a pending suit directs the sale of certain immovable properties, and a decree is passed in terms of the award, this rule applies to a sale held in pursuance of the terms of such award<sup>1</sup>. The reason is that the sale is one in execution of the decree.

**5. Sales by receiver.**—A sale by the Official Receiver is not governed by this rule<sup>1</sup>. Nor does this rule apply to a sale by the Official Receiver in a partnership suit for the purpose of realizing the assets of the partnership<sup>2</sup>.

**6. Sales under Rent Acts.**—This rule does not apply to sales under the Bengal Landlord and Tenant Procedure Act (VIII of 1869)<sup>1</sup> or to sales under the Public Demands Recovery Act<sup>2</sup> or to proceedings under the Madras Estates Land Act, I of 1908 (see Section 192A) or to proceedings under the Bengal Patni Regulation, VIII of 1819 [see Section 144 (b)]<sup>3</sup>.

<sup>4</sup> (16) AIR 1918 Cal 64 (65 66)  
(183) AIR 1933 Mad 753 (754 755)

(Ap-)

(25) AIR 1925 Oudh 123 (129)  
(128) AIR 1925 Pat 40 (43)

(Dis-)

<sup>5</sup> (183) AIR 1933 Cal 96 (97) 56 Cal L Jour 140

sent from in AIR 1931 Cal 688 }  
(31) 41 Cal W N 393 (399) ILR (1937) 2 Cal 606  
(Principles laid down in this rule apply to such

<sup>6</sup> (183) AIR 1933 Cal 96 (97) 56 Cal L Jour 140

**Note 4**

1 (23) AIR 1923 Cal 582 (583 584)

**Note 5**

1 (2b) AIR 1929 Rang 60 (61) 5 Rang 63 (Not governed by Order 21)

2 (11) AIR 1931 Mad 434 (436 437)

**Note 6**

1 [See (27) AIR 1927 Cal 72 (733)]

2 (14) AIR 1914 Cal 554 (556)

3 [See (35) 39 Cal W N 516 (517, 518)]

(23) AIR 1923 Cal 582 (583 584) (Overruling

3 (21) AIR 1931 Cal 169 (170) 48 Cal 69  
[See (20) AIR 1930 Oudh 201 (207)]

O. 21 R 89  
Notes 6-8

The Bengal Tenancy Act (VIII of 1885) contains a provision in Section 174 almost similar to this rule prescribing the procedure for setting aside sales in cases where a tenure or holding has been sold for arrears of rent. Under that Section as it originally stood the judgment debtor alone was entitled to apply. Therefore it was held that the application of a person other than the judgment debtor came under the scope of this rule provided he was otherwise entitled to apply under this rule.<sup>4</sup> This Act was amended by the Bengal Legislative Council by Act I of 1907 Section 54 which provided that Section 310A of the Code of 1882 (corresponding to this rule) shall not apply to sales under the Bengal Tenancy Act.<sup>5</sup> It has been further amended by the Bengal Council in 1928 providing that the judgment debtor or any person whose interests are affected by the sale may apply. The Legislative Council of Eastern Bengal and Assam to which territory also the Bengal Tenancy Act applies has not amended this Act. Therefore in cases arising in that Province the application of a person other than the judgment debtor is governed by this rule.<sup>6</sup> See also the undermentioned cases.<sup>7</sup>

It was held that S 310A applied to sales under the Landlord and Tenant Act (Bengal Act X of 1859).<sup>8</sup>

Similar provision is made in respect of sales of a tenure or holding for an arrear of rent under the Orissa Tenancy Act II of 1913 (Section 238). Where the sale is in execution of a decree for an amount which is not really rent there is no bar to the applicability of this rule.<sup>9</sup>

**7 Applicability of Order 9 to proceedings under this Rule** — An application to set aside a sale under this rule is a proceeding in execution and consequently the provisions of Order 9 do not apply to it.<sup>1</sup> In the undermentioned case<sup>2</sup> a second application to set aside the sale after the dismissal for default of the first application was treated as one for review.

**8 Immovable property.** — A simple mortgage bond<sup>1</sup> or a decree for sale in

4 (96) 23 Cal 893 (896)

(93) 8 Cal W N 50 (97)

(93) 1 Cal W N 114 (117 118)

(98) 2 Cal W N 261viii

[See (16) AIR 1916 Pat 807 (308) (Not a rent

him outside Court within thirty days—Deposit within same period by judgment debtor of compensation money due to auction purchaser—Sale must be set aside.)

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8 (11) 11 Ind 1000 (11) 1000  
[But see (97) 2 Cal W N 127 (127) (The Code of Civil Procedure applies up to the sale and not after it)]

9 (35) AIR 1933 Cal 230 (236)

Note 7

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cannot be said to be without jurisdiction merely because Court has inadvertently omitted to notice that certain transfer fee has not been paid.)

(37) AIR 1937 Pat 635 (639) (Decree-holder admitting that he has received amount due to

Note 8

1 (24) AIR 1924 All 796 (193) 46 All 917

enforcement of a mortgage<sup>2</sup> = not immovable property within the meaning of this rule. But the interest of a mortgagee in a usufructuary mortgage is immovable property for the purposes of this rule<sup>3</sup>. See also Notes to Order 21 Rule 54, *ante*.

Where a judgment-debtor was the owner of a house and of the land on which it stood, and the superstructure alone was sold in execution of a decree, it was held that it was immovable property and that therefore an application would lie under this rule to set aside the sale<sup>4</sup>.

See also Note 12 and Section 16 *ante*.

**9. Court, meaning of.** — The "Court" mentioned in this rule is the Civil Court and not the Court of the Collector or of the Mamlatdar to which execution has been transferred under Section 68, *ante*. Therefore, a deposit made in such Court is not a valid deposit<sup>1</sup>. But where an applicant deposits the amount required in the office of the Collector who had sold the property, and intimation is sent to the Civil Court that the money had been transferred to the Civil Court account, within thirty days of the date of the sale, the deposit is good and the provisions of this rule are complied with<sup>2</sup>.

The High Court of Bombay has, by virtue of its rule making powers, framed a new Rule 91A which provides that where a decree has been sent for execution to a Collector and the sale has been held by him or his subordinate, an application and a deposit made under this rule, if made to the Collector or his subordinate, must be deemed to have been made to or in the 'Court' within the meaning of this rule, and that the sale can be set aside on the basis of such an application and deposit.<sup>3</sup>

**10. Who may apply under this Rule.** — Where an application is made by a person to set aside a sale under this rule on the allegation that he is a person entitled to apply and such allegation is challenged by the opposite party, the question must be determined by the Court<sup>1</sup>.

Under Section 310A of the old Code, "any person whose immovable property had been sold" was entitled to apply. The amending words in this rule, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," have widened the scope of this rule by allowing persons who are not parties to the suit to apply to have a sale set aside<sup>2</sup>.

As to persons who are entitled to apply under this rule, see Notes 11 to 15 below.

**11. "By virtue of a title acquired before such sale."** — The words "by virtue of a title acquired before such sale" apply to the words "owning such property" as well as to the words "holding an interest therein"<sup>1</sup>.

- {24} AIR 1924 Bom 495 (493, 499) 43 Bom 639  
{20} AIR 1920 Bom 130 (130) 44 Bom 50  
{21} AIR 1921 Bom 209 (209) 45 Bom 1132

**Note 10**

1. {96} 23 Cal 333 (396)  
{23} AIR 1923 Pat 353 (353)  
2. {19} AIR 1919 Pat 501 (501, 502) 4 Pat  
14 Jour 340  
{19} AIR 1919 Cal 463 (469)  
{11} 11 Ind Cas 196 (196) (Cal)  
{21} AIR 1921 Mad 157 (159, 161) 44 Mad 554  
(FB)

**Note 11**

1. {21} AIR 1921 Mad 157 (160, 161, 163, 164)  
44 Mad 554 (FB)  
{26} AIR 1926 Nag 10 (13, 14) 21 Nag L 102

**Note 12**

R 91A holding that such applications are not valid are no longer law in Bombay

O. 21 R. 89

Note 12

## 12. "Any person owning such property or holding an interest therein."

A judgment debtor who has not sold his property is clearly entitled to apply under this rule for setting aside the sale of his property. A purchaser from a mortgagor judgment debtor, who is bound by the decree, is also entitled to apply under this rule.<sup>1</sup> An interim receiver appointed under Section 20 of the Provincial Insolvency Act (V of 1920) after the execution sale of the insolvent's properties has no power to apply under this rule, as he cannot be said to be the owner "by virtue of a title acquired before such sale".<sup>2</sup> But where the interim receiver has been expressly authorized by the Court to make an application under this rule, he can do so. In such a case, the application will be deemed to be made on behalf of the owner of the property.<sup>3</sup>

A mortgagee of the property sold in execution of a decree is a person who has an interest therein by virtue of which he is competent to apply.<sup>4</sup> Under the old Code it was held that he was not a person whose immovable property has been sold, as his interest in the mortgaged property could not pass by the sale.<sup>5</sup> Under this rule, the word 'property' means *tangible* property (whether or not persons other than the judgment-debtor have any interest in it), and does not mean merely the right, title and interest of the judgment debtor alone.<sup>6</sup> Therefore, a mortgagee or lessee whose interests are not affected by the sale is also entitled to apply.<sup>7</sup>

Can a person who has purchased the property from the judgment debtor before attachment or a person who claims by a title paramount to that of the judgment-debtor, apply to set aside a sale? It was held under the old Code that he could not, on the ground that the property was *not sold as his*.<sup>8</sup> Under the present Code there is a conflict of opinion, some cases holding that he can apply,<sup>9</sup> others that he cannot.<sup>10</sup> It is submitted that the latter view unduly restricts the scope of this rule.

Under the rule as amended by the Lahore High Court it is enough if the applicant claims interest at the time of making the application. He need not prove

## Note 12

1. (90) 1895 Bom P J 311 (313)
- (93) 21 Mad 416 (417) (Subsequent mortgagee defendant)
- (23) AIR 1923 Pat 490 (491) 2 Pat 715
- (15) AIR 1915 Sind 9 (10) 9 Sind L R 86 (Second mortgagee pending suit)
2. (26) AIR 1926 Mad 357 (357)
3. (37) AIR 1937 Mad 589 (590)
4. (02) 29 Cal 1 (4, 10, 14) (F B) (Overruling 11 Cal W N 23)
- (11) 10 Ind Cas 863 (864) 33 All 481 (Holder of the decree for money in execution of which property is sold though holder of the mortgage is not competent to make an application under this rule)
- (12) 13 Ind Cas 141 (146) (Cal) (Mortgagee, after he obtains mortgage decree, does not lose his interest in the property)

party to the suit)

5. (28) AIR 1923 Mad 1191 (1191) 51 Mad 770
- (36) AIR 1936 Oudh 123 (129) 11 Luck 708
7. (23) AIR 1923 Mad 1191 (1192) 51 Mad 770

- (Lessee—Sale subject to lessee's right)
- (23) AIR 1923 All 127 (127, 128) (Usufructuary mortgage)
  - (15) AIR 1915 All 76 (77, 78) (Prior mortgage)
  - (30) AIR 1920 Mad 90 (291) (Property sold subject to mortgage)
  - (36) AIR 1936 Oudh 123 (129) 11 Luck 703 (Simple mortgage)
  8. (99) 23 Bom 450 (451, 453)
  - (03) 7 Cal W N 243 (244)
  - (08) 12 Cal W N 151 (152, 153)
  - (97) 1 Cal W N 114 (117)
- (See (03) 26 Mad 565 (566) (Donee, prior to attachment))

R. 53 will not preclude him from applying under this rule)

- (27) AIR 1927 Mad 327 (328)
10. (11) 10 Ind Cas 850 (853) (Cal).
- (23) AIR 1923 Mad 659 (660)
- [See (39) AIR 1933 Pat 233 (234) (O 21 R. 89 does not confer right to make deposit on person who purchased property so far back from date of sale that his interest is not affected by sale—Obiter)]



that he had an interest in the property before the sale<sup>11</sup> The same is the law in the North West Frontier Province<sup>12</sup>

O.21 R.89  
Notes 12-14

**13. Transferee before court-sale.** — A transferee from the judgment debtor of immovable property sold in execution of a decree for money, after the attachment but before the court sale, is the owner of the property and can apply to set aside the sale<sup>1</sup> Though under Section 64 *ante* the transfer may be void as against the claim under the attachment that Section does not invalidate the transfer for all purposes Under the old Code it was held that a judgment debtor who has sold the property after attachment was also entitled to apply to set aside the sale<sup>2</sup>

**14. Transferee after court-sale.** — Where the judgment debtor transfers his property to a third person after the execution sale but before confirmation thereof, the transferee is not a person who holds an interest in such property *by virtue of a title acquired before such sale*. He is, therefore, not entitled to apply under this rule to set aside the sale of such property in execution of a decree<sup>3</sup> But, can the judgment debtor in such cases apply under this rule? Where the transfer is by way of a mortgage it is of course clear that the judgment debtor would still be the owner of the equity of redemption and therefore will be entitled to apply<sup>4</sup> Even where the transfer is by way of an *absolute sale*, it has been held by all the Courts except the Judicial Commissioner's Court of Oudh that he can apply<sup>5</sup> The reason is that, in such cases, the judgment debtor must be deemed to own the property for the purpose of the proceedings under this rule The Judicial Commissioner's Court of Oudh has, however, held that he is not so entitled to apply<sup>6</sup> It is submitted that this view is not correct It has been held by the High Court of Allahabad in the undermentioned case<sup>7</sup> that where after the court sale, the judgment debtor executes a mortgage of the properties and the mortgagee and the judgment debtor apply to set aside the sale, each depositing a portion of the amount the two applications may be treated as one made by the judgment debtor notwithstanding that the mortgagee is not independently entitled to apply

11 (35) AIR 1935 Lah 51 (52)  
[See also (38) AIR 1936 Lah 561 (562) (Person

12 (34) AIR 1934 Lesh 25 (26)  
Note 13

(27) AIR 1927 Mad 445 (446) (A I 1923 Mad 65) Dissented from)

(39) AIR 1933 Sind 177 (179)  
(34) AIR 1937 Oudh 103 (103 110)  
2 (25) AIR 1925 Oudh 349 (350)  
3 (26) AIR 1926 All 204 (203 210, 211) All 411  
155(FB)  
(16) AIR 1916 Bom 57 (57) 40 Bom 357  
(21) AIR 1921 Mad 147 (160, 161, 163) 44 Mad

Note 14

1. (22) AIR 1922 Cal 371 (373) 49 Cal 454  
(26) 1 Cal W N 249 (260)

(38) AIR 1933 Sind 177 (177)  
4 (11) 9 Ind Cas 745 (746) 14 Oudh Cas 33  
5 (27) AIR 1927 All 561 (562) All 532



in order to be valid, must be in cash and not by Government promissory notes or cheque<sup>1</sup> A tender by a person who is neither an attorney nor a wakil nor a muktear for the applicant, does not comply with the provisions of this rule and is consequently invalid<sup>2</sup> But if the lodgment schedule was signed by the proper person, the fact that the actual payment into the treasury is not made by his recognized agent is immaterial<sup>3</sup>

It has been held that the deposit mentioned in this rule is not a condition precedent to the *entertainment* of the application although it is a condition precedent to the setting aside of the sale<sup>4</sup>

As to time for deposit, see Note 28, *infra*

See also Note 23, *infra*

**17. Deposit and application.** — An application for setting aside a sale is necessary before the Court can be called upon to act under this rule<sup>1</sup> A mere deposit of the amount without an application in time, is not enough, and the sale cannot be set aside<sup>2</sup> A mere lodgment schedule cannot be treated as an application within the meaning of this rule<sup>3</sup> It has been held by the High Court of Calcutta<sup>4</sup> that where a judgment debtor pays the requisite amount by a *challan* and prays that the execution may be closed, a separate application is not essential and that the *challan* which sets out the purpose is a sufficient compliance with this rule An application for permission to deposit in Court the decree amount and a sum equal to 5 per cent of the purchase-money is an application to set aside the sale, even though there is no *express prayer* in the application to set aside the sale<sup>5</sup> It has also been held that an application for *challan* or an application with a memo of deposit and its receipt is a proceeding within the meaning of Section 153 and can be amended by the inclusion of a prayer for setting aside a sale although the application for amendment is made beyond the period of limitation for an application to set aside the sale<sup>6</sup>

The application may be *oral* or *written*<sup>7</sup> It will not be rendered invalid by the

tenant of the property sold but who has not executed his decree cannot apply under this rule )

**Note 16**

1. ( 87 ) 14 Cal 321 ( 823 )

( 15 ) AIR 1915 Low Bur 97 ( 97 )

( 35 ) 89 Cal W N 829 ( 831 833 ) (Rule contem plates deposit in cash.—But there can be no cash deposit where nothing is due under the decree by reason of previous payments )

2 ( 81 ) AIR 1931 All 449 (450)

( 12 ) 13 Ind Cas 404 (405) (All)

( 17 ) AIR 1917 Mad 739 (740)

( 37 ) AIR 1937 Oudh 108 (110) {Application by judgment debtor to set aside sale — Tender by would be purchaser who acquired interest after auction sale.—Tender is not valid }

3 ( 24 ) AIR 1924 Mad 483 (483)

4. ( 36 ) AIR 1936 Pat 119 (120).

**Note 17**

1. ( 25 ) AIR 1925 Mad 639 (640).

( 17 ) AIR 1917 Mad 662 (662)

( 25 ) AIR 1925 Oudh 411 (412)

( 39 ) 18 Pat 210 (213)

( 40 ) AIR 1940 Pat 87 (88) 5 Cut L Tim 27 (28)

(Application cannot be implied from the fact of deposit )

[But see ( 05 ) 7 Bom L R 263 (264) ]

3 ( 26 ) AIR 1926 Mad 620 (621)

( 22 ) AIR 1922 Mad 83 (83)

4. ( 98 ) 25 Cal 216 (218, 222) (Section 174 Bengal Tenancy Act )

[See also ( 39 ) AIR 1939 Cal 153 (154) (Challans by which amount is deposited may be regarded as sufficient application )]

6. ( 37 ) AIR 1937 Mad 342 (343)

7. ( 12 ) 13 Ind Cas 404 (405) (All)

( 21 ) 63 Ind Cas 140 (141) (All) (Application must be deemed to be one for setting aside sale )

( 25 ) AIR 1925 Mad 909 (910)

( 17 ) AIR 1917 Ma 1 662 (662)

( 25 ) AIR 1925 Oudh 411 (412)

O. 21 R. 89  
Notes 17-18

absence of a formal prayer for setting aside the sale<sup>8</sup> Where the application does not disclose the nature of the interest of the applicant, the Court should not reject the application, but should direct the applicant to supply the necessary particulars<sup>9</sup>

See also the undermentioned case<sup>10</sup>

**18. Failure to deposit full amount.** — It has been already mentioned in Note 2 *ante*, that this rule is in the nature of a concession shown to the judgment debtor The applicant must, therefore, strictly comply with the requirements thereof and a sale will not be set aside unless the *entire amount* specified in sub rule (1) is deposited within 30 days from the date of the sale<sup>1</sup> Thus, a *part payment* coupled with an undertaking to pay the balance cannot be considered as a valid deposit<sup>2</sup> But if the conditions of this rule are complied with, the failure to pay an additional amount to cover the poundage fee is a mere irregularity which will not prevent the Court from entertaining the application<sup>3</sup>

An execution sale cannot be set aside under this rule on deposit of a part of the amount specified in the proclamation of sale, even though the decree holder consents not to claim any further sum so far as that execution application is concerned<sup>4</sup> Where, however the amount mentioned in the proclamation of sale is deposited, the fact that the proclamation of sale was incorrectly drawn up and did not specify the full amount for the recovery of which the sale was ordered, will not render the deposit invalid<sup>5</sup> A contrary view has been expressed in the undermentioned case<sup>6</sup>

Sub rule (3) does not mean that the applicant should deposit also costs and interests not covered by the proclamation, and a Court cannot refuse to set aside a sale merely because such costs and interests are not also deposited within time<sup>7</sup> Nor can it refuse to set aside a sale merely because the amount due under *another* decree, the holder of which has applied for rateable distribution, has not been deposited<sup>8</sup>

A decree against a father and son ordered the sale of the father's interest and the son's interest was to be sold only if there was a balance due after the sale of the father's interest The father's interest was sold and then for the balance, the son's interest was also sold The son thereupon deposited the balance for which his properties were sold and applied under this rule It was held that he was not bound to deposit the whole of the decree amount and that his application was valid<sup>9</sup>

See also Note 22 *infra*

- 8 (17) AIR 1917 Mad 225 (225 226) (Amendment of petition by adding a formal prayer allowed)  
(23) AIR 1923 Pat 159 (161)  
9 (25) AIR 1925 Nag 17 (19)  
10 (30) AIR 1939 All 211 (241) JLR (1939) All 403 (Rule only requires two things, viz., an application and a deposit The rule does not require three things, viz., an application, tender and deposit)

#### Note 18

1. (11) 2 Ind Cas 937 (938) (Mad)  
(25) AIR 1925 Nag 80 (90)  
(24) AIR 1924 Nag 216 (215) (Failure to deposit five per cent)  
(28) AIR 1928 Rang 256 (256) 6 Rang 490 (Four rupees deficit paid one day late—Though short age did not vitiate not being substantial, delay vitiate application)  
(15) AIR 1918 Pat 62 (53) 4 Pat L Jour 55 (In a case under S 174 of the Bengal Tenancy Act

whole amount of decree must be deposited)  
(99) 23 Bom 331 (335)  
(38) 1933 Mad W N 15 (16)  
2 (27) AIR 1922 Bom 193 (194) 45 Bom 171  
3 (31) AIR 1931 All 756 (757) 53 All 29  
(Failure to affix stamps by way of poundage fees)  
(97) 20 Mad 153 (159)  
(38) AIR 1935 Cal 523 (523) (After the sale is set aside the judgment debtor can be made to reimburse the auction purchaser for any costs and the poundage fee he has properly paid in

4 . . . . . (See 174

5 . . . . .

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7 . . . . .

**19. Mistake in calculating the amount to be deposited.** — Where the original deposit is deficient and it appears that the deficiency is due to a wrong calculation made by an officer of the Court and the applicant makes good the deficiency as soon as it is pointed out, though after thirty days have elapsed, is the deposit valid? It has been held that if the mistake is the act of the prescribed officer acting in accordance with the prescribed rules of the Court, then it will not affect the party<sup>1</sup> Otherwise no relief can be given to a party even though he is misled by an officer of the Court<sup>2</sup>

O. 21 R. 89  
Notes 19-24

In the undermentioned case<sup>3</sup> it was held that a trifling mistake as to four annas in making the deposit should be overlooked on the principle *de minimis non curat lex* — the law pays no regard to trifling matters

**20. Conditional deposit.** — In order that a deposit under this rule may be valid, it must be *unconditional*<sup>1</sup> If the applicant prevents the money from being available to the decree-holder *forthwith and unconditionally*, the deposit is bad and will not entitle him to have the sale set aside<sup>2</sup> Since this rule is inconsistent with the notion that a payment into Court may be made under protest or subject to conditions, the Court has no power to order that the decree holder should draw out the money only on his executing a security bond<sup>3</sup> If, as soon as an objection to the conditional deposit is taken, the applicant withdraws his condition, the money becomes available for payment to the decree holder before he has made any attempt to withdraw it and therefore the deposit is not invalid<sup>4</sup>

Where a deposit is properly made under this rule, but subsequently an application is made that the money may be retained in Court pending the result of an application under O 9 R. 13, the subsequent condition cannot invalidate the deposit which was originally good<sup>5</sup>

**21. A sum equal to five per cent.** — Sub rule (1) clause (a) provides that the deposit should include a sum equal to five per cent of the purchase money for payment to the purchaser, and a sale cannot be set aside unless the five per cent is also deposited<sup>1</sup> That amount is intended partly as a *solatium* to the purchaser for the loss

#### Note 19

1. ('80) AIR 1930 Cal 302 (304)
- (‘84) AIR 1934 Pat 246 (246) (Shortage deposit  
— Mistake due to officer of Court)
- (‘83) AIR 1938 Pat 515 (516, 517)
- (‘80) AIR 1930 Cal 249 (250)
- (‘14) AIR 1914 Cal 656 (657)
- (‘10) 7 Ind Cas 52 (53, 54) (Cal)
- (‘98) 25 Cal 609 (611)
- (‘91) 18 Cal 255 (258)
- (‘07) 11 Cal W N 116 (119).
- (‘98) 22 Mad 286 (288) (Court directed that judgment debtor need not pay five per cent — Shortage does not affect)
- (‘98) 1 Oudh Cas 133 (196)
2. (‘99) 26 Cal 449 (458, 459, 460) (F B)
- (‘16) AIR 1916 Pat 290 (292) 1 Pat L Jour 453 (26 Cal 449, *Relief on*)
3. (‘37) AIR 1937 Pat 409 (410) (Defect of four annas in deposit in favour of auction purchaser in challan of deposit — Judgment debtor is taken depositing deficit in name of decree holder — Application to set aside sale held should be allowed notwithstanding the mistake)

#### Note 20

1. (‘21) AIR 1921 Bom 169 (171, 172) 45 Bom 1034
- (‘28) AIR 1928 Pat 193 (194) 7 Pat 30
- (‘83) AIR 1933 Sind 177 (182)
- (‘85) AIR 1935 Mad 842 (844, 847) 58 Mad 972 (F B).
2. (‘32) AIR 1932 Cal 216 (217, 218)
- [See (‘97) 1 Cal W N 132 (133) (The decision is under S. 174, Bengal Tenancy Act)]
3. (‘30) AIR 1930 Mad 921 (923, 924) 53 Mad 943
4. (‘11) 10 Ind Cas 850 (881) (Cal)
- (‘29) AIR 1923 Pat 419 (420) 2 Pat 531
- (‘23) AIR 1923 Pat 159 (160, 161) (10 Ind Cas 850, *I followed*)
5. (‘04) 8 Cal W N 355 (356)
- Note 21
1. (‘34) AIR 1934 Cal 25 (26)
- (‘24) AIR 1924 Nag 216 (216)

O. 21 R. 89  
Notes 21-22

of that which is, perhaps, a good bargain<sup>1</sup> A decree-holder-purchaser is as much entitled to that *solatium* as an outside purchaser<sup>3</sup> To hold otherwise would be to read into the rule after the word 'purchaser' the words 'if such purchaser be not the decree holder'<sup>4</sup> But a mere deposit of the five per cent without the decree amount is not a valid deposit.<sup>5</sup>

Where one of two joint decree-holders obtains permission to bid for himself alone and not on behalf of the other, and purchases the property and thereafter the sale is set aside under this rule, the compensation amount of five per cent should go exclusively to him and not to the other decree-holder.<sup>6</sup>

**22. Less any amount received.** — The amount that can be deducted under clause (b) of sub-rule (1) need not have been received by the decree-holder *before* the sale<sup>1</sup> Nor need such amount have been paid to him *through the Court*.<sup>2</sup>

If, after the proclamation of sale is drawn up, the decree-holder and the judgment debtor adjust the decree in full or in part, the adjustment is tantamount to a receipt of the amount by the decree-holder and it is not necessary that that amount should be deposited when applying to set aside a sale under this rule.<sup>3</sup> The expression "any amount which may have been received by the decree-holder" in sub-rule (1), clause (b) means money actually received by the decree-holder and does not include payment of the sale proceeds into Court,<sup>4</sup> which is not available to the decree-holder until the sale is confirmed.

#### Illustration

Certain properties divided into two lots, A and B, were ordered to be sold to realize a sum of Rs 848 9 9. Properties A and B fetched Rs 420 and Rs. 594 respectively at the sale. The judgment-debtor paid into Court Rs 452 13-0 and applied to have the sale of lot B set aside. This amount would have sufficed to satisfy the requirements of the rule if the Rs 420 for which lot A was sold could be deducted from the decretal amount and if the five per cent could be

[See ('16) AIR 1916 Pat 290 (292) 1 Pat L ('39) AIR 1938 Cal 252 (253). (The auction purchase of 459 (Case under S. 174, Bengal Tenancy Act)]

2. ('99) 26 Cal 449 (451, 452, 457) (F B)

3. ('95) 1895 All W N 140 (140)

('83) AIR 1933 All 222 (223) 55 All 200

('99) 26 Cal 449 (451, 452, 457, 460) (F B).

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#### Note 22

1. ('35) 39 Cal W N 829 (831)

('37) 41 Cal W N 998 (999) I L R (1937) 2 Cal 606

2. ('35) 39 Cal W N 829 (831)

('37) 41 Cal W N 998 (999) : I L R (1937) 2

cent. of the purchase money and receipt from decree holder on full satisfaction — Sale should be set aside)

('12) 14 Ind Cas 326 (326, 327) (Mad).

('11) 12 Ind Cas 169 (169) (Mad).

('03) 11 Oudh Cas 68 (71)

('37) 41 Cal W N 998 (1000) I L R (1937) 2 Cal 606.

[All 152]]

calculated on the purchase money of lot B alone. It was held that as the decree holder had not actually received the sum of Rs. 420 the deposit was not full and the sale could not be set aside.<sup>6</sup>

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On the same principle a judgment debtor is not entitled to take advantage of any deposit made by his co-judgment debtor which was made not conjointly with him, but independently of him.<sup>6</sup>

But where money is deposited by the judgment debtor in Court and it is available to the decree holder *without any obstacle of law* then does that money amount to receipt by the decree holder? According to the High Court of Allahabad it does. Thus, where the judgment debtor deposited Rs. 5000 in Court towards the decree on the date of sale, and subsequently on the same date the properties were sold and the judgment debtor thereafter deposited under this rule Rs. 71,000 which, together with the Rs. 5000 already deposited was the decree amount it was held that the amount of Rs. 5000 must be held to be 'received' by the decree holder, and the deposit of the balance was proper.<sup>7</sup> According to the High Court of Madras,<sup>8</sup> on the other hand, 'received' does not mean "virtually received" or "constructively received" and an amount which has been deposited in Court cannot be said to have been "received" within the meaning of this rule. A similar view has also been held by the Sind Judicial Commissioner's Court.<sup>9</sup>

Where a sale proclamation specified the entire amount due under the decree and also contained a direction that certain items were to be sold for only a part of the decree amount and after sale the persons interested in such items applied to set aside the sale on their depositing the amount for which their property was sold together with the five per cent due to the purchaser, it was held that the deposit was valid.<sup>10</sup> The reason is that in such a case the words 'amount specified in the sale proclamation' can only mean the amount which is to be realized by the sale of the particular properties.

**23. "For payment to the decree-holder."** — The word decree holder in this rule means the decree holder *for the satisfaction of whose decree the sale was ordered* and does not include other decree holders who may be entitled to claim rateable distribution under Section 73. Therefore, it is not necessary for the applicant to deposit into Court the amounts due to the other decree holders claiming rateable distribution.<sup>1</sup> There is a conflict of decisions as to whether money deposited under this rule will be 'assets' available for rateable distribution among the other decree holders of the judgment debtor. The undermentioned decisions<sup>2</sup> have held that such money will not be 'assets' available for rateable distribution under Section 73, the reason being that the money has been paid for a specific purpose. But the contrary view has been held in the undermentioned decisions.<sup>3</sup> In view of the discussion in Note 4 to Section 73 *ante*, it is submitted that the latter view is more correct. Where a decree

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**Notes 23-24**

is attached by two persons who are both substituted for the decree holder defendant and a sale held in execution of the attached decree at the instance of one of them is set aside under this rule, both of them will be regarded as the "decree holder" and will be entitled to the amount deposited.<sup>4</sup> Where the property of a judgment debtor is attached in execution of several decrees and a sale in execution of one of the decrees is set aside by a deposit, the sale does not put an end to the attachment made at the instance of the other decree holders.<sup>5</sup>

Where, in a mortgage suit, a decree for sale in favour of the plaintiff was passed subject to the payment of a certain prior charge in favour of a defendant out of the sale proceeds, and the sale in execution was set aside under this rule by one of the subsequent mortgagees, the decree holder was held entitled to draw the whole amount without any deduction being made on account of the prior charge.<sup>6</sup> The reason is that there were no sale proceeds out of which the prior charge was to be paid, as the sale was set aside.

Upon a sale being set aside under this rule, the decree holder is not entitled to claim interest from the date of sale till the date of deposit.<sup>7</sup>

**24. Sub-rule (2)** — The object of this sub rule is to prevent a person who intends to impeach a sale under Rule 90 from, at the same time, obtaining the benefit of the concession granted by this rule.<sup>1</sup> It has been held by the Allahabad High Court<sup>2</sup> that where applications under Rules 89 and 90 made by the same person are pending, the Court ought to call upon the applicant to make his election as to which application he will prosecute. But this view has been dissented from by the Nagpur High Court<sup>3</sup> which has held that it is for the applicant to withdraw the application under Rule 90 and not for the Court to ask him to do so. The fact that an applicant makes an application under Rule 90 is not a permanent disqualification and therefore he may carry on the application under this rule, if the other application has been withdrawn.<sup>4</sup> A person whose application under Rule 90 is dismissed is also not disqualified from subsequently applying under this rule.<sup>5</sup> An application made by a person under this rule is not barred by the pendency of an application under Rule 90 by another person.<sup>6</sup> But where the same person first applies under Rule 90 and then applies under Rule 89

<sup>1</sup> See also *supra* at O.21 R.89  
<sup>5</sup> (1931) 13 Mad L Jour 221 (221)

<sup>6</sup> (1938) 8 Mad L Jour 135 (137)

<sup>7</sup> (1914) AIR 1914 Low Pur 190 (190)

**Note 24**

<sup>1</sup> (1938) 8 Mad L Jour 56 (58)

<sup>2</sup>  
 (1931)

<sup>6</sup> (1931) 30 All 192 (196)

(1961) 23 Cal 682 (686) {Other judgment debtor appealing against an order under R 90}

devolved}}

R 89 not competent}}



Sub rule (2) will not apply if the application to set aside the sale does not come within the scope of Rule 90 but comes within the scope of Section 47, *ante* <sup>2</sup> Irregularity in the conduct of or in publishing the sale cannot be taken as a plea in an application under this rule <sup>3</sup>

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There is no provision converse to this sub rule and therefore there is nothing to prevent an application being made under Rule 90 where an application under this rule has been made and withdrawn or dismissed <sup>10</sup>

**85 Setting aside sale in respect of portion of property sold.** — See Note 22 above

**26. Necessary parties to application.** — See Notes to O 21 R 92 *infra*

**27. Notice** — See Notes to O 21 R 92 *infra*

**28 Limitation** — An application under this rule to set aside a sale is governed by Article 166 of the Limitation Act and must be made on or before the thirtieth day from the date of the sale <sup>1</sup> The starting point of limitation for such an application is the date on which the sale is *completed* that is the day on which the highest bid is accepted and the twenty five per cent of the purchase money is deposited <sup>2</sup> and not the date on which the sale is confirmed <sup>3</sup> The provisions of Section 14 of the Limitation Act are not applicable to an application under this rule <sup>4</sup>

As to the effect of the failure to implead the auction purchaser and to issue notice to him within thirty days see Notes to Order 21 Rule 93

Sub rule (2) of Rule 92 *infra* and the words may apply on his depositing in this rule show that not only the application but the deposit also must be made within thirty days from the date of the sale <sup>5</sup> If the deposit is not made in time the Court has no power to extend the time either under Section 148 of the Code or under Section 5 of the Limitation Act <sup>6</sup> It has however been held by the Oudh Chief Court in the undermentioned case <sup>7</sup> that where a decree holder who is himself the auction purchaser consents to accept a deposit made by the judgment debtor in full

8 (09) 4 Ind Cas 253 (254) 33 Bom 698 (To set aside sale on account of fraud under S 244 of the old Code)

9 (01) 28 Cal 78 (76)  
[See (09) 23 Bom 531 (535)]

10 (25) AIR 1925 All 78 (779) 47 All 850  
11 (11) 11 Ind Cas 196 (196) (Cal)

Note 28

(29) AIR 1928 Nag 111 (112)

(31) AIR 1931 Oudh 291 (292)

(85) AIR 1935 Oudh 131 (132) 10 Luck 557  
(Collector selling property under directions of

executing Court and Court approving sale subsequently.—Sale is complete only when Court accepts it — See however Note 2 to S 84 in this connection)

3 (02) 29 Cal 626 (628 631 636)

(12) 17 Ind Cas 834 (834) (Nag)

(36) AIR 1936 Pat 553 (550)

4 (02) 29 Cal 626 (632)

5 (11) 10 Ind Cas 51 (53) (Cal)

(17) AIR 1917 Mad 1 6 (176 (177)

(9) AIR 1929 Nag 10 (11)

(36) AIR 1936 Pat 119 (120)

6 (11) 10 Ind Cas 143 (150) (Cal)

(34) AIR 1934 Loh 615 (876)

(33) AIR 1933 Rang 8 (J)

(17) AIR 1917 Cal 554 ( 55)

(12) 11 Ind Cas 365 (366) (Cal)

(17) AIR 1917 Mad 176 (177) (Inherent power under S 151 cannot be invoked)

(1) AIR 1917 Pat 344 (344) 2 Pat L Jour 164

(28) AIR 1928 Rang 256 (256) 6 Rang 490

7. (6) AIR 1936 Oudh 53 (56) 11 Luck 418

to the Act does not apply to an application under O 21 R 83)

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satisfaction of his decree and consents to have the sale set aside on receipt of such deposit, it is open to the Court to set aside the sale although the deposit was made beyond thirty days from the date of the sale.

Where the applicant, without any fault of his own, is not able to deposit the money into Court, on account of the fact that the *challan* was not signed by the Judge and returned to him in time or on account of some other act of the Court, the deposit made on the next day will be a valid deposit on the principle expressed by the maxim *actus curiae neminem gravabit*—an act of Court shall prejudice no man.<sup>8</sup> Where the Court is closed on the last day for making the deposit it may be made on the next re opening day by virtue of the provisions of Section 10 of the General Clauses Act.<sup>9</sup>

The provisions of Section 7 of the Limitation Act do not apply to the period of thirty days for making a deposit under this rule, as that period is not fixed by any provision of the Limitation Act, but by a provision in this Code, namely, Rule 92, *infra*. Consequently a minor is not entitled, by reason of his disability, to an extension of the period under Section 7 of the Limitation Act.<sup>10</sup>

Where A had applied under the rule, but the sale was set aside on the application of B under Rule 90 *infra*, whereupon A withdrew his application which was dismissed as withdrawn and got back the amount deposited, but subsequently B's application was dismissed by the appellate Court and the sale confirmed, it was held that A could not claim to revive the original application made by him by re depositing the amount after limitation.<sup>11</sup>

See also the undermentioned case—

**29. Appeal.**— There was no provision in the old Code for an appeal against an order under Section 310A. Being, however, a decision on a question relating to the execution, discharge or satisfaction of the decree, it was held that such an order would be appealable if the *decree holder* was the purchaser, inasmuch as the question was one between the parties to the suit.<sup>1</sup> But where the auction purchaser was a stranger, there was a conflict of opinion as to the appealability of the order.<sup>2</sup> See Note 19 to Section 47 for a fuller discussion.

8. (22) AIR 1922 All 195 (196) 44 All 9

9. (34) AIR 1934 Lah 875 (876)

1.

matically became confirmed and no order of Court was necessary for the purpose.)

**Note 29**

- (11) 10 Ind Cas 880 (881) (Cal)
  - (24) AIR 1924 Mad 324 (326) 47 Mad 543 (Obiter)
  - (26) AIR 1926 Nag 331 (331) (The Court a direction to pay on the next day—Extension allowed)
  - (03) 6 Oudh Cas 68 (71)
  - 9 (91) 18 Cal 231 (234)
  - (97) 19 All 140 (140)
  - (05) 9 Oudh Cas 214 (215)
  - (03) 6 Oudh Cas 68 (70)
  - 10 (02) 1 Ind Cas 178 (179) 5 Nag L R 1
  - 11 (34) AIR 1934 Mad 593 (595)
  - 12 (37) AIR 1937 Pat 113 (116) 16 Pat 202 (FB)
- (Agreement between decree holder purchaser and judgment debtor that if the decretal amount was paid within a certain date the sale would be set aside and that on default it would be confirmed.—Held on construction of agreement that

- 1 (09) 1 Ind Cas 304 (305) (Cal)
- (11) 10 Ind Cas 51 (52) (Cal)
- (02) 6 Cal W N 57 (60)
- (01) 28 Cal 73 (76)
- (97) 1 Cal W N 703 (705)
- (08) 7 Cal L Jour 282 (283)
- (02) 4 Ind Cas 253 (253, 254) 33 Bom 693
- (06) 31 Bom 207 (214)
- (99) 1 Bom L R 74 (75)
- (98) 21 Mad 416 (416 417)
- (10) 8 Ind Cas 855 (856) (Mad)
- [But see (05) 27 All 263 (265)]
- 2 No appeal lies
- (09) 20 All 379 (383)
- (97) 19 All 140 (141)
- (01) 25 Bom 631 (635)
- (07) 11 Cal L Jour 204 (05)
- (96) 1 Cal W N 114 (117)
- (1900) 10 Mad L Jour 228 (229)

Under this Code an order setting aside a sale or refusing to set aside a sale under Rule 92 is appealable as an order under Order 43 Rule 1 clause (j) <sup>3</sup> An appeal will lie even in a case where the sale is in execution of a small cause decree, transferred to the original side for execution against immovable property <sup>4</sup> The forum of appeal depends upon the value for jurisdiction stated in the suit in which the decree has been passed <sup>5</sup> No second appeal will lie from an order under this rule read with Rule 92, by virtue of the provisions of Section 104 <sup>6</sup>

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Even though the matter may fall under Section 47 (in cases where the decree holder is the purchaser) the order will not be appealable as a decree under this Code, as the definition of decree in Section 2 excludes even an order under Section 47 if it is appealable as an order See Note 2 to Section 2, sub section (2)

In cases under Section 174 of the Bengal Tenancy Act an appeal lies as from a decree where the decree holder is the purchaser, <sup>7</sup> but not where such purchaser is a stranger <sup>8</sup> But the Bengal Legislature has in 1928 amended Section 174 of that Act by adding a clause providing for an appeal under that Section in such cases

When an application under this rule has been dismissed for default and an application for restoration thereof has been unsuccessful, no appeal lies against the order refusing to restore the application <sup>9</sup>

An order confirming the sale is tantamount to a refusal to set aside the sale on the application of the judgment debtor, and is therefore appealable <sup>10</sup>

No second appeal lies against an order setting aside or refusing to set aside a sale under this rule <sup>11</sup>

On a dispute between a person (not the judgment-debtor) who had applied under this rule to set aside a sale and the decree holder, the latter's application to withdraw the money deposited by the former was refused It was held that the matter did not fall under Section 47 and so was not appealable <sup>12</sup>

**30. Revision.**— Where a Court refuses to entertain an application, under this

(11) 9 Ind Cas 472 (474) (Low Bur)

Appeal lies

{ 07) 29 All 275 (278)

{ 01) 25 Bom 418 (421)

{ 11) 12 Ind Cas 169 (169) (Mad)

{ 07) 30 Mad 507 (508, 509)

3. ('18) AIR 1918 All 192 (194) 40 All 425

[See (11) 9 Ind Cas 937 (938) (Mad) (Party having right of second appeal under law before 1903—Cannot be defeated by O 43 R 1 of the present Code)]

7. ('12) 13 Ind Cas 365 (369) (Cal)

8 (25) AIR 1925 Pat 525 (526) 4 Pat 713

9 (07) 29 All 596 (597, 599)

10. (33) AIR 1933 Lah 210 (210)

11. (37) AIR 1937 Rang 537 (538)

12 (35) AIR 1935 Mad 812 (817) 33 Mad 272

(B B)

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satisfaction of his decree and consents to have the sale set aside on receipt of such deposit, it is open to the Court to set aside the sale although the deposit was made beyond thirty days from the date of the sale.

Where the applicant, without any fault of his own, is not able to deposit the money into Court, on account of the fact that the *challan* was not signed by the Judge and returned to him in time or on account of some other act of the Court, the deposit made on the next day will be a valid deposit on the principle expressed by the maxim *actus curiae neminem gravabit*—an act of Court shall prejudice no man<sup>8</sup> Where the Court is closed on the last day for making the deposit it may be made on the next re opening day by virtue of the provisions of Section 10 of the General Clauses Act<sup>9</sup>

The provisions of Section 7 of the Limitation Act do not apply to the period of thirty days for making a deposit under this rule as that period is not fixed by any provision of the Limitation Act, but by a provision in this Code, namely, Rule 92, *infra* Consequently a minor is not entitled, by reason of his disability, to an extension of the period under Section 7 of the Limitation Act<sup>10</sup>

Where A had applied under the rule, but the sale was set aside on the application of B under Rule 90 *infra*, whereupon A withdrew his application which was dismissed as withdrawn and got back the amount deposited, but subsequently B's application was dismissed by the appellate Court and the sale confirmed, it was held that A could not claim to revive the original application made by him by re depositing the amount after limitation<sup>11</sup>

See also the undermentioned case<sup>12</sup>

**29. Appeal.** — There was no provision in the old Code for an appeal against an order under Section 310A. Being, however, a decision on a question relating to the execution, discharge or satisfaction of the decree, it was held that such an order would be appealable if the *decree holder* was the purchaser, inasmuch as the question was one between the parties to the suit<sup>1</sup> But where the auction purchaser was a stranger there was a conflict of opinion as to the appealability of the order<sup>2</sup> See Note 19 to Section 47 for a fuller discussion

8 (22) AIR 1922 All 195 (196) 44 All 9

(34) AIR 1934 Lah 875 (876)

(19) AIR 1919 All 339 (340)

(15) AIR 1915 All 414 (415) 37 All 591 (Trea-  
sury officer regarded as an officer of the Court  
for purpose of this rule)

(11) 10 Ind Cas 51 (54) (Cal)

(11) 10 Ind Cas 880 (881) (Cal)

(24) AIR 1924 Mad 324 (326) 47 Mad 548  
(Obiter)

(26) AIR 1926 Nag 331 (331) (The Court a direc-  
tion to pay on the next day—Extension allowed)

(03) ■ Oudh Cas 68 (71)

9 (91) 18 Cal 231 (234)

(97) 19 All 140 (140)

(05) 9 Oudh Cas 214 (215)

(03) ■ Oudh Cas 68 (70)

10 (09) 1 Ind Cas 178 (179) 5 Nag L R 1

11 (34) AIR 1934 Mad 593 (595)

12 (37) AIR 1937 Pat 113 (116) 16 Pat 202 (FB)

Agreement between decree holder purchaser and  
judgment debtor that if the decretal amount  
was paid within a certain date the sale would  
be set aside and that on default it would be con-  
firmed—Held on construction of agreement that

atically became confirmed and no order of  
Court was necessary for the purpose)

#### Note 29

1. (09) 1 Ind Cas 304 (305) (Cal)

(11) 10 Ind Cas 51 (52) (Cal)

(02) 6 Cal W N 57 (60)

(01) 28 Cal 73 (76)

(97) 1 Cal W N 703 (705)

(08) 7 Cal L Jour 282 (283)

(02) 4 Ind Cas 253 (253, 254) 33 Bom 693

(06) 31 Bom 207 (214)

(99) 1 Bom L R 74 (75)

(98) 21 Mad 416 (416-417)

(10) 8 Ind Cas 855 (856) (Mad)

{But see (05) 27 All 263 (265)}

#### 2. No appeal lies

(09) 20 All 379 (383)

(97) 19 All 140 (141)

(01) 25 Bom 631 (635)

(07) ■ Cal L Jour 204 (205)

(96) 1 Cal W N 114 (117)

(1900) 10 Mad L Jour 228 (229)

Under this Code an order setting aside a sale or refusing to set aside a sale under Rule 92 is appealable as an order under Order 43 Rule 1 clause (j)<sup>3</sup> An appeal will lie even in a case where the sale is in execution of a small cause decree, transferred to the original side for execution against immovable property<sup>4</sup> The forum of appeal depends upon the value for jurisdiction stated in the suit in which the decree has been passed<sup>5</sup> No second appeal will lie from an order under this rule read with Rule 92, by virtue of the provisions of Section 101<sup>6</sup>

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Even though the matter may fall under Section 47 (in cases where the decree-holder is the purchaser) the order will not be appealable as a decree under this Code, as the definition of decree in Section 2 excludes even an order under Section 47 if it is appealable as an order See Note 2 to Section 2, sub section (2)

In cases under Section 174 of the Bengal Tenancy Act an appeal lies as from a decree where the decree holder is the purchaser,<sup>7</sup> but not where such purchaser is a stranger<sup>8</sup> But the Bengal Legislature has in 1928 amended Section 174 of that Act by adding a clause providing for an appeal under that Section in such cases

When an application under this rule has been dismissed for default and an application for restoration thereof has been unsuccessful, no appeal lies against the order refusing to restore the application.<sup>9</sup>

An order confirming the sale is tantamount to a refusal to set aside the sale on the application of the judgment debtor, and is therefore appealable<sup>10</sup>

No second appeal lies against an order setting aside or refusing to set aside a sale under this rule<sup>11</sup>

On a dispute between a person (not the judgment debtor) who had applied under this rule to set aside a sale and the decree holder, the latter's application to withdraw the money deposited by the former was refused It was held that the matter did not fall under Section 47 and so was not appealable<sup>12</sup>

**30. Revision.**— Where a Court refuses to entertain an application, under this rule, of a person who is entitled to apply, on the ground that the applicant has no *locus standi* to apply or allows the application of a person who has not the legal character specified in this rule is the order revisable by the High Court? It has been held by

(11) 9 Ind Cas 472 (474) (Low Bur)

Appeal lies

(07) 29 All 275 (276)

(01) 25 Bom 418 (421)

(11) 12 Ind Cas 169 (169) (Mad)

(07) 30 Mad 507 (508 509)

3. (18) AIR 1918 All 192 (194) 40 All 425.

(26) AIR 1926 Cal 400 (400)

(11) 10 Ind Cas 345 (345) 38 Cal 339

(10) 6 Ind Cas 573 (573) (Cal)

(21) AIR 1921 Lah 156 (157)

{See (11) 9 Ind Cas 937 (938) (Mad) {Party before of the

7.

8. (25) AIR 1925 Pat 525 (526) 4 Pat 713

9 (07) 29 All 536 (537, 538)

10. (33) AIR 1933 Lah 210 (210)

11. (37) AIR 1937 Rang 537 (538)

12. (35) AIR 1935 Mad 842 (847) 50 Mad 972 (F B)

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the High Courts of Calcutta,<sup>1</sup> Madras<sup>2</sup> and Patna<sup>3</sup> and by the Judicial Commissioners Court at Nagpur<sup>4</sup> that the High Court can interfere on the ground that in such case, the Court either refuses to exercise a jurisdiction vested in it by law or exercises a jurisdiction not vested in it by law. The High Court of Allahabad<sup>5</sup> has, however, taken a contrary view that the Court has jurisdiction to decide whether the applicant is entitled to apply and that a decision arrived at in the exercise of such jurisdiction, even though erroneous, cannot be interfered with by the High Court in revision.

Where an applicant has complied with the terms of this rule but his application is nevertheless rejected,<sup>6</sup> or where a sale is set aside even though the applicant does not conform to the provisions of this rule,<sup>7</sup> the order is open to revision by the High Court.

See also the undermentioned cases<sup>8</sup>

**31. Deposit — Suit for refund and contribution.** — Where property belonging to A is sold in execution of a decree against B and A has the sale set aside on depositing the amount under this rule, can he sue the decree holder for the recovery of such amount? It has been held by the High Courts of Bombay, Calcutta and Patna that he is not so entitled to recover.<sup>1</sup> They proceed upon the view that the payment under this rule must be taken to have been deposited for payment to the decree holder voluntarily and unconditionally. The decisions of the Madras High Court are conflicting.

#### Note 30

1 (103) 80 Cal 425 (428)

2 (24) AIR 1924 Mad 773 (724)

(23) AIR 1923 Mad 609 (660)

(21) AIR 1921 Mad 157 (161, 163) 41 Mad 554 (F B)

(17) AIR 1917 Mad 602 (603) (Erroneous decision on limitation)

(02) 5 Oudh Cas 377 (379) (Where no appeal lies no revision)

15

[See however (36) AIR 1936 Pat 119 (121) (Held Court had jurisdiction to decide if applicant had locus standi. The fact that it decided erroneously is no ground for revision)]

4 (26) AIR 1926 Nag 10 (14 15) 21 Nag LR 102

(23) AIR 1923 All 392 (392 393) 45 All 425 (F B)

jurisdiction to decide question and no revision lay)

(31) AIR 1937 Oudh 108 (111) (Error of judgment on point of law — Tender under O 21 R 89 by would be purchaser acquiring interest in property after auction sale — Order of Court setting aside sale holding tender valid, though wrong, cannot be interfered with in revision)

Revision lies

(30) AIR 1930 Cal 249 (250) (Rejection on the ground that deposit is insufficient — Court officer misleading judgment debtor — Revision lies.)

(25) AIR 1925 Nag 17 (18 19) (Dismissal for defect without asking applicant to give particulars)

(01) 25 Bom 631 (635) (Do)

(02) 11 Cal WN 57 (60)

hat

rt

ment's Civil Court)

(31) AIR 1931 All 449 (450) (Rejection of application on the ground that the deposit not made by the proper person)

(13) AIR 1914 Bom 130 (131) 43 Bom 735 (Application under the rule not made within thirty days)

protest — Held that the order was without jurisdiction and could be set aside in revision)

#### Note 31

1 (21) AIR 1921 Bom 104 (171, 172) 45 Bom 1094

(33) AIR 1933 Bom 237 (242) 57 Bom 601.

on this point<sup>2</sup> In a recent decision of that Court<sup>3</sup> it has been held that where a decree holder, though his decree has been fully satisfied, fails to enter satisfaction and fraudulently brings the property to sale and the mortgagee of the property makes a payment under this rule to avoid the sale, the payment so made can be recovered back by the mortgagee under Section 72 of the Contract Act. It is pointed out in the decision that in such cases there is no outstanding decree contemplated by this rule.

Where the deposit is made by one of several judgment-debtors or by a person entitled to apply under this rule and the sale is set aside in consequence, the person making the deposit is entitled to sue the other persons liable to pay the decree amount for contribution or for reimbursement as the case may be.<sup>4</sup> The High Court of Madras has held in the undermentioned case<sup>5</sup> that where the sale is set aside at the instance of a purchaser subsequent to the court sale, the payment made by him is not lawful within the meaning of Section 70 of the Contract Act, even though he was allowed by the Court to apply and therefore, he cannot sue for compensation.

O. 21 R  
Note :

**R. 90. [S. 311.] (1) Where any immoveable property<sup>3</sup> has**

O. 21 R.

Application to set aside  
sale on ground of irregularity  
or fraud.

been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale,<sup>8</sup> may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court<sup>2</sup> is

(07) 12 Cal W N 151 (152, 153)

(28) AIR 1928 Pat 193 (194, 195) 7 Pat 30

(See also (02) 6 Cal W N 336 (33) (Suit by undertenant to recover money paid for his lessee)

(31) 20 Pat L Tim 640 (640). (Decree holder cannot be restrained from withdrawing the money deposited.)

2. ('31) AIR 1931 Mad 753 (757, 759) (Refund

(23) 17 Ind Cas 90 (92) (Cal) (Suit by one of the co owners for compensation — Plaintiff held

a money decree against the defendant — by the plaintiff to set aside the sale of defendant's property in execution of that Plaintiff held entitled to the amount — defendant)

(10) 6 Ind Cas 810 (810, 812, 812) (Cannot recover the five per cent.)

(17) AIR 1917 Bom 141 (145, 147) (Do)

(See (04) 31 Cal 975 (978) (The deposit has an additional — But see (25) AIR 1923 Ratg 500)

5. (30) AIR 1930 Mad 644 (644)

3. (34) AIR 1938 Mad 493 (494, 495) (Reversing on Letters Patent Appeal, A I R 1935 Mad 261)

4. ('23) AIR 1923 All 127 (128) (Deposit by

**O. 21 R. 90** satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

[1877, S. 311; 1859, S. 256.]

### Local Amendments

#### ALLAHABAD

For the words 'Provided that no' read the words "Provided that—

(a) no . . . . . or fraud,"

and add the following proviso

'(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up'

#### CALCUTTA

Add the following to sub rule (1)

'or on the ground of failure to issue notice to him as required by Rule 22 of this Order'

Cancel the proviso and, substitute therefor the following

"Provided—

(i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon"

#### LAHORE

Add the following proviso

"Provided that no such sale be set aside on the ground which the applicant could have put forward before the sale was conducted"

#### MADRAS

After the first paragraph and before the present proviso to the rule, insert the following

"Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less, or to deposit such amount in Court

Provided also that the security furnished or the deposit made as aforesaid, shall

#### O 21 R. 90 (Local Amendments)

(38) AIR 1938 Lah 508 (508) (The objections as to the contents of the proclamation ought to be

1. (Calcutta). (38) 42 Cal W N 661 (665)  
(O 21 R 90 Proviso (ii), is inapplicable if the particular defect in the sale proclamation that is complained of is no part of the order of the Court in drawing up the sale proclamation and it finds a place in the sale proclamation that is actually issued despite the direction of the Court to the contrary)

1. (Lahore). (37) AIR 1937 Lah 309 (310)  
(Where objection to a sale of immovable property is taken under E 60 (1) (c) after sale, but before sale is confirmed objection falls under O 21 R 90 as amended by the Lahore High Court and is not entertainable)

does not apply)



be liable to be proceeded against only to the extent of the deficit on a re sale of the property already brought to sale " O. 21 R. 90

In the present proviso after the word "Provided" insert the word "further"  
NAGPUR

After the proviso to sub rule (1), insert the following further proviso -

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale "

N.-W. F. P.

Add the following further proviso to rule (1) :

"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted " <sup>1</sup>

ODDH

Add the following second proviso :

shall be  
by the

PATNA

Substitute the following for the proviso to sub-rule (1) -

"(1) Provided that no application to set aside a sale shall be admitted unless,

(a) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and

(b) the applicant deposits with his application such amount not exceeding 12½ per cent of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit <sup>1</sup>

(1) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud "

Add the following as sub-rule (2)

" (2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (i) (b), if any "

RANGOON

For the present provisos to rule 90, substitute the following

"Provided that —

(a) no application to set aside a sale shall be admitted unless it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and

(b) no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud " <sup>1</sup>

1. (N.-W. F. P.) ('38) AIR 1938 Pesh 52 (53) (Objection that could have been raised before sale—Sale cannot be set aside)

1. (Oudh) ('35) AIR 1935 Oudh 336 (336) (Sale proclamation—Omission to specify value of property — Judgment debtor failing to object before sale — He cannot raise objection in application under this rule)

1. (Patna). ('37) AIR 1937 Pat 260 (261) (Provision as to deposit is not retrospective) ('35) AIR 1935 Pat 240 (241) 17 Pat 107 (The rule specifically allows the Court to accept security other than cash as the circumstances justify.

deposit cannot be rejected — Opportunity must

## Synopsis

1. Legislative changes.
2. Scope and applicability of the Rule.
3. Immovable property.
4. Sale will not be set aside unless application is made under this Rule. See Note 2
5. Who may apply under the Rule.
6. Auction purchaser.
7. Persons entitled to rateable distribution
8. "Any person whose interests are affected by the sale."
9. Strangers.
10. Grounds on which a sale can be set aside.
11. Material irregularity in publishing or conducting the sale.
12. Omission to attach property and irregularity in attaching property before sale
13. Omission to make an order for sale.
14. Omission to issue notice.
15. Irregularities in publishing the sale — Omission to publish or irregularity in publishing sale proclamation.
16. Misdescription of property.
17. Omission or misstatement of the value of the property.
18. Omission to state the revenue or rent payable on the land.
19. Omission or misstatement of the encumbrances over the property.
20. Other mistakes in the sale proclamation
21. Omission to beat drum
22. Postponement of sale and issue of fresh proclamation.
23. Irregularities in conducting the sale — Sale within thirty days of the proclamation.
- 23a. Omission to fix time for sale
24. Sale on a holiday.
25. Omission to hold sale at stated time and place.
26. Sale of property in one lot though advertised for sale in separate lots.
27. Irregularities regarding the order of sale of lots
28. Other cases where the sale is not in terms of the proclamation.
29. Purchase by decree-holder without permission to bid. See Note 7, Rule 72
30. Irregularities in the grant of permission to bid
31. Sale after satisfaction of the decree
32. Sale after an order of postponement.
33. Sale after attachment under Rule 53.
34. Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties in sale proceedings.
35. Non representation of minor.
36. Other instances of material irregularity.
37. Fraud in publishing and conducting the sale.
38. Combination among bidders.
39. Substantial injury — Proviso
40. Applicant must have sustained substantial injury by reason of such irregularity or fraud.
41. Waiver of irregularity and estoppel.
42. Bona fide purchaser for value without notice
43. Setting aside sale on grounds not taken in the application.
- 43a. Setting aside sale in part only, if and when permissible.
44. Joinder of claims under Section 47.
45. Suit to set aside sale for material irregularity. See Notes to O 21 R 92.
46. Sale, if can be challenged by way of defence in suit for possession. See Notes to O 21 R 92
47. Necessary parties. See Notes to O 21 R 92.
48. Applicability of Order 9 in applications under this Rule
49. Limitation.
- 49a. Stay in aid of execution.
50. Appeal.
51. Revision.

## Other Topics (miscellaneous)

Appeal to Privy Council. See Note 50  
 Compromise of proceedings under this rule — Whether can be recorded under O 23 R. 3. See Note 2  
 More inadequacy of price — Whether sufficient ground. See Note 40  
 Objections that cannot be taken. See Note 2  
 Proceedings under this rule — Judicial. See Note 2  
 Rule which applies to sales in execution of a decree on mortgage. See Note 2

Sale — Where can be set aside by consent. See Note 2

Sale without notice to receiver not in possession of property — Whether irregular. See Note 40

Sale under the Bengal Tenancy Act — Rule, whether applicable. See Note 2

"The Court" — Application to Collector. See Note 2

Mission of High Court. 131 Ind Cas 721 AIR 1931 Rang 173 Overrulen  
 (30) AIR 1933 Rang 291 (2/3) (Schedule Notes

Section No 44 of 27th January 1937 has removed the necessity of a deposit under O 21. R. 90)

**1. Legislative changes. —**

1 The words "or any person entitled to share in a rateable distribution of assets" after the word "decree holder" have been newly added See Note 7

2 The words "or whose interests are affected by the sale" have been substituted for the words "or any person whose immovable property has been sold" See Notes 6 and 8

3 The words "or fraud" have been newly added after the word "irregularity" See Notes 37 and 50

4 The words "unless upon the facts proved the Court is satisfied" have been substituted for the words "unless the applicant proves to the satisfaction of the Court" See Note 40

**2 Scope and applicability of the Rule. —** The rule provides for the setting aside of sales in execution on the ground of material irregularity or fraud in publishing or conducting them. The auction-purchaser at an execution sale has no absolute right to its being confirmed when there is an irregularity or fraud in publishing or conducting it, if the irregularity or fraud is a *material* one and has caused *substantial* injury to any party the sale will be set aside at the instance of *that party*<sup>1</sup> even though the purchaser be a stranger<sup>2</sup>

Before a sale can be so set aside, the following conditions must be satisfied viz —

- (1) *There must be an application for the purpose*<sup>3</sup> The Court cannot set aside the sale under its inherent powers<sup>4</sup> especially when it is barred by limitation<sup>5</sup> But the application need not be accompanied by a deposit as is necessary for an application under Rule 69<sup>6</sup>
- (2) *The application must be one under this rule* A sale cannot be set aside under this rule on an application made under Rule 89<sup>7</sup>
- (3) *The application must be by one or other of the persons specified in the rule*<sup>8</sup>
- (4) *The application must be made to the Court executing the decree* As to the power of the Collector to set aside a sale in cases where the execution of a decree has been transferred to him, see Note 6 to Section 70, ante
- (5) *The application must be based on an irregularity or fraud in publishing or conducting the sale*<sup>9</sup>

**Order 21 Rule 90 — Note 2**

1 (15) AIR 1915 Mad 989 (993) 21 Ind Cas 389 (392) 38 Mad 387.

2 (10) 5 Ind Cas 390 (393) (Cal)

3 (82) 1882 All W N 1 (1)

(30) AIR 1930 All 506 (557) (Two decrees consolidated and property sold in execution by one bid.—To challenge sale on ground of irregularity sales in execution of both decrees must be challenged)

[See also (26) AIR 1926 Lah 514 (514) (An application signed by a duly authorized pleader is enough)]

mada)]

8. See Notes 5 to 9

9 (26) AIR 1926 Cal 629 (629 630)

(31) AIR 1934 Nag 200 (251) (Inadequacy of

order to  
bring

rule)

[See (33) 50 All 146 (150)]

the matter within Order 21]]

O. 21 R. 90  
Note 2

Thus, the following objections are outside the scope of the rule, viz —

- (i) An objection that the sale is illegal and therefore null and void<sup>10</sup>
  - (ii) An objection that the Court had no jurisdiction to execute the decree or sell the property<sup>11</sup>
  - (iii) An objection that the property is not legally saleable<sup>12</sup>
  - (iv) An objection that the decree is invalid,<sup>13</sup> for example, on the ground of fraud in obtaining the decree<sup>14</sup>
  - (v) An objection that the execution is barred by limitation<sup>15</sup> or that no execution ought to have issued under the decree<sup>16</sup>
- (6) *The applicant must prove not only irregularity or fraud in the publishing or conducting of the sale but must also show that he has sustained substantial injury thereby*<sup>17</sup>

An application under the rule cannot be disposed of summarily, without any investigation<sup>18</sup>. Opportunity must be given to either party to adduce evidence in respect of the several allegations made<sup>19</sup>. The proceeding under this rule is a judicial one,<sup>20</sup> and the decision must be based on findings arrived at on legal evidence<sup>21</sup>.

It is open to the parties to compromise the proceedings<sup>22</sup>. In such a case all the parties affected must be parties to the compromise<sup>23</sup>. The judgment debtor and the decree holder cannot, by a compromise between themselves, have the sale set aside behind the back of the auction purchaser<sup>24</sup>.

10 (24) AIR 1924 All 698 (690)

(37) AIR 1937 All 407 (410)

11 (96) 18 All 141 (144 145)

(68) 28 All 273 (275)

(65) 7 All 365 (366) (On the ground that he was no party to decree)

[See (11) 9 Ind Cas 202 (253) (Mad) (An objection that the minor defendant was not properly under

19. (32) AIR 1932 Pat 326 (327) 11 Pat 542

(34) AIR 1934 Pat 540 (541)

(11) 9 Ind Cas 883 (384) (Cal)

(1665) 4 Suth W R 311-9 (9)

(69) 12 Suth W R 511 (512)

(82) 1682 All W N 61 (61)

20 (73) 20 Suth W R 424 (425)

21 (70) 2 N W P H C R 142 (142)

(1665) 2 Suth W R Misc 1 (2)

(81) 7 Cal 31 (33, 41) (Regarding the service of process in execution proceedings the returns of the nazir are not evidence by themselves but must be proved on oath)

(32) AIR 1932 Nag 14 (15) 27 Nag L R 839

(24) AIR 1924 Mad 217 (218 221) 46 Mad 756

[See also (35) AIR 1935 All 182 (183) (Objection that sale proclamation was not posted in locality and beat of drum was not properly made—Negative evidence left in by judgment-

13. (26) AIR 1926 Cal 109 (110)

14

(17) AIR 1917 Pat 467 (467) 2 Pat L Jour 157

16. (66) 6 Suth W R Misc 46 (47)

(11) 10 Ind Cas 625 (625) (Cal) (On account of uncertified adjustment)

17 (24) AIR 1924 Lah 593 (592)

(34) AIR 1934 Pat 540 (541)

(17) AIR 1917 Lah 156 (157)

(11) 10 Ind Cas 252 (253) (Mad)

(1665) 4 Suth W R 74 (74)

(67) 1887 All W N 117 (117)

(66) 3 Bom H O R A C 110 (112)

[See also (28) AIR 1923 Cal 3 3 (332) ]

18 (75) 21 Suth W R 216 (217)

A ... ..

R 3 and not under O 21 R 3 as proceedings are not in execution)

(29) AIR 1929 Lah 556 (557) (It is not a proceeding in execution—it is in the nature of a suit—Compromise can be recorded under O 23, R 3—O 21 R 3 does not apply)

[See (23) AIR 1923 Pat 418 (419) 11 Pat 534 ]

23 (20) AIR 1925 Cal 779 (780)

24. (11) 10 Ind Cas 149 (151 152) (Cal)

An execution sale vitiated by irregularity or fraud should ordinarily be set aside in its entirety<sup>25</sup> except when the sale is by separate lots<sup>26</sup> in which case only the sale of the lots so vitiated will be set aside<sup>27</sup> (See also Note 13a)

O. 21 R. 90  
Note 2

The effect of setting aside a sale under the rule is to restore the parties to the position which they occupied immediately before the sale<sup>28</sup> If the purchaser has got into possession after the sale, the judgment debtor can be put back in possession by way of restitution<sup>29</sup> In proper cases he can be awarded compensation for the loss of profits during the period he was out of possession<sup>30</sup> Conversely, the purchaser can recover from the judgment debtor any money which he might have paid *bona fide* in order to save and preserve the property,<sup>31</sup> and if there was no irregularity or fraud for which he was responsible, he can also be awarded interest on the purchase money deposited by him<sup>32</sup>

mortgage decrees<sup>33</sup> The principle

—

(2) Sales under the Bengal Tenancy Act<sup>34</sup>

(3) Sales under the Madras Rent Recovery Act, VIII of 1865<sup>35</sup>

The rule does not apply to sales held by the Official Receiver under the Provincial Insolvency Act<sup>37</sup> It has also been held to be inapplicable to sales under the Madras Estates Land Act<sup>38</sup> Again, it has been held that where, as the result of the compulsory winding up of a company, the official liquidator sells a decree standing in the name of the directors by auction and the liquidator assigns the decree to the purchaser with the sanction of the Court, this rule does not apply and the Court has no power to set aside the sale<sup>39</sup>

As to whether an application under this rule can be filed after confirmation of the sale, see the undermentioned cases<sup>40</sup>

As to whether an application by a party to the suit to set aside the sale falls

- (31) AIR 1931 P C 88 (35 36) 58 Ind App 50  
27 Nag L R 90 (PC) (Approving 10 Ind Cas 148)  
(25) AIR 1925 Oudh 693 (693)  
25. (28) AIR 1928 Cal 849 (351)  
26 (26) AIR 1926 Cal 829 (829, 830)

- (30) AIR 1930 Pat 280 (281 282) 9 Pat 685  
31 (17) AIR 1917 Cal 216 (217) (A banamidar court auction purchaser who had paid money to save and preserve the estate can when the sale is set aside for irregularity, recover it from the

where  
tack

- (27) AIR 1937 Cal 511 (512) (On setting aside

- (81) 7 Cal 163 (165)  
36 (11) 12 Ind Cas 137 (137) Mad  
37. (29) AIR 1929 Lab 622 (623)  
(32) AIR 1932 Lah 320 (320)  
(18) AIR 1918 Mad 136 (136)

[See however (27) AIR 1927 Nag 262 (263)]

- 38 (20) AIR 1920 Mad 292 (293) 43 Mad 331.

(21) AIR 1921 Mad 507 (505)

(39) AIR 1933 Mad 609 (609)

39 (33) AIR 1933 Mad 176 (177)

40 (10) 5 Ind Cas 330 (395) (Cal) (Sale can be set aside even after confirmation)

(17) AIR 1917 Pat 467 (467) 2 Pat L Jour 157.  
(After confirmation of a sale in execution the only remedy of the judgment-debtor is to apply to have the sale set aside under the rule.)

[See (31) AIR 1931 All 655 (656) (Appellate decree in suit varied, amount reduced and

restitution)]

30. (14) AIR 1914 Cal 697 (693) (That as in case the decree-holder purchaser was guilty of fraud)

O. 21 R. 90  
Notes 2-6

under Section 47 or this rule, see Notes 51 and 55 to Section 47 *ante*, and the undermentioned cases <sup>41</sup>

**3. Immovable property.**—A house attached to land is “immovable property” <sup>1</sup> A debt secured by a mortgage of immovable property or a decree thereon is only moveable property and this rule does not apply to a sale thereof in execution <sup>2</sup> It has, however, been held in the undermentioned case<sup>3</sup> that mortgagee rights as well as the mortgage debt are immovable property See also Section 16, Note 4 and O 21 R 54

**4. Sale will not be set aside unless application is made under this Rule**  
— See Note 2 above

**5. Who may apply under the Rule.**—Under the old Code the right to apply under the corresponding Section was limited to the *decree holder* and to persons *whose property had been sold* <sup>1</sup> Under the present rule, however, the right is conceded to —

(1) the decree holder,

(2) any person entitled to share in a rateable distribution of the assets, and

(3) any person whose interests are affected by the sale

Where *A* who holds a decree against *B*, attaches a decree held by *B* against *C*, and as attaching creditor executes *B*'s decree, and *C*'s properties are sold in such execution, *B* will be considered to be a decree holder entitled to apply under the rule <sup>2</sup>

Where after making an application under the rule the applicant dies, his legal representative can continue the proceedings <sup>3</sup>

See also Notes 6 to 9 below

**6. Auction-purchaser.** — Under the old Code an auction-purchaser could not apply under this rule as he was neither a decree holder nor ‘a person whose immovable property has been sold’ <sup>1</sup> In the present rule the expression “or any person whose interests are affected by the sale” has been newly introduced Does this expression include an auction purchaser? Yes, according to the High Courts of Madras, Allahabad, Patna and Nagpur, the reason being that the word “interests” is not confined to interests prior to the sale but includes “interest” created by the sale itself <sup>2</sup> The High Courts of Calcutta<sup>3</sup> and Lahore<sup>4</sup> and the Judicial Commissioner's Court of Sind<sup>5</sup> have, on the

(See ( 99) 28 Cal 727 (730, 731)  
( 99) 32 Mad 242 (252)  
( 05) 35 Cal 61 (77) ]

for possession of immovable property is not  
immovable property ]]

3. ( 33) AIR 1933 Lah 210 (211)

Note 5

1 ( 83) 5 All 42 (44) (Co sharer whose share has  
not been sold is not entitled to apply)

2 ( 98) 21 Mad 417 (418, 419)

3 ( 32) AIR 1932 Pat 231 (236) 11 Pat 424

specific provision in this rule — The fact that  
the auction purchaser is not made a party will  
not affect the question

Note 3

(Reversing A I R 1931 Lah 630 on  
Patent Appeal)

5 ( 31) AIR 1931 Sind 107 (110) 25 Sind L R  
405

(Decree

other hand held that the "interests" referred to in the rule are interests independent of the sale and not such as come into existence as a result of the sale. The Bombay High Court has also held in similar view.<sup>6</sup>

**O.21 R. 90**  
**Notes 6-8**

The decisions of the High Court of Rangoon<sup>7</sup> are conflicting on the point

**7. Persons entitled to rateable distribution.**— Although a person entitled to rateable distribution had not been specified in Section 311 of the old Code as a person entitled to apply thereunder, such right had been conceded to him on the ground that he was a "decree holder".<sup>1</sup> The present rule specifically includes such persons.<sup>2</sup>

Persons entitled to dividends under the Provincial Insolvency Act are not "persons entitled to rateable distribution" within the meaning of the rule, and cannot therefore apply to set aside execution sales.

8. "Any person whose interests are affected by the sale." — The expression "any person whose immovable property has been sold" in the old Section 311 was interpreted by a Full Bench of the Calcutta High Court to mean "any person whose interests are affected by the sale"<sup>1</sup> The present rules gives effect to this view

The judgment debtor is a person whose "interests are affected by the sale."

The 'interest' need not necessarily be a *proprietary* or a *possessory* interest, it may be a *pecuniary* or other interest.<sup>3</sup> Thus, an attaching creditor *in whose favour a decree has been passed* is a person 'whose interests are affected by the sale within the meaning of this rule'.<sup>4</sup> Similarly, where a mortgage decree was passed against *A* and *B* and the sale of the properties of *A* was postponed until the sale of the properties of *B*, and the properties of *B* were sold for an inadequate price, it was held that *A* was a person whose interests were affected by the sale.<sup>5</sup> There is a conflict

6 (36) AIR 1936 Bom 311 (312) GO Bom

7. (29) AIR 1929 Rang 33 (33) 6 Rang 621

(27) AIR 1927 Rang 801 (802) 5 Rang 516 (

**Note 7**

1. ( 93) 15 AU 318 (820)

(02) 29 C<sub>3</sub>1 548 (554)

(87) 10 Mad 57 (59 62)

{ 01} 24 Mad 811 (816)

( 98 ) 21 Mad 51 (53)

[See ¶ 93] 20 Cal 678 (675) (But a person who is not entitled to come in under § 73 and share in the distribution of the sale-proceeds is not included within the term decree-holder under old § 311.)

2 (15) AIR 1945 Cat 16 (16)

(27) AIR 1927 Mad 67 (CS)

(15) AIR 1915 Mad 541 (542) (1 person not entitled to come in under S 73 is not entitled to apply under this rule)

(3b) AIR 1936 VII 626 (627) (He must have

( 05) 1 Cal L Jour 454 (455) (Do)

(19) AIR 1919 Cal 181 (181)

( 18 ) AIR 1918 Cal 846 (847 )

(36) AIR 1936 Cal 26 (27)

(35) AIR 1950 Cal 28 (21) (Case under S 174, Bengal Tenancy Act—Words of S 174 (1) being in part *matéria* with O 21 R 90)

(39) AIR 1939 Cal 146 (147) I L R (1939) 1 Cal  
273

(39) AIR 1939 Nag 179 (181) I L N (1939) Nag  
357

**Note 8**

1. ( 85) 15 Cal 488 (492) (1 B)

2 (39) AIR 1939 Mad 193 (194)

3 (24) AIR 1924 Cal 766 (787) 51 Cal 495.

(27) AIR 1927 Mad 784 (784)

(37) AIR 1937 Cal 7 (s) (Person obtaining order for attachment before judgment and subsequently getting decree before the sale)  
(But see (1900) 4 Cal W 542 (344))

S. (31) AIR 1931 Pat 217 (217, 21)

0.21 R.90  
Note 8

of decisions as to whether a person who has merely obtained an attachment *before judgment* and in whose favour a decree has not yet been passed can be said to be a person having any such interest. It has been held by the Madras High Court<sup>6</sup> that such a person is one whose interests are affected by the sale within the meaning of the rule. But the Calcutta High Court has held a contrary view.<sup>7</sup> It is not necessary that the applicant should have a *present* interest in the property,<sup>8</sup> a reversioner to a Hindu widow's estate<sup>9</sup> or a person who is entitled to specific performance of a contract to sell the property<sup>10</sup> can apply under this rule. Similarly, a defaulting auction purchaser who would be liable to make good the deficiency on a re-sale, and whose liability is only a contingent one, can apply under this rule.<sup>11</sup> But whatever the nature of the interest might be, it must be in existence at the time when the sale takes place. If it is created *after* the sale, it cannot be affected by the sale. Thus, a person purchasing the property after the execution sale cannot apply under this rule.<sup>12</sup> Similarly a decree holder who attaches the property *after* the court sale and before confirmation of the sale has no *locus standi* to apply under this rule to set aside the sale.<sup>13</sup>

The following persons have been held entitled to apply as being persons 'whose interests are affected by the sale'—

- (1) A real owner of property sold in execution of a decree against his benamidar.<sup>14</sup>
- (2) A judgment debtor who has sold away his property.<sup>15</sup>
- (3) The legal representative of a deceased judgment debtor.<sup>16</sup>
- (4) Where the judgment debtor is a minor, his guardian.<sup>17</sup>
- (5) Where the judgment debtor is a ward of Court, the Court of Wards.<sup>18</sup>
- (6) Where he is an adjudicated insolvent, the Official Receiver.<sup>19</sup>

12 { 39 } AIR 1933 Cal 146 (148) 1 L.R. (1933) 1 Cal 273

[See { 37 } AIR 1937 Nag 161 (162) (Judgment debtor applying under R. 90 and then selling property to another — Latter can continue application)]

13 { 39 } AIR 1933 Mad 501 (502)

14 { 93 } 20 Cal 413 (424, 425)

{ 96 } 19 Mad 167 (168)

15 { 26 } AIR 1926 Mad 217 (218) (Before court

7. { 25 } AIR 1925 Cal 1103 (1104)

{ 12 } 15 Ind Cas 668 (669) (Cal)

{ 38 } AIR 1936 Cal 26 (27) (Case under Bengal Tenancy Act S. 174)

[See however { 34 } AIR 1934 Cal 477 (478) (Decree obtained after sale but before application—Attaching creditor can apply)]

8 { 33 } AIR 1933 Mad 694 (694, 695) (Judgment debtor who has been adjudged insolvent and whose property has vested in Official Receiver

17 { 30 } AIR 1930 Nag 185 (186, 187) 26 Nag L.R. 173

18 { 17 } AIR 1917 Cal 745 (746)

19 { 26 } AIR 1923 Mad 454 (455) (An interim

being cannot apply under this rule as no man is heir to a living person)

10 [See { 19 } AIR 1919 Pat 127 (127) 4 Pat L.Jour 300]

11 { 33 } AIR 1933 Cal 815 (815)

rule]



- (7) A purchaser from the judgment debtor *pendente lite*<sup>20</sup>
  - (8) A transferee of a tenure or occupancy holding sold in execution of a decree for arrears of its own rent<sup>21</sup>
  - (9) One only of several co sharer judgment debtors<sup>22</sup>
- See the undermentioned cases<sup>23</sup> for further illustrations

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¶ **Strangers** — The words whose interests are affected by the sale are wide enough to cover persons who are not parties to the suit<sup>1</sup>. But a person who claims the property sold by a title paramount that is adversely to the judgment debtor is not one whose interests are affected by the sale and cannot therefore apply under this rule<sup>2</sup>.

**10 Grounds on which a sale can be set aside.** — Before a sale can be set aside under this rule it must be shown —

- (i) that there has been a *material* irregularity or fraud in publishing and conducting the sale<sup>3</sup> and

[See also (33) AIR 1933 Cal 486 (486)]

O (27) AIR 1927 Mad 783 (784)

33) AIR 1933 Cal 783 (789) (Purchaser after attachment and before sale is person whose interest has been affected)

[See however (82) & Cal 367 (369) (Does not include a purchaser of the same property at a prior execution sale which has not been confirmed)]

1 (25) AIR 1925 Cal 925 (925) (Purchaser of a non transferable occupancy holding)

95) 22 Cal 802 (804)

84) 10 Cal 496 (500)

93) J Cal W N 134 (140) (Purchaser of a portion)

14) AIR 1914 Cal 524 (524 526) (Do)

25) AIR 1925 Pat 461 (461 462) (Do)

2 (08) III All 192 (196)

\*3 (35) AIR 1935 Pat 210 (211) (Expression any person interested in the sale in S 178

2 (88) 15 Cal 488 (492) (FB) (Overruling 14 Cal 240 — Purchaser prior to attachment)

(16) AIR 1916 All 147 (148) 38 All 558 (Person not a party to a mortgage decree)

(13) 90 Ind Cas 16 (17) (All) (Do)

(27) AIR 1927 Cal 82 (83 84)

(186) 2 Suth W R Misc 13 (14 15) (Purchaser prior to attachment)

(76) 25 Suth W R 79 (79)

(93) 16 Mad 476 (478) (Decree against one brother — Not binding on the other — He is not entitled to apply)

(26) AIR 1926 Nag 68 (71) (Where during the pendency of a partition suit the suit property was sold by auction in execution of a decree against one member alone as belonging to him only the other members cannot apply under R 90 to have the sale set aside as the decreeholder could validly take only the share of that member)

(23) AIR 1923 Pat 451 (452) 2 Pat 396

(22) AIR 1922 Upp Bur 23 (22) 4 Upp Bur R 11 97

89) AIR 1930 Mad 193 (194) (Sale of property in execution of mortgage decree — Judgment debtor and attaching decree holder are persons whose interests *prima facie* are affected by the sale — But if by reason of the claims of mortgagees of the property there would be no

#### Note 10

1 (1900) 4 Cal W N 474 (477)

(14) AIR 1914 All 325 (325) (There was irregularity but not a material one)

(19) AIR 1919 Cal 169 (170)

(08) 12 Cal W N 757 (753 759) (The statement of the value of property which proves to be inadequate is an irregularity but not a material irregularity)

(32) AIR 1932 All 369 (369)

(25) AIR 1923 Lah 918 (918)

(11) 12 Ind Cas 572 (572) (Lah)

(25) AIR 1925 Mad 729 (730)

(19) 52 Ind Cas 167 (167) (U P B R) (The mere absence of a notice to a judgment-debtor of the intended sale of his property is not a material irregularity)

(16) AIR 1916 All 156 (157)

affected by the sale)

37) 41 Cal W N 1246 (1243) (A mortgagor judgment debtor is entitled to maintain an application under O 91 R 90 O P Code for setting aside the sale in execution of the mortgage decree although a receiver has been appointed by Court in respect of the mortgaged properties.)

35) AIR 1935 Pat 406 (406) 14 Pat 436 (Sale of joint family property in execution of decree against father — Son can apply to set aside sale)

#### Note 9

1 (36) AIR 1936 Lah 369 (371)

O 21 R 90  
Notes 10-12

(11) that substantial injury has resulted to the applicant thereby<sup>2</sup>

A sale which is *illegal and void* is not within the contemplation of this rule. Such a sale need not in fact be set aside at all and can be ignored<sup>3</sup>. Nor need any injury be shown to have been sustained by reason of such sale<sup>4</sup>. Where the decree holder is the purchaser it is open to the judgment debtor under Section 47 to attack a sale on grounds other than those specified in this rule<sup>5</sup>.

In determining what is illegal and what is irregular it may be remarked that the distinction is one of *degree*<sup>6</sup>. As a general rule in order to establish an illegality there must be shown some disregard of a positive prohibition of the law<sup>7</sup>.

See Note 12 to Section 115 *ante* for a fuller discussion on this point.

**11 Material irregularity in publishing or conducting the sale** — The term irregularity means not being in conformity to some recognized rule and in the present context it means not being in conformity to the rules prescribed for regulating execution sales<sup>1</sup>. The material irregularity referred to in this rule is an irregularity in the procedure to be followed before property is put up for sale. It does not include the irregularity of selling property not belonging to the judgment debtor<sup>2</sup>. The expression publishing or conducting the sale refers respectively to the proclamation of sale under Rule 66 and to the action of the sale officer<sup>3</sup>. The words conducting the sale do not refer to anything done *before* the sale or any proceedings unconnected with the actual carrying out of the sale<sup>4</sup>. The material irregularity complained of must be one on the part of the Court or its officer<sup>5</sup>.

**12 Omission to attach property and irregularity in attaching property before sale** — It was originally held by the High Court of Allahabad<sup>1</sup> that a regularly perfected attachment was an essential preliminary to sales in execution of simple money decrees and that where there was no such attachment the sale was void and not merely voidable. In view of the decision of the Privy Council in *Tassadik v Ahmad* I L R 21 Calcutta 66 it has now been held by the said High Court that the absence of attachment is only a material irregularity which would not render the sale *ipso facto* void<sup>2</sup>. The same view has been held by other High Courts also<sup>3</sup>.

[See also (14) AIR 1914 Cal 195 (126) 41 Cal 276 (Omission to issue a notification of a revenue sale in vernacular while it was notified in English is not an irregularity)]

2 (32) AIR 1932 All 369 (369)

(89) 11 All 333 (342 343)

3 (93) 15 All 324 (3 6 327)

(83) 4 All 382 (384)

(75) AIR 1975 All 551 (552)

(11) 9 Ind Cas 584 (585) (Cal)

(87) 1887 All W N 30 (32)

4 (89) 11 All 333 (338)

[But see (95) 5 Mad L Jour 70 (73) (There is

irregularity or fraud in sale proclamation is covered by rule)]

4 (80) 7 All 641 (645)

(90) AIR 1990 Mad 481 (484) (Not covered under Rule 66 not issued — It is not a material irregularity in publishing)

5 (1865) 4 South W R Misc S 11 (19)

#### Note 12

1 (83) 5 All 86 (91) (FB)

(85) 7 All 38 (40)

(88) 10 All 506 (514 517)

2 (99) 21 All 311 (313)

(34) AIR 1934 All 430 (432)

(13) 21 Ind Cas 46 (47) (All)

3 (27) AIR 1927 Cal 847 (847)

(31) AIR 1931 Cal 35 (36) 37 Cal 1006

(16) AIR 1916 Cal 465 (467 468)

(07) 34 Cal 787 (802)

(94) 21 Cal 639 (641)

(91) 18 Cal 183 (193)

(67) 8 South W R 415 (418 419)

(30) AIR 1930 Lah 685 (686)

(29) AIR 1929 Lah 441 (449)

(26) AIR 19 G Mad 211 (218 to 215)

(18) AIR 1918 Mad 1262 (1263)

5

■ (21) AIR 1921 Mad 583 (585) 41 Mad 35

■ (99) AIR 19 9 Mad 275 (779)

#### Note 11

1 (95) 5 Mad L Jour 70 (73)

2 (33) AIR 1933 Pat 435 (440) 12 Pat 665

(S B)

3 (08) 32 Bom 572 (574)

[See (37) AIR 1937 Nag 140 (141) (Irregularity or fraud in sale proclamation is covered by rule)]

The question next arises whether, in cases in which it has been held that the absence of attachment is only a material irregularity, it is an irregularity in *publishing and conducting the sale* within the meaning of this rule. According to the High Courts of Calcutta and Rangoon, it is not<sup>4</sup>. The reason, it is conceived, is that such an irregularity is one which is *antecedent* to the publishing and conducting of the sale and, therefore, will be a ground for a proceeding only under Section 47. The High Courts of Allahabad, Lahore and Madras have on the other hand, held that it is an irregularity in publishing and conducting the sale<sup>5</sup>. The publication of the attachment is a step leading up to the publication of the sale, the actual proclamation of sale being a notice to the public that the sale is to take place upon a particular date. The absence of attachment may, therefore, be deemed to be a material irregularity in the publishing of the sale<sup>6</sup>.

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Where there has been an attachment, an error in the warrant of such attachment<sup>7</sup> or the absence of notice of the attachment to the judgment debtor<sup>8</sup> would only be mere irregularities which will not vitiate the sale.

**13. Omission to make an order for sale.**—The omission to pass an order absolute for sale under Section 89 of the Transfer of Property Act in a mortgage decree was held in the undermentioned case<sup>1</sup> to be not an irregularity in publishing or conducting a sale but one *antecedent* to it and, therefore, did not fall within this rule.

**14. Omission to issue notice**—An omission to issue notice under Rule 22 is an irregularity in proceedings which are *anterior* to the publishing or the conduct of the sale<sup>1</sup>. It also goes to the root of the jurisdiction of the Court executing the decree and renders the sale *illegal and void*<sup>2</sup>. It is therefore not a matter coming under this rule. In the undermentioned cases<sup>3</sup> however it has been held that want of a notice under O. 21 R. 22 is a ground for setting aside a sale under this rule. (For a full discussion of the subject, see Order 21 Rule 22 Note 5.)

There is a conflict of opinion as to whether the non service of notice under Rule 66 will be a ground for setting aside a sale under this rule. According to the High

(18) 18 Ind Cas 498 (499) (Mad)

aside merely for want of it. Still less where an

43

2—

(11) 9 Ind Cas 918 (922) (Cal) (But where an objection that the property proclaimed for sale has not been attached is taken before the sale, it is the duty of the Court not to proceed with

6 (99) 31 All 311 (318)

7. (10) 6 Ind Cas 713 (715) 1909 Pan Re No 40.

(30) AIR 1930 Lah 789 (791)

8 (1965) 2 Suth W R 74 (75)

Note 13

1 (28) 1 Oudh Cas 153 (156)

Note 14

1 (25) 32 Bom 572 (574)

2. (37) 21 Bom 424 (439 453) (F B)

3. (33) AIR 1933 Pesh 71 (72)

(37) AIR 1937 Nag 143 (149) 1 L R (1939) Nag 450

(36) AIR 1936 Mad 99 (100) (It can be set aside if there were no attachment at all a sale would not be set

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Court of Madras,<sup>4</sup> the irregularity is not one relating to the publication or the conduct of the sale and the question can be considered only under Section 47. The Chief Court of Lower Burma<sup>5</sup> has held that the absence of such a notice is more than an irregularity and renders the sale void. The High Courts of Calcutta and Lahore and the Judicial Commissioner's Courts of Nagpur and Peshawar have held that it is an irregularity in publishing the sale.<sup>6</sup> The onus of proving that notice under Rule 66 was not properly served is on the judgment debtor.<sup>7</sup>

Where no notice under Rule 66 is required to be given, as where a fresh proclamation is ordered to issue under Rule 69, the non issue of notice is no ground for setting aside a sale under this rule.<sup>8</sup>

The absence of notice prescribed by O 31 R 16 is not a mere irregularity but affects the jurisdiction of the Court.<sup>9</sup>

A sale in execution of a decree pending an insolvency petition against the judgment debtor is not bad for want of notice to the interim receiver.<sup>10</sup>

Non publication of the notices prescribed by Regulation VIII of 1819 in cases of *puni* sales has been held to be a material irregularity.<sup>11</sup>

See also Section 17 Note 61, Order 21 Rule 16 Note 14 and Order 21 Rule 66, Notes 5 and 16.

**15. Irregularities in publishing the sale — Omission to publish or irregularity in publishing sale proclamation.** — The failure to publish the sale proclamation is an irregularity within this rule,<sup>1</sup> so is an irregularity in the preparation and service thereof.<sup>2</sup> As has been seen in the Notes to Rule 67 *ante*, the proclamation should be published on the spot<sup>3</sup> and a copy of the proclamation should be affixed to a conspicuous portion of the property,<sup>4</sup> and a failure to do the one or the other will be an irregularity within this rule. If the properties are situated in several villages or are distinct the failure to proclaim the sale at each village or property will be an irregularity.<sup>5</sup> If, however, the properties are sold in lots and they are sufficiently separated from each other, the affixing of the proclamation on one of such lots may

(20) AIR 1920 Mad 1034 (1035) 43 Mad 57  
(Property already under attachment—Sale without notice to judgment debtor only irregularity)

4. (25) AIR 1925 Mad 1142 (1142)

(20) AIR 1920 Mad 481 (481)

[See however (35) AIR 1935 Mad 459 (462)]

5 (18) AIR 1918 Low Bur 114 (114)

(See (39) AIR 1939 Mad 174 (175) (The fact that there was no proclamation might legitimize)

(copy of the sale proclamation at the court house of the execution Judge amounts to irregularity of a material character as described in O 21 R 90)

3 (82) 1882 All W N 53 (59)

(1) 7 Cal 34 (39, 41)

(39) AIR 1939 Pesh 11 (11)

7 (33) AIR 1933 Pat 640 (640)

8 (26) AIR 1926 Oudh 76 (76, 77)

9 (38) AIR 1938 Cal 734 (735, 736)

10. (36) AIR 1936 Mad 121 (122) 59 Mad 438

11. (16) AIR 1916 Cal 257 (259)

Note 15

1 (26) AIR 1926 Cal 577 (578) (It is not an illegality)

(29) AIR 1929 All 948 (949, 950) 52 All 115  
(Where the Court alters the date fixed for a sale without giving notice to the parties as required by R 66 (2) there is a material irregularity)

(02) 6 Cal W N 44 (46) (Affixed not on the property but on a school some distance off is a material irregularity)

(81) 7 Cal 466 (469, 470)

(23) AIR 1923 Lah 671 (671)

5 (13) 19 Ind Cas 296 (293) 40 Cal 633 40

Ind App 140 (P C)

(85) 11 Cal 74 (76)

be enough<sup>6</sup> The failure to affix a copy of the sale proclamation in the Collector's office as required by Rule 54 has also been held to be an irregularity under this rule<sup>7</sup> but not the failure to direct an advertisement of sale in the Gazette<sup>8</sup> Where two lots, each lot comprising several villages, were brought to sale but the sale proclamation affixed in each village showed that the subject of sale was the *particular village* at which the copy was posted and not the lot of which such village was part, it was held that it was a material irregularity<sup>9</sup>

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**16. Misdescription of property.** — A mere misdescription of property in the sale proclamation where the parties concerned knew what had been attached and sold, is a mere irregularity which would not necessarily invalidate a sale<sup>1</sup> But a fundamental misdescription of the property which has misled the purchaser will be a ground for setting aside the sale<sup>2</sup> The principle of *caveat emptor* cannot apply to such cases<sup>3</sup>

The non specification of the share of the judgment debtor in the property sold is also a material irregularity<sup>4</sup>

See also the undermentioned decision<sup>5</sup>

**17 Omission or mis-statement of the value of the property.** — A mere omission to state in the proclamation of sale the estimated value of the property to be sold will not be a material irregularity under the rule<sup>1</sup> But in particular cases it may

[See however (11) 9 Ind Cas 698 (701) (Cal) (There need not be separate proclamation in each village unless proper notice of the sale could not otherwise be given)]

6 (88) 1 Bom 368 (370) (Otherwise it would be an irregularity)

(80) AIR 1980 Lah 685 (687)

7 (91) 18 Cal 422 (426) (F B) (It is not an illegality)

(111) 8 Cal 932 (932 933)

(24) AIR 1924 Mad 217 (219 223) 46 Mad 786

8 (19) AIR 1919 Lah 260 (261)

9 (33) AIR 1938 Mad 225 (226 227) 56 Mad 356

#### Note 16

1 (26) AIR 1926 Nag 246 (248)

(88) AIR 1933 Lah 1031 (1032) (Boundaries not correctly given in sale proclamation—But every body recognizing property to be sold from municipal number—Held sale could not be set aside)

(83) AIR 1933 Cal 662 (663) (Advertisement in newspaper—One property fully described and for description of others reference to sale proclamation given — Bidders not misled — Irregularity does not vitiate sale)

(76) 25 South W R 820 (827) (Mention of wrong pargana)

(17) AIR 1917 Mad 967 (967)

(34) AIR 1934 Pat 186 (187) (Registry office wrongly described in report of property—Irregularity is not sufficient to set aside sale)

2 (19) AIR 1915 All 459 (462 464) 47 All 479

(26) AIR 1926 Lah 567 (568) (A mistake in the dimensions of the property is a material irregularity)

(05) 105 Pun Re No 47, para 163

(03) 6 Oudh Cas 61 (72) (Ins adequate description — Only numbers given and no boundaries)

(32) AIR 1932 Lat 234 (236, 237) 11 Lat 424

(430) (Where in the proclamation of sale the area of the land was stated to be 144 acres,

whereas in fact it was 440 acres and its value as Rs 20 000 when in fact it was worth about two lakhs of rupees—A material irregularity)

(89) 12 Mad 19 (25) 15 Ind App 471 (PC) (As

property vague and misleading—Held to be material irregularity)

(35) AIR 1935 Lah 390 (391) (Proclamation not giving proper boundaries and silent on estimated value of property—No bidders except decree holder—Sale set aside)

3. (25) AIR 1925 All 459 (462 464) 47 All 479

4. (87) 1857 All W N 50 (51)

(02) 6 Cal W N 526 (527, 528)

(78) 3 Cal 544 (546)

[See (38) AIR 1938 Rang 433 (434) (Proclamation not bad for not specifying shares of judgment-debtors *inter se*)]

[See however (31) AIR 1931 Bom 367 (368) (Held to be no misdescription but only a lacuna in it)]

(21) AIR 1921 All 223 (224) (Mistake in sale proclamation regarding share of judgment debtor—Sunk by auction purchaser to set aside sale—Held, intentional misrepresentation was essential)]

■ (36) AIR 1936 Cal 703 (705) (A condition of sale requiring the purchaser to assume certain

is intended to cover a law which goes to the root of the title.)

#### Note 17

1. (22) AIR 1912 Lah 35 (36)

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be necessary to give the value in order to enable the bidders to judge the value of the property, the omission in such cases may amount to a material irregularity.<sup>2</sup>

A deliberate *mis-statement* of the value of the property calculated to mislead possible bidders and to prevent them from offering adequate prices or from bidding at all, is a material irregularity.<sup>3</sup> If it results in substantial injury, the sale will be set aside but not otherwise.<sup>4</sup>

**18. Omission to state the revenue or rent payable on the land.** — The omission in the sale proclamation of the Government revenue payable on the land is a material irregularity under the rule,<sup>1</sup> as also a materially incorrect statement of such revenue.<sup>2</sup> But the omission to state the *income* of the property has been held not to be a material irregularity.<sup>3</sup>

**19. Omission or mis-statement of the encumbrances over the property.** — An omission to state or a mis-statement of the encumbrances on the property will be a material irregularity under this rule.<sup>1</sup> It has been held in the undermentioned

- (16) AIR 1916 All 186 (187)  
(33) AIR 1933 Cal 662 (663) (Omission by Judge to determine value is gross irregularity but sale will not be set aside unless substantial injury is

- (30) AIR 1930 Oudh 81 (81 82) 5 Luck 481.  
(28) AIR 1928 Pat 103 (109)  
(21) 57 Ind Cas 640 (641) (Pat)  
(18) AIR 1918 Pat 266 (267).  
(17) AIR 1917 Pat 72 (74).

- hopeless )  
(28) AIR 1928 Nag 281 (282).  
(38) AIR 1935 Lah 505 (503)  
[See (24) AIR 1924 Cal 589 (592) (Valuation of both parties given in proclamation without value fixed by Court—It is no material irregularity)]

2. (29) AIR 1929 All 948 (948, 949). 62 All 115.  
(30) AIR 1930 Nag 191 (192)  
(84) AIR 1935 Lah 300 (301) (Proclamation silent as to estimated value of property—No bidders except decree holder—Fresh sale after fresh proclamation ordered)

3. (98) 20 All 412 (417, 418) 25 Ind App 146 (PC)

- (33) AIR 1933 Cal 339 (340) (When discrepancy in value was so great as to shock the conscience, that circumstance must be regarded as something more than the kind of irregularity commonly alleged and it really was good evidence of fraud on the part of the decree-holder)

- 40 Ind

- (19) AIR 1919 Cal 350 (351)  
(17) AIR 1917 Cal 461 (462)  
(12) 16 Ind Cas 974 (975) (Cal).  
(11) 13 Ind Cas 337 (341) (Cal).  
(11) 11 Ind Cas 433 (441) (Cal).  
(11) 10 Ind Cas 475 (476) (Cal).  
(11) 9 Ind Cas 693 (701) (Cal).  
(10) 11 Ind Cas 135 (137) (Cal).  
(01) 6 Cal W N 48 (56).  
(01) 6 Cal W N 836 (635).  
(13) 21 Ind Cas 592 (593) (Mad).  
(15) AIR 1915 Mad 959 (991) 39 Mad 357.  
(1900) 23 Mad 568 (570).

Even in such case Court would require high standard of evidence to prove that there had been fraud or irregularity on account of under-valuation (*Obiter*)

- [See however (34) AIR 1934 Pat 186 (187). not

- 4  
(34) AIR 1934 Mad 260 (262).  
(17) AIR 1917 Pat 72 (74)  
(37) AIR 1937 Rang 157 (158)

Note 18

- (81) 7 Cal 723 (725).  
(93) 21 Mad 51 (52, 53)  
(1900) 23 Mad 628 (629)  
[See also (60) 12 Suth W R 453 (453, 459)]  
2. (15) AIR 1915 Mad 939 (991) 33 Mad 387.  
(77) 26 Suth W R 44 (47).  
3. (23) AIR 1923 Lah 918 (918).  
(17) AIR 1917 Lah 136 (137).

Note 19

case<sup>2</sup> that an omission to mention encumbrances would not, of itself, be injurious to the judgment debtor as it would only be likely to persuade auction-purchasers to offer higher prices

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Notes 19-24

An attachment is not an encumbrance on the property and hence an omission to mention an attachment in a sale proclamation is not a material irregularity.<sup>3</sup>

**20. Other mistakes in the sale proclamation.** — Where the sale proclamation advertised the sale of property in satisfaction of the whole decree amount but as a matter of fact part of the decree had been satisfied, it was held in the undermentioned case<sup>1</sup> that it was only an irregularity and did not render the sale a nullity

**21. Omission to beat drum.** — Omission to have the drum beaten at the time of the proclamation of sale as required by O 21 R 54 and 67 is a material irregularity within the meaning of this rule<sup>1</sup> But an omission to have the drum beaten at the time of the sale is not such an irregularity<sup>2</sup>

**22. Postponement of sale and issue of fresh proclamation.** — Where a sale is adjourned under Rule 69 by more than seven days, a fresh proclamation is necessary, unless the same has been waived (See Notes 8 and 9 to O 21 R 69, *ante*)

**23. Irregularities in conducting the sale** — **Sale within thirty days of the proclamation.** — A sale held within thirty days of the date of the publication of the proclamation at the place where the property is situate, or within thirty days of the affixture of the proclamation in the court-house is vitiated by a material irregularity within the meaning of this rule but it does not become *ipso facto* null and void<sup>1</sup>

**23a. Omission to fix time for sale.** — An omission to fix the time for sale is an irregularity<sup>1</sup>

**24. Sale on a holiday.** — To hold a sale on a holiday is neither an illegality nor an irregularity within the meaning of this rule<sup>1</sup>

(85) AIR 1935 Lah 902 (962)

(85) AIR 1935 Mad 607 (609) (Parties agreeing that sale shall be free from encumbrances — Statement to contrary in sale proclamation not corrected — Omission to inform intending purchasers that sale is free from encumbrances — There is material irregularity and sale should be set aside)

[See (99) 1899 Pun Re No 30, page 153]

2. (33) AIR 1933 All 546 (548, 550) 55 All 519. (Under valuation making property fetch low price is not irregularity)

3 (87) AIR 1937 Pat 60 (52)

**Note 20**

1 (17) AIR 1917 Mad 739 (741)

**Note 21**

1. (86) 10 Bom 504 (505)

(33) AIR 1933 All 747 (747) 55 All 182

(97) 20 Mad 159 (161)

2 (10) AIR 1910 All 206 (207)

**Note 23**

1. (21) 21 Cal 66 (69) 20 Ind App 176 (P C)

(33) AIR 1933 Lah 184 (186) (The sale can be set aside and property resold if the judgment debtor gave security for making up the deficiency if any in the resale)

(89) 11 All 333 (339, 345) (Per Brodhurst, J)

(87) 9 All 511 (512, 513) (Per Mahmood J)

(85) 1835 All W N 304 (304)

(04) 31 Cal 385 (392)

(81) 7 Cal 34 (40 41)

(82) 11 Cal L Rep 303 (304) (Sale within thirty days of publication on the spot — Material irregularity)

(95) 11 Mad L Jour 70 (72 73)

(91) 14 Wld 227 (228)

(24) AIR 1924 Nag 293 (294)

(18) AIR 1918 Nag 213 (213 214)

(23) AIR 1923 Pat 45 (48) 2 Pat 207

(35) AIR 1935 Lah 962 (963)

In view of the Privy Council decision in 22 Cal 66 the following cases to the contrary are no longer good law

(87) 14 Cal 1 (8)

(85) 7 All 2-3 (259)

(82) 4 All 300 (301 302)

**Note 23a**

1 (35) AIR 1935 Lah 331 (332)

(37) AIR 1937 All 407 (409)

**Note 24**

1. (81) 3 All 333 (334)

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**Note 25**

**25. Omission to hold sale at stated time and place.** — As to the effect of a sale held on a day different from that on which it was notified to be held, and of which judgment debtor could have had no notice, see Note 12 to Rule 60. See also the undermentioned cases<sup>1</sup> Where the Court ordered the sale to be held at a particular place but it was notified to be held and was actually held at a different place, it was held that the sale was illegal<sup>2</sup>

An officer conducting a sale is entitled to postpone a sale for a period of not more than seven days for sufficient reasons<sup>3</sup> Such reasons must, however, be recorded in writing otherwise the postponement will constitute a material irregularity<sup>4</sup> Where a sale is adjourned for a period of more than seven days it will be a material irregularity to hold the sale without a fresh proclamation<sup>5</sup> It has also been held that where a re sale is ordered or a sale is adjourned, the omission to fix the date and hour of the sale is a material irregularity<sup>6</sup> As to whether the holding of sale at an earlier or later hour than that specified is an irregularity, see Note 6 to Rule 66 and the undermentioned cases<sup>7</sup> See the same Note and the cases noted

(82) 1882 All W N 169 (169)

[But see (1865) 8 South W M Misc 24 (24)]

**Note 25**

1 (38) AIR 1938 Cal 486 (487) (Date fixed for sale a holiday — Sale held the next day not a nullity)

(30) AIR 1938 Cal 369 (374) I L R (1938) 1 Cal 530 (Failure to mention in advertisement of sale date from which monthly sales commence is not irregularity — Also failure to mention therein that Collector has taken possession of properties under S. 99, Cess Act, does not prejudice judgment debtor)

(87) AIR 1937 Pat 20 (21) (The holding of a sale, fixed for the first day of the monthly sales, on the following day in its due order, because it could not be held earlier is not illegal — It does not amount even to a material irregularity)

(

**Rules**

(34) AIR 1934 Pat 659 (660) (Where there is no sale on the date advertised it cannot be said to

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on the 20th a day which was not fixed for the sale it is not illegality but only an irregularity)

2. (21) AIR 1921 Mad 533 (535, 536) 44 Mad 35

3 (11) 12 Ind Cas 174 (175) 39 Cal 26 38 Ind App 200 (P C)

(90) 17 Cal 152 (154)

(81) 7 Cal 31 (40) (Illness of the selling officer is a good reason)

(72) 17 South W M 278 (278) (That the date originally fixed was a holiday is a good reason)

(72) 17 South W M 210 (210) (That there was no bidder is a good reason)

4 (32) AIR 1932 All 369 (369)

[See (90) 14 Mad 227 (228) (Adjournment without ground is a mere irregularity)]

5 [See (21) AIR 1921 Cal 597 (598)]

[See however (10) 8 Ind Cas 504 (505) (Mad) (A sale in execution conducted from day to day for longer than seven days, is neither illegal nor irregular)]

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(02) 11 Cal W N 49 (51)

(97) 20 Mad 159 (161)

(25) AIR 1925 Mad 681 (683) (Omission to mention date of sale in proper place in sale proclamation — Irregularity)

(33) AIR 1933 Nag 107 (100) I L R 1933 Nag 406

[See also (33) AIR 1933 All 192 (193)]

[See however (35) AIR 1935 All 182 (182, 183)]

[Sale officer adjourned the sale for want of time — No hour mentioned as regards the adjourned date — No irregularity]]

7. (70) 14 South W M 320 (321)

(34) AIR 1934 Bom 349 (351) 53 Bom 564

(Sale notified to take place from 11 A M to 5 P M begun at 12 noon and closed at 3 P M — Court finding that there were sufficient bidders and sale could be finished earlier — Closing of sale at 3 P M is not an irregularity)

(33) AIR 1933 Pesh 57 (59, 60) (Sale held earlier than hour mentioned in proclamation — Sale not void — It is material irregularity)

(85) 1885 Pun Re No 96 page 213 (Material irregularity)

(07) 4 Low Bur Rul 123 (124) (Do)

(87) 1537 All W N 129 (129)

(36) 83 Un L R 515 (517) (Sale conducted two hours after appointed time — Intending bidders departing after waiting — Sale irregular)



below<sup>a</sup> as to the effect of the omission to state the place of sale, or of holding the sale at a place different from that notified

O. 21 R. 90  
Notes 25-27

**26. Sale of property in one lot though advertised for sale in separate lots.** — Where property has been ordered and advertised to be sold in separate lots, it will be a material irregularity to sell it in one lot. But if there was no order for sale in separate lots though the sale proclamation described the property in several lots, it is not a material irregularity to sell all the property in one lot<sup>1</sup>. Again, where property has been advertised for sale in one lot it is not an irregularity to sell it in separate lots<sup>2</sup>.

**27. Irregularities regarding the order of sale of lots.** — Where the decree itself directs the sale of properties in a particular order, a sale held in any other order will be vitiated by a material irregularity<sup>1</sup>. Where a mortgage decree does not give any direction as to the order in which the mortgaged properties are to be sold but there are a number of judgment debtors with rights of contribution, they can apply to the executing Court to look into the equities *inter se* and direct a sale in consonance therewith. Where the Court disregards such equities, there is a material irregularity<sup>2</sup>. In the absence of any direction in the decree, a particular course followed by the Court in selling the properties cannot be said to constitute a gross irregularity merely because a better way of carrying out the sale was possible<sup>3</sup>.

Where, in the absence of a direction in the decree the executing Court fixes the order in which the properties are to be sold, any change in the order so specified will be a material irregularity unless the change is notified in time to the bidders<sup>4</sup>.

The practice in the Madras Presidency as regards execution sales is to sell the lots in the order in which they appear in the sale proclamation and a departure from that order may amount to material irregularity<sup>5</sup>.

In the absence of a direction by the executing Court for the sale of the properties in a particular order, the sale of the items in an order different from that specified in the sale list will not be irregular<sup>6</sup>.

(189) AIR 1939 Nag 258 (259, 260) (Holding of sale two or three hours before the time fixed is not

**Note 27**

1. (12) 16 Ind Cas 230 (236) (Cal)
- (17) AIR 1917 Mad 877 (879)
2. (25) AIR 1925 Pat 148 (150, 151)
3. (28) AIR 1928 Mad 684 (685)
4. (69) 12 Suth W R 281 (282)

[See also (96) 23 Cal 351 (353, 356)]

(14) AIR 1914 All 323 (326) (Where property to be sold was divided in nine lots and the Court ordered the sale only of so many lots as would satisfy the decree, but the nazir sold all the

violating the sale)  
(194) 15 Cal 794 (798) (Sale before hour fixed —

- 8
- (29) AIR 1923 Lah 213 (216) (Assumed that time, date and place were not specified)
  - (21) AIR 1921 Mad 484 (486) (Omission to state in the proclamation the place of sale did not mislead the bidders—*Held* sale not liable to be set aside)

**Note 26**

1. (17) AIR 1917 Lah 16 (137)
- [But see (69) 12 Suth W R 492 (493, 494)]
2. (38) 21 Mad 417 (419)
- [See (75) 23 Suth W R 1 (1, 5)]

(The disturbance by the officer conducting sale, of the list of properties to be sold in course of monthly sales prepared under Rule 233 of Calcutta High Court Civil Rules and the sale of property out of its turn is only a breach of

5. (39) AIR 1939 Mad 403 (403) ILR (1939) Mad 216
6. (31) AIR 1931 All 153 (160)

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Notes 28-32

**28. Other cases where the sale is not in terms of the proclamation. —**

It is a material irregularity for a decree holder to cause the sale officer to announce at the time of the sale an encumbrance not stated in the proclamation and an application to notify which had been rejected by the Court<sup>1</sup> It will be equally an irregularity if without notice the property is sold free of encumbrance, when the sale proclamation advertised the sale subject to encumbrances<sup>2</sup>

Where an entire interest in a property has been proclaimed and brought to sale but on the date of sale a portion only of such property is sold without fresh proclamation, does it amount to an irregularity? According to the High Courts of Allahabad, Madras and Patna it does not<sup>3</sup> But according to the High Courts of Calcutta, Lahore and Nagpur it amounts to a material irregularity rendering the sale liable to be set aside<sup>4</sup>

**29. Purchase by decree-holder without permission to bid. —** See Note 7 to Rule 72, *ante*

**30. Irregularities in the grant of permission to bid. —** Where after the decree holder had been given leave to bid and without notice to him the Court imposed a limit below which the decree holder should not bid and the property was sold at an undervalue it was held that the sale could be set aside for irregularity<sup>1</sup> Where there were three applications by the decree holder on different dates for leave to bid but the affidavit required by Rule 153 of the Madras Civil Rules of Practice was not attached to the first two applications but only to the last one, it was held by the Madras High Court that this did not amount to any irregularity<sup>2</sup>

**31. Sale after satisfaction of the decree. —** Where after a decree has been satisfied and the satisfaction has been recorded, a sale is held in execution of the decree, the sale is a nullity<sup>1</sup> and therefore the matter does not fall within this rule See Note 71 to Section 47, *ante*

If the satisfaction has not been recorded and the period for certification has expired the Court cannot go into the question at all and an application to set aside the sale on the ground that the decree was satisfied cannot be maintained under this rule<sup>2</sup> Even if the ninety days have not elapsed there is no irregularity or fraud in publishing or conducting the sale and the matter will not fall under this rule but only under Section 47<sup>3</sup>

**32. Sale after an order of postponement. —** A sale held after an order of postponement passed by the executing Court is a nullity whether the order was or was not communicated to the selling officer before the sale<sup>1</sup>

As to the effect of sales held in contravention of a stay order, see Note 65 to Section 47 and Order 11 Rule 5

(33) AIR 1933 All 546 (517) 55 All 19

Note 28

1 (25) AIR 1925 Oudh 424 (424)

2 (11) 9 Ind Cas 383 (334) (Cal)

3. (32) AIR 1932 All 664 (664) (Under circumstances it may amount to irregularity)

(20) 11 Mad L W 477 (478 479)

(24) AIR 1924 Pat 808 (803)

4 (78) 3 Cal 544 (546)

(80) 3 Cal L Rep 237 (233)

(20) AIR 1930 Lah 15 (16) (Whole house advertised—Sale of half of the house irregular)

(30) AIR 1939 Nag 241 (242)

[See also (32) AIR 1932 All 664 (664) (Do)]

Note 30

1 (25) AIR 1925 Oudh 381 (357)

2 (25) AIR 1925 Mad 729 (730)

" " "

(91) 16 All 5 (7 9)

2 (27) AIR 1927 Lah 84 (34)

3 (11) 10 Ind Cas 625 (626) (Cal)

Note 32

L (21) AIR 1911 All 101 (103)

Where an order of *injunction* restraining the sale has been obtained but the sale is held *before* the order is communicated it is a material irregularity according to the Judicial Commissioner's Court of Nagpur<sup>2</sup> but not according to the High Court of Allahabad<sup>3</sup> Where the sale is held *after* the order of injunction was communicated, it is a nullity<sup>4</sup>

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Notes 32-33

**33. Sale after attachment under Rule 53.** — A sale held in contravention of an attachment of the decree effected under Rule 53 is invalid as being without jurisdiction and is not a mere irregularity<sup>1</sup>

**34. Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings.** — Where an execution is taken against a wrong representative, the sale is not a *nullity* though it may amount to a material irregularity<sup>1</sup>

A sale held during the lifetime of the judgment debtor but confirmed after his death without impleading his legal representatives on the record is not void<sup>2</sup>

Where properties had been attached during the lifetime of the decree holder but the sale was held after his death without impleading his legal representatives, it was held that there was no irregularity<sup>3</sup>

As to the effect of a sale where the judgment debtor dies after attachment but before sale and the sale is held without impleading his legal representatives see Note 12 to Section 50 *ante*, and the undermentioned cases<sup>4</sup>

**35. Non-representation of minor.** — A sale held in execution of a decree against a minor is not void for the reason that no guardian had been appointed for him in the execution proceedings<sup>1</sup> It will however be a material irregularity under this rule<sup>2</sup> But where the minor is not represented in the suit itself a sale in execution of such decree is void even though he is represented by a guardian in the execution proceedings<sup>3</sup>

Where subsequent to the decree but prior to the sale in execution the judgment debtor had been adjudged insane and no guardian was appointed for him in the execution proceedings it was held that there was a material irregularity under this rule<sup>4</sup>

#### Note 35

- { 90 } 12 All 96 (93)
- { 80 } 2 All 686 (637)
- { 74 } 6 N W P H C R 354 (356)
- { 72 } 4 N W P H C R 135 (137)
- 2. { 20 } AIR 1910 Nag 12 (13)
- 3 { 22 } AIR 1922 All 282 (282)
- 4 { 25 } AIR 1925 Oudh 424 (424 426)

#### Note 33

- 1 { 05 } 32 Cal 1104 (1106)

#### Note 34

- 1 { 01 } 25 Bom 337 (347 348) 17 Ind App 216

- is irregularity — *Quare* ]
- 4 { 13 } 13 Ind Cas 110 (111) (All) (Sale is not nullity)
- { 19 } AIR 1919 Cal 411 (413) (Do)
- { 96 } 23 Cal 656 (657) (Do)

- 1 { 96 } 23 Cal 686 (690) (Nor even incorrect description of a person as a minor)
- { 83 } AIR 1933 Mad 833 (836) (Decree obtained against minor's father — Death of father — Minor not impleaded but his mother brought on record as legal representative — Held execution proceedings were substantially right)
- { 83 } AIR 1933 Mad 179 (180) (Minor judgment-debtor represented by Court officer — Representation sufficient)
- { 35 } 61 Cal L Jour 322 (327)
- 2 { 13 } 19 Ind Cas 296 (297 298) 40 Cal 635 40 Ind App 140 (P C)
- { 27 } AIR 1917 Cal 873 (874)
- { 96 } AIR 1916 Cal 102 (112)
- { 21 } AIR 1921 Cal 476 (478)
- { 10 } AIR 1916 Cal 603 (608)
- [But see { 11 } 3 Ind Cas 252 (253) (Mad)]
- 3 { 83 } AIR 1933 Cal 627 (629) 60 Cal 753
- 4 { 96 } 19 Mad 219 (227 228)

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Note 36

**36. Other instances of material irregularity.** — The following have been held to constitute material irregularity within the meaning of this rule, viz —

- (1) Collusion between the decree holder and the judgment debtor <sup>1</sup>
- (2) Disparaging remarks by the decree holder about the property to be sold which are calculated to deter bidders from bidding at the sale <sup>2</sup>
- (3) Omission in the execution of a mortgage decree of the name of the subsequent mortgagee <sup>3</sup>
- (4) Holding sale in court room without notice to the public <sup>4</sup>
- (5) Confirmation of sale before an application under this rule is decided <sup>5</sup>

(18) AIR 1916 Pat 64 (65) 1 Pat L Jour 261

(83) AIR 1933 All 161 (162)

(83) AIR 1933 All 137 (138)

(23) AIR 1929 All 671 (672) (Time given to produce a person offering a higher bid and sale in his favour)

(83) AIR 1933 Oudh 345 (346) 8 Luck 731 (Failure to deposit 25 per cent of purchase money immediately is only irregularity which does not affect validity of sale unless substantial injury is caused to judgment debtor)

(16) AIR 1916 All 186 (189) (Allowing a bidder for several lots to deposit 25 per cent at the conclusion of the sale of all the lots is an irregularity)

(65) 1685 All W N 319 (319) (Landed ancestral estate which ought to be sold under rules made by Government by the Collector was sold by the Civil Court — Held it is a material irregularity)

(82) 1882 All W N 39 (39) (Judgment debtor preventing decree holder from bidding — Sale must be set aside)

(25) AIR 1925 Sind 101 (102) (Two second

(36) AIR 1936 Pat 572 (576) (Property in possession of receiver — Sale in execution of decree without leave of Court is irregular and void)

R 90 only after sale takes place but is void

under R 84 is a material irregularity — See also O 21 R 84 Note 4)

(58) 1888 Pan Re No 5 (The omission to get

a material irregularity but whether such irregularity results in substantial injury depends

valued and low upset price fixed — sale must be set aside)

In the following cases the sale was held to be void on the ground of *illegality*

0.21 R 90  
Note 36

- (1) Omission to serve notice under Rule 22<sup>7</sup> *Vide also* Notes under Rule 22
- (2) Omission on the part of the Judge to sign the order of attachment and sale notification<sup>8</sup>
- (3) Selling the property as being subject to a mortgage when the decree directs its sale free from the mortgage<sup>9</sup>
- (4) Selling property not covered by the decree<sup>10</sup> (See also Note 68 to Section 47 *ante*)
- (5) Decree holder deterring persons by threats and intimidation from attending and bidding at the sale<sup>11</sup>

The following circumstances have been held to constitute no irregularity

- (1) Omission to make an application for sale as required by Rule 66<sup>12</sup>
- (2) Holding a sale for a sum larger than what is really due<sup>13</sup>
- (3) Knocking down the sale to the highest bidder for a price which is subsequently found to be too low<sup>14</sup>
- (4) Knocking down the sale to a lower bidder when the higher bidders are not *bona fide* and have no money to deposit as required<sup>15</sup>
- (5) Sale held without notice to a receiver who is not in possession of the property sold<sup>16</sup>
- (6) Conducting a sale from day to day and fixing a date for bringing the sale to an end<sup>17</sup>
- (7) Decree holder purchaser dissuading others from bidding at a court sale and thus causing the property to be sold at a low price<sup>18</sup>
- (8) Reduction of upset price during the conduct of the sale without notice to the judgment debtor<sup>19</sup>

See also the undermentioned cases<sup>20</sup>

Where the same property has been notified for sale in execution of two decrees it is quite proper and regular to hold one sale in respect of both of them<sup>21</sup> In the

(37) AIR 1937 Lah 113 (114) (Deposit of 25 per cent made three days after sale and accepted by Court—There is mere irregularity)

(So held under the unusual circumstances of the case)

16 (29) AIR 1929 Rang 311 (312) 7 Rang 425  
17 (33) AIR 1933 Mad 225 (227) 36 Mad 336

8 (85) 7 All 506 (510) (PC)  
(81) 8 All 701 (701 05)  
9 (93) 70 Cal 599 (602)

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335)

(3) AIR 1935 Mad 697 (699) (Order for sale — Receiver appointed by the Court in respect of same property and later on — the receiver was ordered applying for sale — at that time the receiver had not — subsequent sale — (action by the Court is not final — Sale should not be set aside)

21 (1) 151 All W N 29 ( )

14 (84) 81 Lon 4 (4 5)

(73) 8 N W L R 12 (0)

15 (1901) J Moo Ind 111 321 (31 317) (PC)

O 21 R 90  
Notes 36-37

undermentioned case<sup>2</sup> the High Court had directed stay of sale on the judgment debtor furnishing security. He did not furnish security but on the day of sale offered a security which was rejected by the officer conducting the sale. Thereupon the sale was held. It was held that the sale could not be set aside on the ground that there was an impression that the sale had been postponed and consequently few bidders attended the sale.

**37 Fraud in publishing and conducting the sale** — Section 311 of the old Code provided only for cases of material irregularity as a ground for setting aside a sale and did not include *fraud* in publishing and conducting a sale as a ground of attack. It was held under that Code that such an application came within the scope of Sect on 214 (now Section 47).<sup>1</sup> The fact that Section 312 of the old Code provided that the sale shall be confirmed in the absence of an application under Section 311 on the ground of material irregularity was held not to deprive the Court of the power to refuse to confirm the sale where it had been brought about by fraud.<sup>2</sup> The present rule has been framed so as to include fraud as well so that an application can now be made under this rule to set aside a sale on the ground of fraud in publishing and conducting the sale.<sup>3</sup> The effect of including fraud in this rule is to take the applications setting up fraud in publishing and conducting the sale out of the scope of Section 47 and to bring them under this rule.<sup>4</sup> See also Note 55 to Section 47 *ante*.

The word *fraud* in this rule means that which is dishonest and morally wrong and does not include an irregularity.<sup>5</sup> The burden of proving fraud rests upon the applicant and must be proved by clear and definite evidence.<sup>6</sup> General and vague allegations of fraud<sup>7</sup> and mere proof of suspicious circumstances are not enough.<sup>8</sup> But it is open to a Court to make an inference of fraud from established facts taken together as a whole.<sup>9</sup> In order to enable an applicant to succeed it is not necessary that the *auction purchaser* should also have been a party to the fraud; the fraud of the decree holder would be sufficient.<sup>10</sup> The reason is that the applicant claims relief not against the purchaser alone but also against the decree holder. The view expressed in the undermentioned case<sup>11</sup> that it must be proved that the auction purchaser was a

22 { 81 } 1881 All W N 104 (104)

**Note 37**

- 1 { 06 } 28 All 681 (682-683)  
{ 05 } 2 All 02 { 03 } (Appl cat on could be made  
    <sup>a</sup> on after confirmation of sale)  
{ 09 } 4 Ind Cas 203 (254) 33 Bom 698  
{ 07 } 5 Cal L Jour 328 (332)  
{ 02 } 6 Cal W N 263 (285-289)

- 2 { 81 } 2 Mad 264 (269-270)  
3 { 16 } AIR 1916 All 184 (185)  
  { 15 } AIR 1915 Mad 100 (155)  
4 { 3 } AIR 1923 Lah 92 (593) 4 Lah 243

- t on of fraud aga nst purchaser alone — *He* *a*  
    can succeed )  
  { 01 } 6 Cal W N 279 (231-233) (Do )  
11 { 97 } 40 Mad 10 (12)

A mere undervaluation of property will not amount to fraud within the meaning of this rule<sup>13</sup> But a wilful mis statement of value in the sale proclamation evidencing a deliberate design to get the property sold for a low price will amount to fraud<sup>13</sup> Similarly any other wilful mis statement in the sale proclamation calculated to affect the price of the property may amount to fraud<sup>13</sup> So also a great discrepancy between the value of the property stated in the proclamation and the real value is valuable evidence of fraud<sup>15</sup>

See also the undermentioned cases<sup>16</sup> as to particular instances of fraud

See the undermentioned cases<sup>17</sup> for circumstances which were held not to amount to fraud

**38 Combination among bidders.** — There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale<sup>1</sup> Therefore a charge against a bidder or decree holder that he and other bidders who

O 21 R 90  
Notes 37-38

- 13 (25) AIR 1925 Pat 521 (521) (Gross undervaluation of property and non service of processes do not by themselves constitute fraud)
- 13 (22) AIR 1922 Pat 507 (510 511) 2 Pat 65 (11) 11 Ind Cas 295 (297) (Cal)
- 14 (28) AIR 1928 Mad 1188 (1189) (To bring property to sale subject to a bogus mortgage is fraud)
- (72) 18 Suth W R 340 (343) (Where six tenures with separate recorded jamas were lumped together and sold in one lot and no description of the property to be sold was given in consequence of which the purchaser was the only bidder the sale was set aside as being fraudulent)
- 15 (33) AIR 1933 Cal 339 (340) (Real value seventy times more than given in the proclamation)
- to the nature and interest put to sale and he
- representa  
dders from

- (11) 11 Ind Cas 399 (401) (PC) (Where the plaintiff was dissuaded from bidding at the sale by the pleader for the judgment-debtor falsely assuring him that he had instructions to apply for a postponement the auction purchaser could not be held responsible for the misrepresentation.)
- (35) AIR 1935 Mad 257 (257) (Unenforced agreement between judgment debtor and decree-holder not to sell property of judgment-debtor — Agreement cannot be relied on to prove fraud in conducting sale)
- (33) AIR 1935 Cal 97 (93) (Any fraudulent collusion to the decree cannot be a ground for setting aside a sale under S 174 Bengal Tenancy Act.)

Note 38

- 1 (96) 18 Bom 312 (314)

O. 21 R. 90  
Notes 38-39  
- 3 -

have acted in concert with him have acted in such a manner as to prevent the best price from being obtained, does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale.<sup>2</sup> There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition. If the object be to obtain the property at a sacrifice by artifice the combination is fraudulent. If the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent.<sup>3</sup>

**39. Substantial injury—Proviso.**—Before a sale is set aside under this rule it is essential under the proviso to the rule that there should have been *substantial injury* and that such injury should have been sustained by the applicant *by reason of the irregularity or fraud*. A Court has no jurisdiction to set aside a sale under this rule without going into the question of substantial injury.<sup>4</sup> That is to say, the applicant must prove substantial injury in addition to the material irregularity or fraud in publishing and conducting the sale, and a mere proof of irregularity or fraud alone is of no avail.<sup>5</sup> A decree holder who has suffered substantial injury is entitled to have a sale set aside under this rule. It does not matter whether that substantial injury is suffered by him in his capacity as a decree holder or as an individual.<sup>6</sup> The onus of proving substantial injury lies on the applicant.<sup>7</sup>

"Injury means loss which is wrongful.<sup>8</sup> Such loss must also be *substantial*.<sup>9</sup> The fact that the price realized at the sale is less than the value stated in the proclamation of sale is no proof of wrongful loss.<sup>7</sup> Nor is the *market value* of the property a safe criterion in finding substantial injury.<sup>8</sup> But a denial of opportunity to purchase the property is a substantial injury.<sup>9</sup>

- (16) AIR 1916 Sind 20 (21) 10 Sind L R 53  
3 (7) 6 Cal L Jour 111 (115 116)

**Note 39**

- 1 (18) AIR 1918 Pat 352 (352) (No publication of sale on spot—Substantial injury not proved—Sale cannot be set aside)  
[See (01) 25 Bom 337 (348) 27 Ind App 216 (PC)  
(00) 12 All 96 (95) (Where sale is illegal no injury need be proved)  
(85) 10 All 506 (517) (Do)]  
[See also (25) 11 Mad L Jour 70 (73 74) (In both cases injury must be proved—This is not good law)]

- 2 (11) 12 Ind Cas 174 (175) 39 Ind App 200  
39 Cal 26 (P C)  
(33) AIR 1933 Cal 496 (487) (Date fixed for sale bold day—Sale on following day—No allegation or proof as to price or of bidders—Sale held could not be set aside although there was material irregularity)  
(11) 10 Ind Cas 475 (476) (Cal) (Deliberate undervaluation of property in sale proclamation held material irregularity—Property sold below proper value—Sale set aside)  
(09) 1 Ind Cas 246 (247) (Cal)  
(52) 11 Cal 932 (933)  
(14) AIR 1914 Mad 312 (315 317)  
(14) AIR 1914 Oudh 161 (164)

- (31) AIR 1931 Pat 43 (44)  
(30) AIR 1930 Pat 58 (60) (And one of the most usual forms of showing that the applicant has sustained injury is to show that the property has been sold for a gross undervalue)  
(24) AIR 1924 Pat 785 (786)  
(21) AIR 1921 Pat 479 (480)  
(22) AIR 1922 Upp Bur 22 (22) 4 Upp Eur Rul 97  
(25) AIR 1925 Sind 253 (254) 18 Sind L R 190  
instances no sud 110 W  
act that de  
perty to the  
judgment debtor for the price bought may be considered to see whether judgment debtor suffered injury)  
(37) AIR 1937 All 407 (410)  
3 (33) AIR 1933 All 161 (162)  
4 (25) AIR 1925 Pat 149 (149)  
5 (03) 7 Cal W N 439 (440) (When a person loses what he has been in the habit of wrong fully gaining it is no substantial injury or injury of any sort or kind)  
(25) AIR 1925 All 459 (462) 47 All 479 (Loss

- 8 (72) 18 South W R 197 (197, 198)  
9 (33) AIR 1933 All 161 (163)



Where in a case it was found that there had been material irregularity in the conduct of the sale and the property fetched an inadequate price in consequence, the mere fact that the real value of the property did not exceed the amount of the decree and that the unsatisfied balance of the decree could not be realized from the judgment debtor on account of limitation, would not bring the case within the proviso to this rule<sup>10</sup>

See the undermentioned case<sup>11</sup> which is illustrative of what is and what is not "substantial injury"

**40. Applicant must have sustained substantial injury by reason of such irregularity or fraud.** — As has been already mentioned in Note 39 above, in order that an applicant under this rule may have a sale set aside, a mere proof of irregularity is not enough, he must show that he sustained substantial injury as a result of such material irregularity or fraud<sup>1</sup> In the absence of evidence to show that the injury is the result of irregularity, the Court cannot presume from the proved existence of irregularity and injury that the latter occurred by reason of the former<sup>2</sup>

The proviso to Section 311 of the old Code provided that "no sale shall be set aside unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity" In a case<sup>3</sup> arising under that Section their Lordships of the Privy Council observed as follows

"Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was held without full compliance with the provisions

10 (12) 15 Ind Cas 728 (729) (Cal)

11 (36) AIR 1936 Pat 26 (27) (No interest of judgment debtor in property sold or having doubtful claim therein at date of sale — Price fetched not inadequate — Judgment debtor held not materially prejudiced)

#### Note 40

1 (83) 9 Cal 656 (660 662) 10 Ind App 25 (PC) (Injury cannot be inferred from proof of irregularity)

(34) AIR 1934 Pat 186 (187) (Undervaluation in sale proclamation is not always by itself sufficient to set aside sale)

(34) AIR 1934 Pat 274 (279) 13 Pat 467

(20) AIR 1920 All 206 (207)

(10) AIR 1916 All 186 (187)

(18) 20 Ind Cas 16 (17) (All)

(24) AIR 1924 All 698 (699)

(28) AIR 1928 Cal 328 (331)

(24) AIR 1924 Cal 1055 (1055)

(21) AIR 1921 Cal 597 (598)

(20) AIR 1920 Cal 518 (518)

(19) AIR 1919 Cal 1005 (1006)

(12) 10 Ind Cas 394 (395 396) (Cal)

(7) Cal I Jor 240 (242) (I B)

(35) 31 Cal 502 (507 508) (I B)

(74) 22 Suth W R 400 (500)

(78) 19 Suth W R 78 (78)

(71) 15 Suth W R 70 (70)

(63) 12 Suth W R 492 (493)

(63) 12 Suth W R 488 (489)

(1865) 11 Suth W R Misc 40 (40)

(66) 6 Suth W R Misc 31 (31) (Smallness of price is not sufficient ground for setting aside sale unless it be the effect of irregularity)

(1865) 2 Suth W R Misc 1 (2)

(20) AIR 1920 Lah 624 (625)

(27) AIR 1927 Lah 84 (84)

(26) AIR 1926 Lah 587 (588)

(24) AIR 1924 Lah 592 (592)

(23) AIR 1923 Lah 213 (216)

(22) AIR 1922 Lah 35 (36)

(19) AIR 1919 Lah 260 (264)

(18) AIR 1918 Mad 1262 (1264)

(11) 9 Ind Cas 252 (252 253) (Mad)

(89) 12 Mad 19 (26) 15 Ind App 171 (P C)

(98) 1 Oudh Cas 185 (150)

(93) 1 Oudh Cas 14 (17)

(17) AIR 1917 Pat 694 (695)

(18) AIR 1918 Pat 686 (687)

(13) 20 Ind Cas 192 (193) (Low Bur)

(96) 19 All 141 (143)

(88) 15 Cal 468 (491) (FB)

(17) AIR 1917 Mad 877 (878) (Some connection must be shown)

(38) 42 Cal W N 661 (662)

(37) AIR 1937 All 407 (410)

(35) AIR 1935 Lah 390 (391)

(36) AIR 1936 Lah 555 (557)

(34) 36 Pun L R No 163 (184)

[See also (35) AIR 1935 Cal 743 (744) (For annulment of sale under the Bengal Land Revenue Sales Act by Civil Court sale must be contrary to provisions of Act and substantial injury to owner must be caused by irregularity)]

2 (83) 9 Cal 656 (660 662) 10 Ind App 25 (P C)

(89) 12 Mad 19 (25 26) 15 Ind App 171 (P C)

(83) 11 Cal 658 (660 661)

(87) 11 Cal 00 (210 213) (I B)

[But see (81) 7 Cal 730 (732) (Where both material irregularity and injury have been proved Court may reasonably presume that the injury is due to such irregularity)]

3. (94) 21 Cal 66 (70) 20 Ind App 176 (P C)

O. 21 R. 90  
Notes 39-40

O. 21 R. 90  
Notes 38-39

have acted in concert with him have acted in such a manner as to prevent the best price from being obtained, does, not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale.<sup>2</sup> There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition. If the object be to obtain the property at a sacrifice by artifice, the combination is fraudulent, if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent.<sup>3</sup>

**39. Substantial injury—Proviso.**—Before a sale is set aside under this rule, it is essential under the proviso to the rule that there should have been *substantial injury* and that such injury should have been sustained by the applicant *by reason of the irregularity or fraud*. A Court has no jurisdiction to set aside a sale under this rule without going into the question of substantial injury.<sup>1</sup> That is to say, the applicant must prove substantial injury in addition to the material irregularity, or fraud in publishing and conducting the sale, and a mere proof of irregularity or fraud alone is of no avail.<sup>2</sup> A decree holder who has suffered substantial injury is entitled to have a sale set aside under this rule, it does not matter whether that substantial injury is suffered by him in his capacity as a decree holder or as an individual.<sup>3</sup> The onus of proving substantial injury lies on the applicant.<sup>4</sup>

'Injury means loss which is wrongful.'<sup>5</sup> Such loss must also be *substantial*.<sup>6</sup> The fact that the price realized at the sale is less than the value stated in the proclamation of sale is no proof of wrongful loss.<sup>7</sup> Nor is the *market value* of the property a safe criterion in finding substantial injury.<sup>8</sup> But a denial of opportunity to purchase the property is a substantial injury.<sup>9</sup>

- 2 (1900) 28 Mad 227 (288, 294) 27 Ind App 17  
(PC) (Affirming 19 Mad 315 on this point)  
(09) 1 Ind Cas 153 (161) 36 Cal 226  
(09) 4 Ind Cas 1006 (1012) (Lab)  
(16) AIR 1916 Sind 20 (21) 10 Sind L R 53  
3 (07) 6 Cal L Jour 111 (115 116)

**Note 39**

- 1 (18) AIR 1918 Pat 352 (352) (No publication

- (31) AIR 1931 Pat 43 (44)  
(30) AIR 1930 Pat 58 (60) (And one of the most usual forms of showing that the applicant has sustained injury is to show that the property

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decree holder offered to return the property to the  
if it may be

good law ]]

not be set aside although there was material irregularity }

- (11) 10 Ind Cas 475 (476) (Cal) (Deliberate un

need not be pecuniary }

6. (27) AIR 1927 Cal 873 (874)  
(26) AIR 1926 Pat 202 (203) 4 Pat 626  
7. (22) AIR 1922 Pat 550 (551) 1 Pat 214  
8 (72) 18 Sath W II 197 (197, 198)  
9 (33) AIR 1933 III 161 (163)

- (14) AIR 1914 Mad 312 (315 317)  
(14) AIR 1914 Oudh 164 (165)

The inadequacy must have been occasioned by some irregularity<sup>14</sup> In the absence of proof to the contrary the presumption is that the price fetched at a court sale is adequate<sup>15</sup> **O. 21 R. 90 Notes 40-41**

For other instances where substantial injury has been held to be the result of irregularity or fraud, see the cases cited below<sup>16</sup> See also the undermentioned case<sup>17</sup>

**41. Waiver of irregularity and estoppel**—If a judgment debtor has received notice under Rule 66 *ante*, or has knowledge of the contents of the proclamation of sale before it is issued, and neglects to take any objection to the proceedings he will not afterwards be allowed to object to the sale under this rule on any of the grounds which he might have then urged<sup>1</sup> The reason of this rule of estoppel is stated by their Lordships of the Privy Council as follows: It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property, if the judgment debtors could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold which they knew well but of which the execution creditor or decree holder might be perfectly ignorant that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole

14 (25) AIR 1925 Mad 729 (780)

(34) AIR 1984 Nag 250 (251)

15 (38) AIR 1933 All 213 (218) 55 All 221

16 (13) 21 Ind Cas 592 (593) (Mad) (Irregularity in fixing value)

(25) AIR 1925 Oudh 424 (424) (Irregularity in proclaiming incumbrance)

(15) AIR 1915 Oudh 124 (126) 18 Oudh Cas 1 (Time of sale on adjourned date not specified)

(12) 15 Ind Cas 858 (890) 16 Oudh Cas 80 (Fact that the decree holder agrees to bid for the property for the amount of the decree and purchases it for a sum less than that amount is sufficient to show that his fraud has led to substantial loss)

17 (30) AIR 1936 Pat 26 (27) (Decree for

(14) AIR 1914 Mad 312 (317)

(22) AIR 1922 Mad 301 (302) (Defendant becoming major after decree not recorded as major—Sale held—Ex minor knew of proceedings—Is estopped)

(31) AIR 1981 Pat 68 (64)

(24) AIR 1924 Pat 111 (112) 2 Pat 916

(31) AIR 1931 Oudh 398 (399) (Where an objection to

debtor)

Notes 41

is not stated in sale proclamation is only a material irregularity—Failure to serve sale proclamation but judgment debtor aware of it—Sale is not vitiated)

(12) 16 Ind Cas 235 (236) (Cal)

(30) AIR 1930 Lah 653 (656)

(24) AIR 1924 Mad 217 (218) 20 Mad 736

(17) AIR 1917 Mad 307 (307)

is not maintainable—Yet he can plead inadequacy of price and consequential loss.

Note The decree seems to offend the principle that mere inadequacy of price is no ground for setting aside a sale under this rule—See Note 40)]

(But see (30) AIR 1930 Nag 191 (193) (Judgment debtor not appearing though served to settle terms of proclamation—Still he is not estopped from applying to set aside sale)

(01) 4 Oudh Cas 3 9 (3-4)

(11) 15 South W R 93 (94) (Sale of judgment debtor on previous occasion is so far as his

**O.21 R.90** : proceedings were vitiated ' 2 The same principle will apply if the judgment debtor had  
**Note 41** consented to the irregularity before sale ' 3

Where a judgment debtor applies for postponement of the sale and gets it adjourned he must be deemed to have admitted that the proclamation was correct, or at any rate, there was no such mistake or irregularity as would be likely to mislead ' 4 The judgment debtor cannot also urge any objections to the sale if at the time of postponement of the sale he consented to waive any irregularity ' 5 Where, however, he was not aware of the facts to which he was bound to object at the time when he had an opportunity of so doing, there can be no waiver or estoppel ' 6 The reason is that a person can be taken to have waived only such rights as were within his knowledge

In the following instances it has been held that there is no waiver

- (1) Where a judgment debtor agrees to waive an irregularity provided the sale is postponed, but the Court does not allow such postponement, there can be no relinquishment of his right to object to the sale ' 7
- (2) Where the judgment debtor waives the issue of a fresh proclamation only, he can urge any objection on the ground of an irregularity in the publication of the original proclamation ' 8
- (3) Even though a sale is postponed at the instance of the debtor on the condition that fresh proclamation is waived, if an attaching decree holder subsequently applies that a fresh proclamation should issue and that prayer is refused, the latter can question the sale on the ground of want of fresh proclamation ' 9
- (4) A judgment debtor who waives a fresh proclamation will not be deemed to have waived the non specification of the hour of sale on the day to which the sale is postponed ' 10
- (5) The fact that the applicant himself bid at the sale will not amount to a waiver of the irregularity ' 11

Where a judgment debtor's objection to an irregularity made before sale is overruled by the Court, he is not precluded from urging the same ground in an application to set aside the sale ' 12

Where, during the pendency of an application under this rule to set aside

being heard when he objects alleging material irregularity )

2 ( 89 ) 12 Mad 19 (25) 15 Ind App 171 (PC)

( '18 ) AIR 1918 Cal 203 (294)

( 05 ) 2 Cal L Jour 584 (587 589)

( 07 ) 6 Cal L Jour 62 (67 to 70)

( 01 ) 6 Cal W N 42 (43 44)

( 07 ) 6 Cal L Jour 111 (113) (Judgment Debtor

( 37 ) AIR 1937 Lah 113 (114)

(See also ( 35 ) AIR 1935 Mad 150 (151) (Judgment debtor getting adjournment of sale by giving up objections to sale proclamation will be estopped from raising same objection in an application under this rule)

( 38 ) AIR 1938 P C 230 (231 232) 32 Sind L R 579 (PC) (Waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation. But the waiver of any necessity for a fresh sale proclamation will not imply a waiver of the right to object to irregularities in attachment )]

5. ( 26 ) AIR 1926 Cal 577 (578)

a sale, the debtor got time for paying the decree amount on condition that the petition should be dismissed on his failure to do so, he would be estopped, on his failure to abide by the agreement, from continuing the proceedings<sup>13</sup> O. 21 R. 90  
Notes 41-43a

A question of waiver is a mixed question of law and fact<sup>14</sup>

As to whether an objection can be taken in the event of appeal, see Note 43.

**42. Bona fide purchaser for value without notice.** — Where the conditions laid down in this rule are satisfied, the fact that the auction purchaser is a stranger and a *bona fide* purchaser for value without notice of irregularity or fraud will not prevent the sale from being set aside<sup>1</sup>. See also Note 37, *ante*. The plea of *bona fide* purchaser for value may, however, be given effect to in proceedings or suits to set aside sales on the ground that the decree and the execution proceedings are tainted by fraud and collusion<sup>2</sup>.

**43. Setting aside sale on grounds not taken in the application.** — It has been held by the High Courts of Allahabad and Lahore that where an application under this rule is made on certain grounds, it is not open to the applicant to ask the Court to adjudicate upon objections which were not expressly taken in the application<sup>3</sup>. But he can apply, even after the expiry of thirty days, to be allowed to furnish *further particulars* and this application may be treated as one to amend the original application<sup>4</sup>. The High Court of Madras<sup>5</sup> has, however, held that there is nothing to prevent a Court even in appeal from considering the validity of the sale from every point of view and exercise its inherent powers in setting aside a sale on a ground not pleaded. It has been held by the Nagpur High Court<sup>6</sup> that where an irregularity is demonstrable from the record itself, it is within the power of the Court to consider the objection based on such irregularity even if not specifically taken in the application. But a new ground requiring evidence cannot be taken for the first time in appeal<sup>7</sup>.

**43a. Setting aside sale in part only, if and when permissible.** — It has been held by the Patna High Court that where properties are sold in several lots, the Court can set aside the sale in respect of some only of the lots but that the circumstances under which this can be done are limited to cases in which both the irregularity and the injury can be satisfactorily allotted to one part only of the sale where the irregularity extends to the whole property and to all the lots, it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale

11 (2) 29 Cal 577 (550)

14 (1) 9 Ind Cas 693 (701) (Cal) (And should not be allowed to be raised at a late stage of the proceedings)

**Note 42**

1 (23) AIR 1923 Cal 533 (541)

(1) AIR 1917 Mad 42 (42)

(3) AIR 1913 1 at 433 (435)

(See also (6) 9 Buth W R 196 (199) (TB) (It must be decided in each case in accordance with the principles of justice, equity and good conscience, as to whether the sale ought to be set aside or not))

2 (66) 10 Moo Ind App 454 (473-474) (P C)

**Note 43**

1. (32) AIR 1932 Lah 576 (576) (Objections taken after period of limitation)

(99) 21 All 140 (142)

(19) AIR 1919 Lah 260 (261) (Objections not stated in application cannot be entertained by

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2. (24) AIR 1924 Mad 1778 (770)

[See (7) AIR 1927 Nag 319 (319) (If in the

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3. (32) AIR 1932 Lah 576 (576) (Objections taken after period of limitation)

(99) 21 All 140 (142)

(19) AIR 1919 Lah 260 (261) (Objections not stated in application cannot be entertained by

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4. (23) AIR 1923 Cal 533 (541)

(1) AIR 1917 Mad 42 (42)

(3) AIR 1913 1 at 433 (435)

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5. (32) AIR 1932 Lah 576 (576) (Objections taken after period of limitation)

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6. (23) AIR 1923 Cal 533 (541)

(1) AIR 1917 Mad 42 (42)

(3) AIR 1913 1 at 433 (435)

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7. (32) AIR 1932 Lah 576 (576) (Objections taken after period of limitation)

(99) 21 All 140 (142)

(19) AIR 1919 Lah 260 (261) (Objections not stated in application cannot be entertained by

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**O 21 R 90** price obtained cannot be shown to be inadequate in view of the advertised value<sup>1</sup> But  
**Notes 43a-44** this view has been dissent from by the Madras High Court which has held that in such cases the sale should be set aside only in respect of the items which have been sold for an inadequate price in consequence of the irregularity but not in respect of the items which notwithstanding the irregularity have been sold for an adequate price<sup>2</sup>

It has been held by the Calcutta High Court that where after dismissing the applications under this rule made by some of the judgment debtors the Court passes an order setting aside the sale on an application by another judgment debtor under this rule the order will take effect only so far as the share and interest of that judgment debtor are concerned and the sale will stand confirmed as regards the share and interest of the other judgment debtors<sup>3</sup> But this decision has been distinguished by the Nagpur High Court in the undermentioned case<sup>4</sup> in which it was held that where there are several judgment debtors to whom the property belongs but the application is made by only one of them and the property sold consists of only one item and the irregularity cannot be apportioned the entire sale must be set aside and not only with regard to the share of the judgment debtor who applies

See also Note 2 *ante*

**44 Joinder of claims under Section 47** — A prayer for a relief coming within the scope of Section 47 can be joined with a prayer for a relief under this rule in one and the same application<sup>1</sup> Every application to set aside a sale involves a question relating to the execution discharge or satisfaction of the decree and therefore comes within the scope of Section 47<sup>2</sup> But where the application falls within the scope of this rule and Section 47 a second appeal against an order on such an application is barred by Section 104<sup>3</sup> See Note 15 to Section 2 sub section (2) *ante* But where the matter falls within Section 47 *alone* even though the application purports to be under this rule also and the question is between parties to the suit the order will be appealable as a decree<sup>4</sup> Where an application contains grounds coming both under Section 47 and this rule that portion of the order relating to the question under Section 47 is

[See (23) AIR 1923 PC 93 (94-95) (PC) (Applicant did not ask for opportunity to let in evidence — Cannot ask for it before the Privy Council)]

(24) AIR 1924 Mad 778 (779)

4 (32) AIR 1932 Cal 672 (683) 50 Cal 900 (1901)

#### Note 43a

1 (83) AIR 1933 Pat 223 (224) 12 Pat 181

2 (36) AIR 1936 Mad 121 (122) 59 Mad 438

3 (37) 41 Cal WN 224 (225)

4 (39) AIR 1937 Nag 238 (260) (Where there is only one house which is sold and the irregularity in the conduct of the sale could not be apportioned)

only under S 47 G P C)

(24) AIR 1924 Mad 431 (432) 47 Mad 938 (FD)

(25) AIR 1935 Mad 1142 (1143)

(17) AIR 1917 Mad 924 (925)

(24) AIR 1924 Rang 124 (124) 1 Rang 533 (Defective attachment — Question comes under Section 47)

(24) AIR 1924 All 693 (699)

[See (35) AIR 1935 Mad 433 (435) (It is not clear from the report of this case whether the

#### Note 44

1 (28) AIR 1923 Pat 272 (272) 7 Pat 331

[But see (96) 18 All 141 (143-144)]

2 (17) AIR 1917 Mad 924 (925)

(17) AIR 1917 Mad 677 (680)

[See (34) AIR 1934 Nag 21 (2) 31 Nag L R 67 (Application to set aside sale on ground of fraud or irregularity — Only decree-holder made party — Stranger purchaser not formally joined — Application is not under Rule 90 but under Sect on 47)]

3 (1) AIR 1917 Mad 924 (925)

is by the judgment debtor therefore S 47 would

implied the judgment is not correct)]



**O. 21 R. 90**  
**Note 49**

The starting point of limitation is the date on which the officer conducting the sale has accepted the final bid, therefore, the period of limitation does not begin to run until then<sup>3</sup>

The period of limitation prescribed by Article 166 cannot be enlarged by Section 5 of the Limitation Act<sup>4</sup> Where an execution sale is held by the Collector to whom the decree has been transferred for execution and the applicant applies to the Collector under this rule and after the expiry of thirty days prefers a second application to the Court, the time spent in prosecuting the first application cannot be excluded under Section 14 of the Limitation Act<sup>5</sup> Where the applicant was a minor on the date of sale it was held in cases arising under the old Limitation Act of 1877 that he was entitled to the benefit of Section 7 of the Limitation Act in computing the period of limitation for an application under this rule<sup>6</sup> The present Sections 6 and 7 of the Limitation Act, 1908 limit the application of those Sections to applications in execution of a decree and do not apply to an application to set aside a sale<sup>7</sup>

Where, in an application under this rule made more than thirty days of the sale the applicant relies upon fraud as an exemption from limitation he must bring his case within Section 18 of the Limitation Act<sup>8</sup> Where a sale is brought about by fraud for instance by suppression of processes and submission of false returns and an application to set aside the sale is made more than thirty days after the date of the sale, it is not enough for the applicant to show that the execution proceedings were irregular and fraudulent but he must carry the fraud further and show that the existence of his right to set aside the sale had been kept concealed from his knowledge by fraud<sup>9</sup> Such fraud need not necessarily be that of the decree holder or auction purchaser but may be of a third person<sup>10</sup> When once such fraud has been established by the applicant, it is for the opposite party to show at what precise point of time the applicant had clear and definite knowledge of the facts which would entitle him to apply for setting aside the sale The reason is that the fraud is a continuing influence and until that influence ends, it retains its power of mischief<sup>11</sup>

(10) 6 Ind Cas 713 (714, 715) 1910 Pun Re No 40 (Do)

(17) AIR 1917 Low Bur 80 (81) (Do)

(86) AIR 1936 Pat 559 (560) (Sale set aside after one month — Order setting aside reversed on appeal — Fresh application to set aside by another person — Limitation runs only from date

7 (35) AIR 1935 Pat 450 (450)

8 (18) AIR 1918 Cal 77 (78)

[See (99) 3 Cal W N 333 (335)]

(86) AIR 1936 Cal 706 (707) (Execution sale fraudulently conducted by decree holder — Application to set aside sale beyond time — S 18 cannot apply when property purchased bona fide by third party)

(35) AIR 1935 Cal 89 (90) (Auction purchaser guilty of fraud — Application to set aside sale under S 173 Bengal Tenancy Act — S 19 Limitation Act can be waived off)

9 (11) 11 Ind Cas 433 (442) (Cal)

(97) 1 Cal W N 67 (68 70)

(26) AIR 1926 Cal 229 (230 231)

(25) AIR 1925 Pat 521 (522 523)

(93) AIR 1923 Pat 435 (436)

the sale)

[See (14) AIR 1914 Mad 997 (298) (Where sale is nullity Art 166 does not apply)]

3 (30) AIR 1930 Lah 41 (42)

(30) AIR 1930 Pesh 160 (161) (The sale is complete as soon as the offer of the auction purchaser is accepted by the auctioneer and it is immaterial for the purpose of Art 166 whether the 25 per cent deposit is made or not)

4 (26) 92 Ind Cas 539 (539) (Lah)

(84) AIR 1931 Al 314 (314)

(39) AIR 1933 Cal 310 (312) ILR (1933) 1 Cal 452

5 (99) 23 Bom 531 (535)

6. (57) ■ All 411 (413)

(10) 6 Ind Cas 483 (483) (Lah)

(39) AIR 1933 Cal 663 (663) 43 Cal W N 563 (665) I L R (1933) 2 Cal 163

10 (33) AIR 1933 Mad 626 (627) 50 Mad 734

11 (25) AIR 1923 Cal 349 (350)

(33) AIR 1933 Cal 332 (340)



In cases where fraud is relied on in support of an application made after time it is immaterial that the application is made after confirmation of the sale<sup>12</sup>

O 21 R 90  
Notes 49-50

Where notice under Rule 23 of this Order is not given the sale is void. But if an application is made under this rule to set it aside it must be filed within thirty days of the sale<sup>13</sup>

See also Notes to Article 166 in the Authors' Commentary on the Limitation Act 49a. **Step-in-aid of execution** — It has been held that an application by a decree holder praying for the dismissal of an application made by the judgment debtor under this rule is a step in aid of execution within the meaning of Article 162 of the Limitation Act<sup>1</sup>

**50. Appeal** — Order 43 Rule 1 clause (j) provides for an appeal against an order under Rule 23 *infra* setting aside or refusing to set aside a sale<sup>1</sup>. Section 174 of the Bengal Tenancy Act as amended by the Bengal Legislative Council in 1928 allows an appeal against an order under that rule<sup>2</sup>

It has been already mentioned in Note 37 *ante* that Section 311 of the old Code allowed an application to be made only on the ground of material irregularity and that an application to set aside a sale on the ground of fraud in publishing and conducting the sale fell within the scope of Section 314. It was therefore held that no second appeal lay against an order on an application seeking to set aside a sale on the ground of material irregularity<sup>3</sup> but that if fraud was the ground of the application a second appeal would lie if the matter was between parties to the suit<sup>4</sup>. But under this Code

(26) AIR 19

(1) AIR 19

(12) 10 Ind

(38) NW Cal

(79) AIR 1919 Pat 228 (229 230)

(80) AIR 1930 Pat 58 (60)

(24) AIR 1924 Pat 406 (437)

(27) AIR 1922 Pat 422 (423)

(89) AIR 1939 Cal 603 (665) 43 Cal WN 862

(867) ILR (1939) 2 Cal 163

an order is made against him he can appeal under O 43 R 1)

(80) 5 Cal 259 (262)

(37) AIR 1939 Mad 482 (483) 1 L R (1939) Mad 349 (Order of Court declining to entertain application under O 21 R 90 falls under O 43 R 1)

(82) AIR 1932 Cal 381 (381)

Note 49a

2 The following cases are no longer law in law

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(

703 (Where on the judgment debtor applying under this rule the decree-holder files a list of witnesses and a petition of objections it amounts to taking a step in aid of execution)

Note 50

1 (11) 10 Ind Cas 148 (140 151) (Cal) (Aug

(01) 28 Cal 4 (6)

(95) 22 Cal 801 (804)

(91) 18 Cal 422 (426)

(66) 6 Suth W R Misc 119 (119 120)

(98) 21 Mad 417 (419)

(96) 19 Mad 29 (30)

(96) 19 Mad 167 (168)

(69) 5 Mad H C R 218 (214)

4 (12) 16 Ind Cas 690 (691) (Cal) (Right of second appeal under the old Code cannot be affected by new Code)

139

(87) 9 All 411 (412 413)

**O. 21 R 30**  
**Note 50**

an order on an application under this rule whether made on the ground of material irregularity or on the ground of fraud is not open to second appeal by virtue of the provisions of Section 104<sup>5</sup>. The result will be the same even if the question fell within Section 47 for the order being appealable as an order will not fall within the definition of the term decree in Section 2 *ante*. As to the right of second appeal in cases where objections are taken both under this rule and under Section 47, see Note 44 *ante*.

Where the objection to the sale does not fall under this rule but falls under Section 47, a decision deciding such objection will be open to second appeal<sup>6</sup>.

No appeal lies under the Letters Patent against the order of a single Judge of the High Court made on appeal or in revision against the order of an executing Court in an application under this rule<sup>7</sup>.

The provisions of Section 104 and O 43 R 1 cannot restrict the provisions relating to appeals to the King in Council. Therefore an appeal to the Privy Council will lie against an order of the High Court under Rule 92<sup>8</sup>.

An order dismissing an application under this rule for default is appealable under O 43 R 1 the effect of such order being the confirmation of the sale<sup>9</sup>. The fact that a distinct order confirming the sale has not been recorded does not alter the

- (04) 81 Cal 885 (390 391)
- (99) 26 Cal 589 (542 545)
- (99) 26 Cal 824 (326)
- (09) 2 Ind Cas 983 (934) (Cal)
- 5 (09) AIR 1929 All 553 (553)
- (33) AIR 1933 Mad 838 (838)

- (29) AIR 1929 Mad 624 (624)
- (10) 8 Ind Cas 883 (883) (Mad)
- (30) AIR 1930 Nag 58 (58)
- (17) AIR 1917 Oudh 45 (45)
- (24) AIR 1924 Pat 503 (503)
- (24) AIR 1924 Pat 182 (182)
- (24) AIR 1924 Pat 111 (112) 2 Pat 915
- (20) AIR 1920 Pat 710 (710)
- (18) AIR 1918 Pat 297 (298) 3 Pat L Jour 645
- (18) AIR 1918 Upp Bur 88 (81) 2 Upp Bur
- Rul 139
- (38) AIR 1938 Nag 107 (107) I L R (1938)
- Nag 436
- (37) AIR 1937 Pat 90 (91)

to an allegation of an irregularity in an auction sale and comes under Order 21 Rule 90)

- (32) AIR 1932 Lah 530 (531)
- (28) All 1928 All 354 (354)
- (18) AIR 1918 All 209 (210) 40 All 122
- (30) AIR 1932 Cal 203 (204)
- (12) 13 Ind Cas 147 (147) (All)
- (07) AIR 1927 Cal 657 (658) (Even though be-
- tween decree holder purchaser and judgment
- debtor)
- (06) AIR 1926 Cal 229 (231)
- (17) AIR 1917 Cal 9 (9)

- (36) AIR 1936 All 608 (607) (Second appeal
- treated as revision)
- (36) AIR 1936 All 763 (764) (No second appeal
- lies even where the purchaser is the decree-holder
- himself)
- [But see (30) AIR 1930 Nag 131 (132) (Sub-
- mitted to be erroneous)]
- 6 (36) AIR 1936 Lah 573 (574) (Object on an
- ground that executing Court had no jurisdiction
- to sale)

- (10) 8 Ind Cas 3 (4) (Cal) (Do)
- (11) 9 Ind Cas 135 (135) (Cal)
- (30) AIR 1930 Lah 208 (209)
- (28) AIR 1928 Lah 444 (444)
- (28) AIR 1928 Lah 414 (416)

Ann 140 (P C)

- (20) AIR 1920 Lah 377 (377) 1919 Pun Ra
- No 168
- (19) AIR 1919 Lah 152 (154)
- (15) AIR 1915 Lah 293 (295)

character of the order and is no ground for refusing to entertain an appeal.<sup>12</sup> But an order refusing to restore an application under this rule which has been dismissed for default is not appealable.<sup>13</sup> The reason is, as already mentioned in Note 18 *ante*, that Order 9 does not apply to proceedings under this rule.

An application by the Official Receiver to set aside a sale in execution is one under this rule and not under Section 17, inasmuch as he is not the representative of the judgment debtor for this purpose. No second appeal therefore lies in such a case.<sup>14</sup>

In an appeal from an order confirming the sale, the purchaser in auction is the principal person interested and is a necessary party.<sup>15</sup>

Where an application by a judgment debtor for setting aside a sale is dismissed and thereafter he is adjudicated a bankrupt on an application by a creditor filed subsequent to the sale, the judgment debtor can appeal from the order, the property in such cases does not vest in the Official Receiver, having been sold away before adjudication.<sup>16</sup>

**51. Revision.**—Where a sale is set aside under this rule without proof of substantial injury,<sup>1</sup> or on the application of a person who is not entitled to apply,<sup>2</sup> or where a sale is confirmed before an application under this rule is decided,<sup>3</sup> or where the lower Court sets aside a sale having misunderstood the legal position with regard to sales,<sup>4</sup> the order is open to revision. Similarly, an order refusing to set aside a sale, on the ground that the applicant had no *locus standi* to apply, is open to revision.<sup>5</sup> But an order passed by a Court under this rule in the exercise of its jurisdiction is not revisable even though it may be erroneous.<sup>6</sup> An order dismissing an application

O. 21 R. 00  
Notes 50-51

See AIR 1924 Cal 25 (ant) 53 Cal 616  
(Opposite party ready. Order of dismissal is  
appealable—AIR 1924 Cal 773 (distinguish))  
[But see (AC) AIR 1926 Cal 773 (774) 53 Cal  
679. (Dismissed from AIR 1922 Cal 407)  
(OT) 10 Oudh Cas 171 (172)]

10. (22) AIR 1922 Cal 407 (409) 56 Cal 903

11. (56) 10 Bom 433 (434)  
(27) AIR 1927 Cal 934 (934)  
(26) 97 Ind Cas 704 (704) (Cal)  
(20) AIR 1920 Cal 447 (448)  
(18) AIR 1916 Cal 533 (540)  
(10) 11 Ind Cas 149 (149, 149) (Cal).  
(04) 31 Cal 207 (207).  
(1900) 27 Cal 414 (415)  
(26) AIR 1926 Lah 102 (102).  
(07) 1907 Pan Re No 25, page 99.  
(58) 11 Mad 319 (321)  
(07) 10 Oudh Cas 353 (354).

confirming the sale—But it seems that his  
adjudication was before the sale and not after-  
wards as in the case adumbrated in the above  
proposition]]

**Note 51**

1. (24) AIR 1914 All 673 (679).
2. (30) AIR 1930 Pat 54 (60).
3. (24) AIR 1914 Pat 745 (747).
4. (01) 24 Mad 311 (315).
5. (76) 9 Mad 145 (146).
6. (37) AIR 1937 Pat 357 (356).
7. (23) 20 Cal 6 (11) - 19 Ind App 154 (170).
8. (33) AIR 1933 All 137 (133).
9. (37) AIR 1937 Pat 104 (103) (Advertising  
sale on certain day but actually holding it one  
day afterwards does not amount to material  
irregularity owing to Rr. 13 and 15, Patna High  
Court General Rules.)

12. (32) AIR 1932 Cal 203 (201).

- meaning of § 115, O.P.C.)
- (37) AIR 1937 Cal 7 (8). (There is failure to exer-  
cise jurisdiction by lower Court in such a case.)
  6. (32) AIR 1932 All 140 (140)
  - (29) AIR 1929 Bom 198 (195).
  - (28) AIR 1928 Cal 189 (190) (Erroneous view of  
limitation)
  - (26) AIR 1926 Cal 773 (774, 775, 778) 53 Cal  
679 (Refusal to restore an application dismissed  
for default)

**O. 21 R. 90 Note 51** under this rule for default is not open to revision, since the order is appealable? See also the undermentioned cases<sup>a</sup>

It is not open to the petitioner to urge a new point in revision which was not taken in the Court below<sup>a</sup>

**O. 21 R. 91**

**R. 91. [S. 313]** The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest

[1877, S. 313]

### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1 Scope of the Rule</li> <li>2 Saleable interest</li> <li>3 Who may apply under this Rule               <ol style="list-style-type: none"> <li>4 Necessary parties to application</li> <li>5 Limitation</li> </ol> </li> <li>6 To what Court application should be made where execution is transferred to Collector</li> </ol> | <ol style="list-style-type: none"> <li>7 Notice See Rule 92 proviso</li> <li>8 Compensation for loss of property bought at court sale.</li> <li>9 Suit for refund of purchase money where there is no saleable interest See Notes to Order 21 Rule 93</li> <li>10 Appeal</li> </ol> |
|---|---|

### Other Topics (miscellaneous)

No warranty of title in court sales See Notes 1 and 8

Remedies open to purchaser See Notes 1 and 8.

Rule inapplicable to purchaser knowing want of saleable interest at sale itself See Note 1

**1. Scope of the Rule.** — The general principle is that a court sale carries with it no guarantee that the property is the property of the judgment debtor the auction purchaser takes the risk and bears the loss if it is subsequently discovered not to be

- |   |  |
|---|--|
| <p>(50) 22 Cal 802 (805)</p> <p>(94) 21 Cal 799 (806)</p> <p>(31) AIR 1931 Cal 425 (426)</p> <p>(70) 13 South W R 250 (251) (Absence of specific notice—Court treating it as an</p> | <p>(78) 11 Mad 264 (269)</p> <p>(29) " " (1500)</p> <p>(35) " " "</p> <p>sal</p> <p>—</p> <p>diction—Hindu</p> <p>(38) AIR R 90 (P</p> <p>tion for a</p> <p>city insur-</p> <p>to it and refusing—Dismissal of suit</p> <p>set aside sale for failure to make deposit—Appeal</p> <p>—Order refusing to accept security—Revision is maintainable)</p> <p>(79) AIR 1939 Lah 222 (222) (Objection to sale by Court owing to</p> |
|---|--|

- 8 (31) AIR 1931
- (27) AIR 1929 AIR 793 (793) 51 AIR 1023
- (25) AIR 1928 AIR 354 (354)
- (26) AIR 19 6 All 305 (306) 48 All 266
- (33) 15 All 407 (409)
- (23) AIR 1929 Cal 36 (37)
- (26) AIR 19 6 Cal 30 (31)
- (21) AIR 19 1 Cal 251 (252) 48 Cal 119
- (22) AIR 1928 Lah 414 (414)

- [See also (12) 13 Ind Cas 147 (149) (150)]
- (31) AIR 1931 Pat 63 (61)
- (24) AIR 1924 Nag 293 (294)]
- 9 (22) AIR 1922 Lah 35 (36)
- (24) AIR 1925 Pat 461 (461)

the property of the judgment debtor a sale in execution of a decree is therefore not void, so far as the purchaser is concerned, by reason of the fact that the property sold does not belong to the judgment debtor.<sup>1</sup> This rule may be considered an exception to the general principle in that it allows an auction purchaser to set aside a sale by an application under this rule, on the ground that the judgment debtor had no saleable interest in the property sold. The distinction between this rule and Rule 90 is that while the latter provides for the setting aside of a sale for irregularities in the proceedings which have led up to the sale, this rule applies to an entirely different state of affairs and comes into operation in those cases where in spite of the prescribed procedure having been regularly followed property has been sold in which the judgment debtor had no saleable interest.<sup>2</sup> The object of the rule is to provide a quick and inexpensive remedy in such cases by which the auction purchaser could get out of his difficulty.<sup>3</sup> But the rule is intended for the protection of an innocent auction-purchaser where therefore, the purchaser knew at the time of the sale that the judgment debtor had no saleable interest in the property sold,<sup>4</sup> or where the purchaser has abused the process of the Court for a fraudulent purpose and has not acted in good faith,<sup>5</sup> he is not entitled to the benefit of the provisions of this rule.

It follows from what has been stated above that an auction sale cannot be set aside on the ground of want of a saleable interest in the judgment debtor, except by an application under this rule within the period of limitation prescribed therefor.<sup>6</sup> Where therefore no application under this rule is filed within time and the sale is confirmed under Rule 93 the auction purchaser cannot treat the sale as void or (where he is the decree holder) apply for execution again on the ground that he has subsequently discovered that the judgment debtor had no saleable interest in the property sold. This is the view of the High Court of Madras.<sup>7</sup> The High Court of Patna has however held in the undermentioned cases<sup>8</sup> that the proposition that no judicial sale can be set aside for want of saleable interest in the judgment debtor, except by a resort to the procedure of Order 21, is not well founded, it has accordingly held that where, in a suit to which both the auction purchaser and the judgment debtor were parties, the auction sale has been declared to be invalid as against a stranger, the sale must, in effect, be taken to have been set aside, and the auction purchaser, if he is the decree holder, can again apply for execution. But the same High Court has held in the undermentioned Full Bench decision<sup>9</sup> distinguishing the above cases, that

Order 21 Rule 91 — Note 1

(39) AIR 1939 Nag 479 (182) I L R (1939) Nag 387

discovery of a defect in the title of the judgment

purchaser }

real owner ]]

2 (33) AIR 1933 Pat 435 (440) 12 Pat 665

(FB)

. 309

O.21 R.91  
Note 1

**O.21 R.91**  
**Notes 1-2**

once a sale has been *confirmed*, it will not be open to the decree holder auction purchaser to apply for execution again on the ground that the judgment debtor had no saleable interest in the property. The Allahabad High Court has also held the same view.<sup>10</sup>

So also, except by following the procedure laid down in this rule and in Rule 93 *infra*, an auction purchaser cannot recover the purchase money paid by him on the ground that the judgment debtor had no saleable interest in the property.<sup>11</sup> See for fuller discussion, Notes to Rule 93, *infra*.

Where a sale in execution of a decree is set aside on the ground that the judgment debtor had no saleable interest in the property sold, the execution proceedings are revived and the decree holder can file an application for execution again within three years of the judgment of the Court setting aside the sale.<sup>12</sup>

This rule does not apply to sales held under the Bengal Tenancy Act 1855<sup>13</sup> or to sales under the Orissa Tenancy Act, II of 1913 [Section 228, sub section (3)], or to proceedings under the Madras Estates Land Act, I of 1908 [Section 193 sub section (a)]. It does not also apply to sales held by the Registrar under Chapter 27 of the Calcutta High Court Rules.<sup>14</sup>

This rule is applicable to proceedings under the Chota Nagpur Tenancy Act see Rule 95 Note 1, *infra*.

Where after a sale in execution of a decree, a third party files a suit for a declaration that the properties belong to him, and the purchaser thereupon files an application that he should be allowed to pay the purchase money after the decision of the declaratory suit, it has been held that such an application is not one under this rule and is not justified by any provision in the Code.<sup>15</sup>

**2. Saleable interest.** — The words “no saleable interest” in this rule mean “nothing to sell” and are not intended to be confined to cases where a judgment debtor’s interest is unsaleable either by prohibition of law or for some other reason.<sup>1</sup> Where there is a total failure of consideration for the price paid by the purchaser at a court sale by reason of the fact that the judgment debtor has no saleable interest whatever in the property sold, the sale can be set aside on an application under this rule.<sup>2</sup> But where the judgment debtor has some saleable interest however small it may be, the purchaser buys at his own risk and, there being no warranty that the property sold shall answer to the description given of it, the sale cannot be set

10 (38) AIR 1938 All 593 (601) ILR (1938) All 922 (FB) (Order confirming sale is *res judicata* between decree-holder, auction purchaser and judgment debtor and former cannot re-open matter by application for further execution or by any other means)

(See also (35) AIR 1935 All 910 (911))

11 (38) AIR 1938 Pat 447 (449) (No inherent power under § 151, C P C, to grant refund without setting aside sale)

(

(37) AIR 1939 Cal 310 (312) ILR (1939) 1 Cal 452 (Suit or application under § 151 C P C not maintainable)

(37) AIR 1937 All 13 (19)

(38) AIR 1938 All 593 (601) ILR (1938) All 922 (FB) (Suit for refund of purchase money not maintainable)

(38) AIR 1938 Cal 263 (265) ILR (1938) 1 Cal 219 (FB) (Do)

12 (26) AIR 1926 Cal 738 (33 740) (3 14 excludes such applicability)

14 (29) AIR 1929 Cal 207 (208)

15 (31) AIR 1931 Lah 214 (245)

**Note 2**

1 (83) 5 All 577 (33 538) (FB)

2 (13) 21 Ind Cas 774 (700) (Cal)

(83) 9 Cal 217 (200)

(80) 11 Cal L Rep 85 (90)

(25) AIR 1925 Sind 193 (190) 17 Sind L R 21

aside under this rule<sup>3</sup>. Thus, where in a court sale several parcels of immovable properties are sold in one lot and it is found that the judgment debtor has a saleable interest in one of such parcels and none in others, this rule does not apply<sup>4</sup>. The fact that it is found that the property sold is subject to a mortgage does not mean that the debtor has no saleable interest,<sup>5</sup> and this is so even if the amount due under the encumbrance exceeds the value of the property<sup>6</sup>.

The saleable interest contemplated by this rule is the interest on the date of sale<sup>7</sup>. Thus, where a decree for foreclosure of certain mortgaged properties allowed time till 20th July 1883 to the mortgagor to redeem and the property was sold in execution of a money decree on 30th June 1883, it was held that the fact that before the confirmation of the sale the judgment debtor had lost his interest was immaterial and that this rule did not apply, inasmuch as on the date of sale he had a saleable interest<sup>8</sup>.

See also Note 5 to Section 60, *ante*

**3. Who may apply under this Rule.** — It is only the auction purchaser who is entitled to apply under this rule<sup>1</sup>. The judgment debtor cannot apply under this rule<sup>2</sup>. But a decree holder auction purchaser can apply under this rule<sup>3</sup>. Where the purchase is made by an executor of the deceased judgment debtor in his personal capacity, he is not debarred from applying under this rule, even though he had applied under Rule 90 in the capacity of executor<sup>4</sup>.

**4. Necessary parties to application.** — A person alleged by the auction-purchaser to be the real owner of the property is not a necessary party to an application under this rule as he is not a person who will be affected by the order<sup>1</sup>. See also Notes to Rule 92 *infra*

**5. Limitation.** — An application under this rule is governed by Article 166 of the Limitation Act and must be made within thirty days of the date of the sale<sup>1</sup>.

**6. To what Court application should be made where execution is transferred to Collector** — Where a decree is transferred for execution to the Collector, an application under this rule should be made to the Civil Court and not to the Collector<sup>1</sup>. See also Rule 91A added by the Bombay High Court

3 (18) 21 Ind Cas 774 (776) (Cal)  
(09) 3 Ind Cas 438 (439) (Cal)  
(01) 28 Cal 235 (237)

(35) AIR 1935 All 910 (911)  
4 (15) AIR 1915 Cal 536 (530)

Note 4

1 (14) AIR 1914 Mad 318 (319)

Note 5

1. (27) AIR 1927 Mad 394 (395) 50 Mad 639  
(27) AIR 1927 Mad 635 (636, 635)

4. (12) 15 Ind Cas 109 (110) (Mad)  
(14) AIR 1914 Low Bur 142 (142)

5 (83) 9 Cal 506 (507)

(14) AIR 1918 Pat 636 (637) 3 Pat L Jour 516

[But see (81) 8 Cal L Rep 468 (470)]

II (8) J All 167 (168)

7. (25) AIR 1925 Ind 193 (197) 17 Sind LR 281  
(05) 2 Cal L Jour 506 (507) (Purchaser after default in payment of revenue cannot apply in the event of a subsequent revenue sale.)

8 (84) 1864 All W N 318 (318)

Note 3

1 (05) 1 Nag L R 167 (168)

2. (07) 29 All 612 (613)

3 (35) AIR 1935 Mad 340 (341) (This only namely is to apply under this rule)

1. (87) 9 All 43 (45)  
(89) 11 All 94 (96)

Note 6

O.21 R.91  
Notes 2-6

O. 21 R. 91  
Notes 7-8

7. Notice. — See Rule 92, proviso

8. Compensation for loss of property bought at court-sale. — As has been seen in Note 1 above, there is no warranty of title in court sales<sup>1</sup> The reason is as observed by Peacock, C J : 'A purchaser at a sale in execution knows that all that he purchases is the right and title of the judgment debtor He knows that no one guarantees to him that the judgment debtor has a good title and he purchases the property with his eyes open, and he regulates the price which he bids for the land with reference to the circumstances under which he is purchasing, and the risk he runs''<sup>2</sup>

Now, suppose that, subsequent to the sale, the auction purchaser finds that the judgment debtor has title only to a portion of the property, that is to say, that he has only a fractional interest It has been already mentioned in Note 2 *ante*, that to such a case this rule does not apply Has the purchaser got any other remedy? On the principle mentioned above, he cannot claim to recover a proportionate part of the purchase money by way of compensation either by an application in the execution proceedings<sup>3</sup> or by a separate suit<sup>4</sup> Where the purchaser is induced by *misrepresentation or fraudulent concealment* to buy the property for a price much more than it is really worth the purchaser has no remedy under this rule<sup>5</sup> He can, however, recover compensation in a *separate suit*<sup>6</sup>

It has been held by the High Court of Calcutta<sup>7</sup> that in the case of execution sales held by the Registrar on the original side of that Court, the purchaser is entitled to recover compensation for deficiency of the interest of the judgment debtor See also Note 1 above

An execution sale is also liable to be set aside on account of the misrepresentations of the officer conducting the sale, which has led to a useless property being sold for a high price<sup>8</sup> The reason is that it is incumbent on the Court to be scrupulous in

- { 33 } AIR 1938 Oudh 84 (80) 13 Luck 746  
(Auction purchaser therefore cannot assume the position of *bona fide* transferee without notice)  
{ 34 } AIR 1934 Pat 683 (685)  
{ 38 } AIR 1938 Pat 447 (449)

2. { 69 } 12 Suth W R 8 (10) (FB)  
[See also { 37 } AIR 1937 All 18 (19)]

- { 31 } AIR 1931 All 377 (378) 53 All 496  
(1900) 27 Cal 264 (268)  
{ 21 } AIR 1921 Cal 115 (117)  
{ 80 } 1880 Pun Re No 16, p 37

[But see { 33 } AIR 1933 All 218 (220, 221) 55 All 221 (Rule of  *caveat emptor*  is not to be extended to case where purchaser is decree holder and sale is found to be nullity in another suit)]

- 4 { 31 } AIR 1921 All 223 (224)  
(O.) 27 All 537 (539)  
(O.) 23 All 355 (357, 358)  
(80) 2 All 828 (829 830)  
(16) AIR 1916 Mad 622 (623)  
(94) 17 Mad 228 (231)

- { 19 } AIR 1919 Lah 253 (254) 1919 Pun Re No 52  
(79) 1879 Pun Re No 181 page 355  
[See also { 20 } AIR 1920 Mad 316 (317) 43 Mad 309]

- [But see { 71 } N W P H C R 67 (69)]  
5. { 93 } 20 Cal 8 (10, 11) 19 Ind App 154 (PC)  
{ 15 } AIR 1915 Cal 548 (550)  
{ 84 } 10 Cal 368 (372)  
6 { 69 } 3 Ind C. 438 (439 440) (Cal)

[See { 14 } AIR 1914 Low Bur 142 (142)] (see cannot recover when he is not misled by such

7. { 02 } 29 Cal 420 (427)  
[See { 02 } 29 Cal 370 (374)]

8. { 00 } 1 Ind Cas 122 (123 124) 36 Ind App 22  
36 Cal 323 (PC)  
[See also { 18 } AIR 1918 Bom 59 (63)]



the extreme and to be very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its officers.

O. 21 R. 91  
Notes 8-10

**9. Suit for refund of purchase money where there is no saleable interest.** — See Notes to Order 21 Rule 93 *infra*

**10 Appeal.** — Under Order 11 Rule 1 clause (j) an appeal lies against an order setting aside or refusing to set aside a sale under Rule 92 read with this rule

### Local Amendment

#### BOMBAY

The following shall be *added* as Rule 91A

91A Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector on application under Rules 89, 90 or 91 and in the case of an application under Rule 91 the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under Section 70 of the Code shall be deemed to have been made to or in the Court within the meaning of Rules 89, 90 and 91 <sup>1</sup>

O 21 R. 91A  
(Bombay)

**R. 92. [Ss 312, 314 ] (1)** Where no application is made

O. 21 R. 92

**Sale when to become** under rule 89, rule 90 or rule 91, or where such  
**absolute or be set aside** application is made and disallowed, the Court shall make an order confirming the sale,<sup>1,2</sup> and thereupon the sale shall become absolute

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days<sup>3</sup> from the date of sale, the Court shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby <sup>4</sup>

(3) No suit<sup>5</sup> to set aside an order made under this rule shall be brought by any person against whom such order is made.

[1877, Ss 312, 314; 1859, Ss 256, 257 ]

### Local Amendments

#### ALLAHABAD

In sub rule (1) *after* the words the Court shall, *insert* the words subject to the provisions of Rule 58 (2)

#### MADRAS

In sub rule (2) *after* the words within thirty days from the date of sale *insert* the following words

and in case where the amount deposited has been diminished owing to any

O 21 R 91A (Bombay)

1 ( 38) AIR 1938 Bom 209 (209) (There is nothing to compel an applicant to make his application to the Collector rather than to the Civil Court )

**O 21 R 92**  
**Notes 1-2**

cause not within the control of the depositor such deficiency has been made good within such time as may be fixed by the Court

### NAGPUR

In sub rule (1) *after* the word *make* *insert* the words *subject to the provisions of Rule 58 (2)*

### ODDH

In sub rule (1) *after* the words *the Court shall* *insert* the words *subject to the provisions of Rule 58 (2)*

### PATNA

In sub rule (1), *after* the words *the Court shall* *insert* the words *subject to the provisions of Rule 58 (2)*

## Synopsis

- |  |  |
|--|--|
| 1 Legislative changes                                    | 9 Court fee on a plaint in suit to set aside sale                        |
| 2 Scope of the Rule                                      | 10 Sale by receiver  |
| 2a Court meaning of                                      | 11 Sale held by Collector — Confirmation                                 |
| 3 Deposit made within thirty days See Notes to O 21 R 89 | 12 Confirmation before thirty days                                       |
| 4 Necessary parties and notice to them                   | 12a Compromise after sale but before confirmation                        |
| 5 Suit to set aside or restore sale                      | 13 Appeal  |
| 6 Plea of irregularity or fraud in defence               | 14 Appeal to the Privy Council See Sect 109 Note b and O 21 R 90 Note 80 |
| 7 Suits to set aside sales under other Acts              | 15 Step in aid of execution  |
| 8 Limitation for suits to set aside sales                | 16 Revision  |

## Other Topics (miscellaneous)

Absence of application—Effect See Notes 2 and 4

Application disallowed—Effect See Note 2

Confirmation—Effect See Notes 2 and 6

Effect of reversal of decrees before confirmation See Note 2

Inherent powers to set aside sales See Note 2

Letters Patent appeal See Note 13

Note 5

When sale is to be set aside under this rule See Note 2

### 1 Legislative changes —

1 Under Section 312 of the old Code the Court was bound to confirm the sale only if no application under Section 311 (now Rule 90) had been made or if such application is made and disallowed Under the present rule the Court should confirm the sale only where no application is made under Rules 89 90 or 91 or where such application is made and disallowed

2 The words *as regards the parties to the suit* which occurred in the first paragraph of Section 312 of the old Code have been omitted See the undermentioned case<sup>1</sup>

3 The words *on the ground of such irregularity* alter the words *no suit to set aside* in the last paragraph of Section 312 corresponding to sub rule (3) have been omitted

2 Scope of the Rule — This rule provides for the confirmation of sale in certain cases and for the setting aside of sale in certain other cases A sale should be confirmed where no application is made under Rules 89 90 or 91 or where such

application is made and disallowed. It is the duty of the Court in such cases to confirm the sale,<sup>1</sup> even without an application by, or the presence of, the party concerned.<sup>2</sup> Where the purchaser is a stranger, the Court cannot refuse to confirm the sale on the ground that the decree has been subsequently adjusted by the decree holder and judgment debtor.<sup>3</sup> Upon confirmation the sale will become absolute.<sup>4</sup> The rule requires an order confirming the sale. In the absence of such order, the sale will not automatically get confirmed merely because no application to set aside the sale has been made within the period of limitation or an application has been made and disallowed.<sup>5</sup> It has, however, been held that an express order of confirmation is not necessary.<sup>6</sup>

A sale should be set aside under this rule where an application under Rules 89, 90 or 91 is made and allowed. But this does not mean that the Court has no power to set aside an execution sale on any ground whatever in the absence of such an application. Thus under Section 47 of the Code the Court can at any time before the sale is confirmed take notice of an objection by the judgment debtor that the property is not liable to sale and refuse to confirm the sale.<sup>7</sup> Under its inherent powers, the Court can refuse to confirm the sale or can set it aside where it has been misled by

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#### Notes 2

1. (30) AIR 1930 Nag 11 (14 15)
- (34) AIR 1934 Lah 146 (146) (No irregularity in publishing and conducting sale — Executing Court cannot refuse to confirm sale.)
- (93) 20 Cal 8 (11) 12 Ind App 154 (116)
- (76) 9 Ind App 30 (236) (119)
- (2) 21 All 140 (141)
- (10) 18 All 141 14
- (84) 8 Lah 424 4
- (9) 24 Cal 624 (174 175)
- (78) 1 J South W R 247 (248)

#### following cases

- (31) AIR 1931 Rang 148 (149) 9 Rang 104
- (Held that Court ought not to stay confirmation)
- (25) AIR 19-9 Nag 265 (272) 24 Nag L R 127
- (11) (Court cannot confirm sale where purchaser is decree holder, but it can confirm where purchaser is a third party)
- (36) AIR 19-6 Nag 493 (300) (Does not affect a

- (25) AIR 1925 Rang 271 (178) 3 Rang 182
- (27) AIR 1927 Lah 71 (72)

8. (77) AIR 1927 Cal 881 (881)
- (15) AIR 1915 Lah 9 (9) 1915 Pan Re No 61.
7. (39) AIR 1939 Lah 113 (115) 1 L R (1939) Lah 103
- (39) AIR 1939 All 368 (369) 1 L R (1939) All 385
- (Legal representative of judgment debtor failing to object in execution proceedings that property sought to be sold or sold is his personal

- 3 (34) AIR 1934 Lah 508 (509) 15 Lah 801
- (31) AIR 1931 PC 33 (34) 58 Ind App 50 27 Nag L R 95 (PC) (Adjustment between decree holder and judgment debtor after execution sale—Court cannot refuse to confirm the sale on the ground of adjustment—AIR 1922 Nag 248 and AIR 1928 Nag 43, Overruled)

See also Notes to Rules 2 and 89 ante, and the

in execution take an objection to the executability of such a decree under S 47 within 90 days of the sale of the property of the puse mortgagee, and relief cannot be refused to him ]]

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the decree holder or where there has been abuse of the process of Court,<sup>8</sup> or where the decree has been reversed before the date of confirmation of the sale.<sup>9</sup> Similarly, a sale can be set aside on the ground that before the sale the decree had been adjusted between the parties although the fact of such adjustment is brought to the notice of the Court only after the sale.<sup>10</sup> (See also Note 2 to Section 151.) But a sale is not liable to be set aside merely on the ground that the application for execution was time barred,<sup>11</sup> or on the ground that the decree has been amended.<sup>12</sup> Similarly the inherent power of the Court cannot be invoked where there is another remedy available for getting the sale set aside.<sup>13</sup> The Court has also no jurisdiction to set aside a sale under Section 151 of the Code on the application of a third party alleging that owing to the conduct of another third party he was misled and therefore did not attend and could not bid at the auction of the property.<sup>14 15</sup> As to the effect of the reversal of a decree on the rights of the auction purchaser see Note 13 to Section 144.

This rule relates only to cases of valid sale where no application is made under Rules 89, 90 and 91 or where such application is made and disallowed. It has no application to cases where the sale is a nullity.<sup>16</sup> In such cases the Court can declare the sale to be void.<sup>17</sup>

Where an application is made to set aside a sale under the inherent powers of the Court<sup>18</sup> or where an application is made under Rule 90 after the expiry of thirty days from the date of the sale relying on Section 18 of the Limitation Act<sup>19</sup> the fact that the sale has been confirmed is no bar to the maintainability of the application.

Where a sale is set aside and, in the meanwhile the purchaser has obtained possession of the properties the Court has got inherent power to order restitution to be made.<sup>20</sup> See also Note 34 to Section 144.

A decree holder is entitled to interest on the decretal amount up to the date of confirmation inasmuch as he is not bound to withdraw the money deposited by the

8 (23) AIR 1923 Mad 635 (636 638) 46 Mad 583

(83) AIR 1933 Mad 899 (401) (Sale in contravention of direct order of Court)

(30) AIR 1930 Lah 208 (210)

(15) AIR 1915 Oudh 140 (142)

(81) 6 Cal 103 (106)

(72) 18 Suth W R 11 (12)

(72) 18 Suth W R 833 (334)

(30) AIR 1930 Lah 793 (794)

(80) 2 Mad 264 (269)

(25) AIR 1923 Nag 27 (26) 24 Nag L R 46

(25) AIR 1925 Sind 253 (254) 18 Sind L R 180

See also Note 2 to Section 151

[See (29) AIR 1929 All 485 (491 492) (Where the remedy is time barred it cannot be given by the use of inherent powers)]

9 (20) AIR 1900 Cal 99 (101)

(21) AIR 1921 Nag 121 (122)

[See also (25) AIR 1925 Nag 60 (61) 20 Nag L R 168]]

10 (39) AIR 1939 Lah 326 (327) 41 Pun L R 220 (221)

11 (13) 19 Ind Cas 377 (378) (Cal)

(55) 11 Cal 3 G (878)

(81) 7 Cal 91 (96)

(83) 6 Mad 237 (233)

(1) AIR 1917 Pat 467 (467) 2 Pat L Jour 157

[But see (10) 13 Suth W R 273 (276)]

(38) AIR 1938 All 89 (90)]

12 (25) AIR 1925 All 264 (266)

[See (1) 13 Suth W R 273 (276)]

(1) 13 Suth W R 273 (276)

(1) 13 Suth W R 273 (276)

(1) 13 Suth W R 273 (276)

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(1) 13 Suth W R 273 (276)

(1) 13 Suth W R 273 (276)

auction purchaser before the sale is confirmed<sup>21</sup>

The effect of an order setting aside the sale is to remit the parties to the position in which they stood before the date of the sale<sup>22</sup>

Section 21 of the Central Provinces Debt Conciliation Act II of 1933 does not preclude the Court from confirming an execution sale held prior to an application made by the debtor under Section 4 of the Act<sup>23</sup>

**2a Court, meaning of** — The word Court in this rule means the Court which held the sale<sup>1</sup>

**3. Deposit made within thirty days** — See Notes to Order 21 Rule 89

**4 Necessary parties and notice to them.** — It has been seen in the Notes to Rules 89 90 and 91 that an application under these rules to set aside the sale must be made within thirty days of the date of the sale under Article 166 of the Limitation Act If no such application is made within time the sale cannot be set aside under this rule<sup>1</sup>

Before an order setting aside a sale under this rule is made it is essential that notice of the application should be given to all persons affected by the order thereon<sup>2</sup> Thus notice must be given to the auction purchaser<sup>3</sup> An order setting aside the sale, made without giving such persons an opportunity of being heard is according to the High Courts of Madras and Patna without jurisdiction<sup>4</sup> According to the High Court of Calcutta such an order is not a nullity and if the person affected does not impugn the validity of the order in a proceeding directed against it he cannot attack it collaterally in any other proceeding<sup>5</sup> The Peshawar Judicial Commissioner's Court has held that the omission to issue notice under this rule makes the order setting aside the sale illegal<sup>6</sup> Where on an agreement between the decree holder and some of the judgment debtors the Court settled a sale with X and confirmed it on the same date without notice to the other judgment debtors it was held by the High Court of

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- ( 88) AIR 1938 Cal 862 (863) (The debt which was extinguished by the sale is revived as soon as the sale is set aside )
- ( 23) AIR 1923 Pat 353 (353)
- ( 24) AIR 1924 Pat 507 (509)
- ( 25) AIR 1925 Cal 157 (158) (If a party has actual notice the absence of formal notice does not vitiate the proceedings )
- ( 12) 14 Ind Cas 67 (69) 89 Cal 687
- 23** ( 88) AIR 1938 Nag 2 3 (275) ILR (1939) Nag 104
- [See also ( 87) AIR 1937 Nag 98 (99) (Executing Court cannot refuse to confirm sale on ground that after the sale the Debt Conciliation Board issues a certificate under S 15 (1) of the Act )]

Note 2a

- 1 ( 34) AIR 1934 Cal 822 (823)

Note 4

how ever there is a conflict of decisions for which see Note 6 to R 90 )

- 4 ( 16) 32 Ind Cas 591 (593) (Mad)

- ( 21) AIR 1921 Pat 293 ( 31)

- 5 ( 33) AIR 1933 Cal 464 (466)

- ( 28) AIR 1928 Cal 96 ( 68) (It is only a wrong order )

- 6 ( 33) AIR 1933 Pesh 14 (15) (Notice not given to auction purchaser—Order set aside on appeal by him )

- ( 96) 1 Cal W N 161n
- ( 21) AIR 1921 Lah 156 (157)

21 R.92 Allahabad that the proceedings were materially irregular and that the sale should be set aside.<sup>7</sup> But in any case it is not necessary that the notice should be given within thirty days of the date of the sale.<sup>8</sup>

It is not necessary that the persons who would be affected by an order under this rule need be described as parties in the application it is sufficient if the notice required by this rule is given to them.<sup>9</sup> Certain decisions, however, hold that such persons are necessary parties.<sup>10</sup> Where an application to set aside a sale was made *bona fide* impleading the decree holder as a party, but he was dead on the date of the application, and his legal representative was brought on the record after the expiry of the period of limitation, it was held in the undermentioned case<sup>11</sup> that the application would not be defeated by reason of the fact that the legal representative of the decree holder was not impleaded within the period of limitation.

Where the auction purchaser is alleged to be a *benamidar* for a third party, it is not necessary to give notice to the latter under this rule.<sup>12</sup> Persons who have applied for rateable distribution in the proceeds of an execution sale have no such direct or proximate interest as would entitle them to notice under this rule.<sup>13</sup>

**5. Suit to set aside or restore sale.**—Section 312 of the old Code provided in the last paragraph thereof that “no suit to set aside on the ground of such irregularity, an order passed under this Section shall be brought” etc. In the undermentioned cases<sup>1</sup> these words were interpreted as not including suits to confirm the sale which had been set aside under Section 312. These cases are now no longer law in view of the alteration effected in sub rule (3) of the present rule which enacts that “no suit to set aside an order made under this rule shall be brought,” etc.

7 (20) AIR 1929 All 671 (672)

8 (13) 19 Ind Cas 475 (476) 37 Bom 887

(25) AIR 1928 Lah 418 (414)

1

(22) AIR 1922 Oudh 129 (130)

(30) AIR 1930 All 167 (168)

(35) AIR 1935 Cal 502 (503) 62 Cal 286 (Application not bad in form because notice has not

(37) 167 Ind Cas 166 (166) (Lah) (Auction purchaser is necessary party)

11. (32) AIR 1932 Cal 733 (733)

12. (2) 29 Cal 682 (686)

(See also (23) AIR 1923 All 462 (463))

to rateable distribution is entitled to notice under this rule.]

#### Note 5

1. (98) 20 All 379 (381, 382) (F B) (Overruling 18 All 437)

(63) 25 All 355 (357)

(81) 3 All 554 (553, 561) (F B)

(88) 1858 All W N 243 (245)

(87) 9 All 604 (604)

(91) 1691 All W N 41 (42)

(81) 3 All 701 (704)

(81) 3 All 206 (210)

(76) 1 All 374 (377)

(95) 19 Bom 216 (219, 220)

(See also (69) 1 N W 211 C R 61 (63) (Held that the order was not under Ss. 256, 257 and could not be regarded as bar to the suit))

(24) AIR 1924 Pat 37 (37, 38) 2 Pat 800

(14) AIR 1914 Oudh 307 (307) 25 Ind Cas 907

A suit to set aside an execution sale on grounds covered by Rules 69, 90 and 91 is barred by sub rule (3),<sup>3</sup> inasmuch as the suit would in effect be one to set aside an order under this rule.

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**Note 5**

A suit to set aside a sale in execution on grounds other than those covered by Rules 69, 90 and 91 is not within the prohibition of sub rule (3) and is, therefore, not barred by it.<sup>4</sup> Thus, where the decree and the sale are attacked on the ground of fraud (not covered by Rule 90)<sup>5</sup> or where the sale is attacked on the ground of want of jurisdiction,<sup>6</sup> a suit to set aside such a sale on those grounds is not barred by this rule. Where in execution of a mortgage decree a property not included in the mortgage was sold, a suit by the mortgagor to recover possession of the property from the mortgagee purchaser was held not to be barred by this rule.<sup>7</sup>

The rules relating to the execution of decrees under this Code do not apply to

- (16) AIR 1916 All 184 (185)
- (85) 7 All 450 (451)
- (83) 1853 All W N 264 (268)
- (81) 1891 All W N 33 (39)
- (02) 26 Bom 40 (42)
- (19) AIR 1919 Cal 411 (418)
- (15) AIR 1915 Mad 150 (155)
- (59) 16 Cal 33 (40)
- (3) 19 South W H 414 (416)
- (27) AIR 1927 Lah 618 (619)
- (26) AIR 1927 Lah 1 (1) 7 Lah 1
- (25) AIR 1924 Mad 1194 (1197)
- (21) AIR 1921 Mad 121 (121) 44 Mad 351
- (29) AIR 1929 Nag 180 (181) 25 Nag L R 58
- (20) AIR 1926 Oudh 45 (46)

- (25) AIR 1925 Pat 376 (378) (The rule does not apply when the property for possession of which the judgment debtor sued was never sold at all but was wrongly taken possession of by the auction purchaser)
- (85) 7 All 450 (452)
- (69) 12 South W R 41 (42)
- (11) 11 Ind Cas 392 (401) (PC) (So assumed)
- [See also (83) 11 Cal 136 (135) 11 Ind App 234 (PC)]
- (35) AIR 1935 All 470 (475) 57 All 630 (Where a decree in execution of which the sale took place is itself found to be invalid, or where it is found that the sale officer had no authority to sell the property, the remedy of a separate suit would not be barred)
- [See however (38) AIR 1938 Lah 690 (691) (In this case a suit by judgment-debtor to set aside sale on an allegation of fraud not covered by R. 90 was held to be barred by S. 47)]

- (38) 68 Cal L Jour 481 (483)
- (37) AIR 1937 Nag 140 (142)
- (35) AIR 1935 All 470 (473) 57 All 630
- (35) AIR 1935 Cal 356 (357)
- [See (92) 19 Cal 341 (345)]
- (91) 18 Cal 139 (143)
- (84) 10 Cal 496 (500)

- (34) AIR 1934 Lah 400 (400) (Declaratory suit by stranger purchaser on ground of fraud not barred by a prior dismissed application under O. 21 R. 90 for the same relief)
- (25) AIR 1925 All 146 (150, 154) 47 All 217
- (97) 24 Cal 546 (548)
- (69) 11 South W R 297 (298)
- (35) AIR 1935 All 470 (475) 57 All 630 (Decree itself attacked as invalid — Remedy of separate suit not barred)

<sup>3</sup> See cases in points 4 to 6 *infra*

- (32) AIR 1932 Cal 126 (128) 59 Cal 117 (The sub rule however has no application here what is prayed for in the suit is not the setting aside of the order confirming the sale but certain declarations the nature of which has already been set out and also an injunction as regards the taking of possession)

suit not barred)]

- 6 (28) AIR 1928 All 363 (364, 365) 51 All 686
- (29) AIR 1929 All 673 (673)

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**Notes 5-7**

insolvency proceedings therefore a suit questioning an order dismissing an application to set aside a sale held by the Insolvency Court is not barred by this rule<sup>7</sup>

It has been held that the auction purchaser can sue for damages for loss suffered by him on account of the fraud practised by the decree holder in regard to the sale<sup>8</sup>. See also Note 4 to O 31 R 93 *infra*

An application to set aside a sale was withdrawn on a compromise between the parties and the sale was confirmed. Afterwards the compromise was declared by a decree to be void. It was held that the effect of this was that the order confirming the sale also became void and the application to set aside the sale should be heard on the merits<sup>9</sup>.

**6 Plea of irregularity or fraud in defence** — Where a party applies under Rule 90 to set aside the sale and the application is dismissed he will in answer to a suit by the purchaser for possession be barred by *res judicata* from impeaching the sale on the same grounds<sup>1</sup>. Even if no such application is made such a plea in defence cannot be raised after confirmation of the sale<sup>2</sup>. The reason is that the sale becomes absolute and the order confirming the sale amounts to a judicial determination that none of the objections exists upon which the validity of the sale could have been questioned. Nor can a third person impeach the title of the auction purchaser on the ground of any alleged irregularities in the execution sale<sup>3</sup>.

It has been held in the undermentioned case<sup>4</sup> that the fact that an application under R 89 or R 90 has been dismissed will not preclude the mortgagor judgment debtor from pleading by way of defence in a suit by the auction purchaser for possession that the properties sold were not included either in the mortgage or in the decree thereon.

### 7 Suits to set aside sales under other Acts —

(1) *Public Demands Recovery Act (Bengal Act III of 1913)* — It was held under the repealed Act I of 1890 that this rule did not apply to sales held in enforcement of a certificate under that Act and that a suit to set aside such a sale was maintainable<sup>5</sup>. See Section 20 of Act III of 1913.

(2) *Bengal Tenancy Act (VIII of 1885)* — It has been held that the rule does not apply to sales held under the Bengal Tenancy Act inasmuch as § 174 thereof contains a complete rule on the subject<sup>6</sup>. There is a conflict of opinion as to whether a suit is maintainable to set aside or to confirm such a sale. See the cases cited below<sup>7</sup>.

7 (23) AIR 1923 Lah 224 (225)

8 (87) AIR 1937 Pat 532 (533) 16 Pat 196

(See also (34) AIR 1934 Lah 400 (400) (Suit

{

sale property on a representation that the property is subject to a mortgage is barred by sub-rule (3)]]

■ (34) AIR 1934 All 433 (434)

Note 6

1 (1) AIR 1917 Cal 193 (193)

(00) 3 Ind Cas 24 (75) 31 All 393

(16) AIR 1916 Cal 46, (467)

2 (25) AIR 19 5 Cal 81 (81 82)

(9) AIR 19 9 Cal 3 4 (3 8 3 9) 57 Cal 403 (17 B)

3 (27) AIR 1927 Cal 82 (83 84)

4 (21) AIR 1921 Mad 7 9 (200)

Note 7

1 (06) 33 Cal 451 (458)

(05) 32 Cal 1100 (1140)

(02) 29 Cal 94 (95)

(02) 29 Cal 73 (91 93) (17 B)

2 (21) AIR 1921 Lat 51 (55) 6 Pat L 400

3 (91) 18 Cal 481 (493) (10)



As to cases under Bengal Act XI of 1859 and Act X of 1853 see the under mentioned cases<sup>4</sup>

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Notes 7-12

(3) *Milris Estates Land Act (I of 1908)* — A suit will lie to set aside a sale held under the *Milris Estates Land Act*<sup>5</sup>

**8. Limitation for suits to set aside sales** — In cases not covered by this rule and to which the bar under sub rule (3) does not apply a suit to set aside an execution sale should be brought within one year from the date of confirmation of sale under Article 12 of the Limitation Act of 1908<sup>1</sup> That Article however does not apply where the sale is a nullity<sup>2</sup> Such a sale does not require to be set aside but may be declared to be void. A third person whose property has been sold is not bound by the sale and a suit by him for setting aside the sale is not governed by Article 12 of the Limitation Act<sup>3</sup>

**9 Court-fee on a plaint in suit to set aside sale** — A suit to set aside an auction sale for arrears of revenue is in no sense a suit for a mere declaration without consequential relief<sup>1</sup> The plaint in such a suit should be stamped as if it were a suit for recovery of the property sold<sup>2</sup>

**10 Sale by receiver** — A sale by a receiver appointed by a Court is not one in execution of a decree and need not be confirmed under this rule<sup>1</sup>

**11 Sale held by Collector — Confirmation** — The Collector to whom a decree has been transferred for execution is not a Court executing the decree<sup>1</sup> The Civil Court of the proper Court to confirm a sale held by the Collector<sup>2</sup> See Notes 2 4 and 6 to Section 9

**12 Confirmation before thirty days** — No sale can be confirmed or can become absolute under this rule before the expiry of the period of thirty days from the date of the sale<sup>1</sup> A sale becomes complete only when the bid is accepted and

(21) AIR 1921 Pat 54 (6) 6 Pat L Jour 16 (No  
—Reversing AIR 1919 1st 240)

(18) AIR 1918 1st 120 (125) 3 Pat L Jour 122  
(125)

<sup>4</sup> *Under Act XI of 1859*

(98) 25 Cal 8 (5 9) (Revenue sale where there  
is no arrears of revenue is void and can be set

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5 (27) AIR 1927 Mad 1035 (1036 103) 51  
Mad 76

(26) AIR 1926 Mad 190 (191) 49 Mad 490

Note 8

1 (01) 25 Bon 337 (351 352) 27 Ind App 216 (PC)

(13) 19 Ind Cas 120 (121) (All)

(95) 23 Cal 77 (785 786) 23 Ind App 45 (PC)

(85) 11 Cal 287 (292)

(28) AIR 1928 All 363 (365) 30 All 686

(24) AIR 1924 Lah 396 (396 397)

3 (86) 9 Mad 460 (463)

(33) AIR 1933 Lah 10 (11) (Person not party  
to sale not suing to set aside sale but only  
contending that his rights are not affected by  
the sale—Art 12 does not apply)

Note 9

1 (24) AIR 1924 Cal 31 (32) 51 Cal 216

2 (81) 9 Cal L Rep 231 (232)

Note 10

1 (26) AIR 1926 All 124 (126) 48 All 209

Note 11

1 (25) AIR 1925 All 146 (149) 47 All 217

2 (96) 1596 Pan Re No 83 page 261

Note 12

(30) AIR 1936 Pat 164 (166) (But a petition of  
compromise between the parties under which  
the sale is to be confirmed without the auction  
purchaser having to pay the full purchase-

of fraud is governed by Art 95 and not by  
Art 12}}

2 (99) AIR 1929 All 673 (673)

**O. 21 R. 92** , declaration is made of such bidder being the purchaser<sup>2</sup>  
**Notes 12-13**

**12a. Compromise after sale but before confirmation.** — After a sale and before its confirmation the decree holder and judgment debtor came to an arrangement that the judgment debtor should pay the decree amount by 29th December 1930, that the confirmation of the sale should be held over till that date and that if the amount was not paid as agreed the sale should be confirmed without delay. Both parties applied to the Court to pass orders accordingly. The Court passed orders accordingly and stated 'the darkhast is allowed to be withdrawn for the present'. It was held that these words must be taken as amounting only to an order staying the execution till 29th December 1930, and that on the failure of the judgment debtor to pay the amount as agreed the sale should be confirmed<sup>1</sup>.

**13. Appeal.** — An order under this rule setting aside or refusing to set aside an execution sale is appealable under Order 43 Rule 1 (j) of the Code<sup>1</sup>. An order merely confirming the sale in the absence of an application to set it aside,<sup>2</sup> or an order refusing to confirm a sale on the ground that the decree had been satisfied,<sup>3</sup> is not an order setting aside or refusing to set aside a sale and is, therefore, not appealable. Similarly, an order setting aside a sale *suo motu* under the Court's *inherent* powers is not one under this rule and is not appealable<sup>4</sup>. In the undermentioned case<sup>5</sup> it was held that an order directing the re-sale of the property on the failure of the auction purchaser to deposit 25 per cent of the purchase money as required by Rule 84 was covered by this rule and that it was appealable. As to whether an appeal lies from an order setting aside or refusing to set aside a sale under the Madras Estates Land Act or the Bengal Tenancy Act or the Agra Tenancy Act, see the undermentioned cases<sup>6</sup>.

money may be recorded before the expiry of (78) 1 Cal L. Rep 250 (251) (No appeal—Decision under Act of 1859)

2 (34) AIR 1934 Oudh 25 (27) 9 Luck 393

Note 12a

1. (33) AIR 1933 Bom 858 (359) 57 Bom 616

Note 13

[See (37) AIR 1937 Pat 672 (672) (An order refusing the application of one of the parties for an order directing the other party to act up to the terms of a compromise whereby the parties had agreed to the postponement of the confirmation of the sale is not open to appeal.)]

As to the right of appeal in cases arising under the old Acts see the following decisions

(81) 3 All 316 (320) (No appeal—Decision under the Code of 1877 as amended by Act XII of 1879)

(74) G N W P H C R 302 (310) (No appeal—Decision under Act XIII of 1861)

4. (25) AIR 1925 Sind 203 (254) 18 Sind — B 130

5 (39) AIR 1939 Lah 46 (46) (The auction purchaser in this case was the decree holder himself and therefore it was held that an appeal lay under S 47 also)

6. (23) AIR 1923 Mad 1107 (1107) (Madras Estates Land Act — No appeal lies)

(19) AIR 1919 Cal 921 (921) (Bengal Tenancy Act — No appeal lies)

(05) 2 All L Jour 130 (131) (Agra Tenancy Act — No appeal lies)

No second appeal will lie from an order setting aside or refusing to set aside a sale under this rule.<sup>7</sup> See Section 104, sub section (3) As to whether an appeal lies under the Letters Patent against an order under this rule, see Note 50 to Order 21 Rule 90 and the undermentioned cases.<sup>8</sup>

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Notes 13-15

In an appeal from an order rejecting an application under this rule to set aside an execution sale, the auction purchaser is a necessary party. If he is not made a party, the appeal must be dismissed.<sup>9</sup> As to whether the auction purchaser is a necessary party to an appeal against an order *setting aside* a sale, see the undermentioned decision.<sup>10</sup>

Where there is an appeal filed against an order refusing to set aside the sale under this rule the sale does not become absolute within the meaning of Article 180 of the Limitation Act until the disposal of the appeal, even though the Court has confirmed the sale.<sup>11</sup>

An auction purchaser is a party to a proceeding for setting aside a sale and hence, he can appeal from an order passed in such proceeding.<sup>12</sup> See also the undermentioned case.<sup>13</sup>

**14. Appeal to the Privy Council.**—See Note 6 to Section 109 and Note 50 to Order 21 Rule 90

**15. Step-in-aid of execution.**—An application or an objection preferred by the decree holder praying that an application to set aside a sale should not be granted is a step in aid of execution within the meaning of Article 182 of the Limitation Act.<sup>1</sup> But an application merely asking for a confirmation of sale where no application under Rules 69, 90 or 91 is preferred is not a step in aid of execution, inasmuch as it is the duty of the Court to confirm the sale even in the absence of any application for that purpose.<sup>2</sup> Nor will the mere act of confirmation by the Court amount to a step in aid

lies

- (37) 167 Ind Cas 166 (167) (Lah)  
(36) AIR 1936 Lah 478 (479) (Affirming on Letters Patent Appeal AIR 1935 Lah 602)  
[See also (35) AIR 1933 Nag 525 (527)]  
[See however (37) AIR 1937 Lah 263 (265)]

- (1865) 2 Suth W R Misc 19 (19)  
(27) AIR 1927 Lah 603 (803)  
(12) 17 Ind Cas 884 (884-885) 8 Nag L R 177.  
(17) AIR 1917 Oudh 45 (45)  
(18) AIR 1918 Upp Bur 30 (31) 2 Upp Bur Rul

12. (39) AIR 1939 Sind 62 (64) I L R (1939) har 417

13. (36) AIR 1936 Lah 363 (369) (A judgment debtor who was declared insolvent during the sale proceedings has no locus standi to appeal from an order confirming the sale)

Note 15

1. (94) 21 Cal 23 (23)  
2. (94) 31 Cal 1011 (1015)

Court setting aside sale — Appellate Court

O. 21 R. 92 by the party<sup>3</sup>  
Notes 15-16

16. Revision. — See Note 24 to Section 115 and the undermentioned cases<sup>1</sup>

O. 21 R. 93

**R. 93.** [S. 315.] Where a sale of immoveable property is set aside under rule 92,<sup>2</sup> the purchaser shall be entitled<sup>6</sup> to an order for repayment of his purchase-money, with or without interest<sup>7</sup> as the Court may direct, against any person to whom it has been paid.

[1877, S. 315; 1859, S. 258.]

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1 Legislative changes.</li> <li>2 "Where a sale of immoveable property is set aside under Rule 92."</li> <li>2a Right of decree holder to withdraw purchase money before confirmation of sale</li> <li>3 Sale set aside for want of saleable interest.</li> <li>4. Suit for purchase-money in such cases</li> <li>5 Sale set aside for irregularity.</li> </ol> | <ol style="list-style-type: none"> <li>6. What the purchaser is entitled to under this rule. See Notes 7 to 10</li> <li>7. Interest.</li> <li>8. Value of improvements effected by him</li> <li>9 Poundage fee</li> <li>10. Liability for mesne profits.</li> <li>11 Limitation</li> <li>12. Order under this Rule — Executability of.</li> <li>13. Appeal and revision.</li> </ol> |
|--|---|

### Other Topics (miscellaneous)

'Caveat emptor' — Applicability to court sales      Misrepresentation, fraud or negligence of the  
See Notes 3 and 4      decree holder — Effect      See Notes 4

1. Legislative changes. — Section 315 of the old Code ran as follows —

his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided for by this Code for the execution of a decree for money "

As to the effect of the changes introduced into this rule, see Notes 3 and 4 below

2. "Where a sale of immoveable property is set aside under Rule 92." — This rule applies only where the sale is *set aside under Rule 92*. Where a sale is not so set aside, the mere fact that the auction-purchaser finds that the judgment debtor had no saleable interest in the property sold will not entitle him to a refund under

3 (82) 10 Cal L Rep 330 (330)

(70) 13 South W R 315 (315)

(63) 11 South W R 117 (117)

(63) 9 South W R 100 (101)

(67) 8 South W R 359 (360)

(70) 4 Beng L R A C 115 (116)

[But see (72) 18 South W R 156 (157)]

(73) 20 South W R 31 (33)

(74) 12 Beng L R 506a ]

### Note 10

1. (25) AIR 1925 Sind 253 (254) 13 Sind L R 130 (Where sale is set aside under rule 92, the purchaser is entitled to a refund of his purchase money)

(33) AIR 1933 AN 137 (137).

(33) AIR 1933 Lah 59 (100) 13 Lah 761

(Refusal to confirm sale. — Revision lies)

(36) AIR 1936 Oudh 172 (172)

this rule<sup>1</sup> Where a sale of immovable property is set aside under Rule 92 *supra* the auction purchaser is entitled to an order under this rule for repayment of the purchase money.<sup>2</sup> The decree holder is also entitled to apply for a fresh sale but limitation therefor under Article 181 of the Limitation Act does not begin to run until he is compelled to refund the purchase money.<sup>3</sup> Although this rule only applies to cases where the sale is set aside under Rule 92 yet even where the sale is set aside under Section 47, the Court has inherent power to order a refund of the purchase money by the decree holder.<sup>4</sup> See also Note 1 below.

This rule is applicable to sales for arrears of rent under the Orissa Tenancy Act, II of 1913 Section 22<sup>5</sup> sub section (2) as well as to sales of immovables under the Chota Nagpur Tenancy Act. See Rule 95 *infra*.

**2a. Right of decree-holder to withdraw purchase-money before confirmation of sale.**—This rule implies that the decree holder may be allowed to withdraw the purchase money even before the confirmation of the sale. But he cannot claim to do so *as of right*. The matter is in the discretion of the Court.<sup>1</sup> At the same time he is not *bound* to withdraw the money before the confirmation of the sale and where he is entitled under the decree to interest up to the date of realization of the decretal amount he is entitled to interest up to the date of confirmation.<sup>2</sup>

**3 Sale set aside for want of saleable interest.**—It has been already mentioned in Notes 1 and 8 to Rule 91 *supra*, that there is no warranty of title in court sales. The purchaser must be taken to buy the property with all risks and all defects in the judgment held for a title except as provided by Rule 91 and this rule.<sup>1</sup> But this rule is well as Rule 91 will apply only to cases of *entire absence of interest* in the judgment debtor and not to cases where the judgment debtor has *some* interest in the property however small that may be.<sup>2</sup>

Under Section 315 of the old Code the purchaser could *apply* for refund of the purchase money even where it was found in a separate suit that the judgment debtor had no saleable interest in the property sold.<sup>3</sup> The omission of the words *where it is found that the judgment debtor has no saleable interest* in the present rule,

#### Order 21 Rule 93

1 (33) AIR 1933 All 68 (64)

(38) AIR 1938 Pat 447 (4)

auction purchaser on finding judgment debtor had no saleable interest to apply for refund arises only after setting aside sale under O 21 R 91—Where such procedure is not followed Court cannot order refund under its inherent powers)

(38) AIR 1938 Pesh 66 (67) (Execution sale confirmed and application by auction purchaser to be put in possession—Possess on not given on account of decree passed in favour of another in regular suit claiming property as his own—Auction purchaser cannot apply under this rule for refund of purchase money)

(36) AIR 1936 Mad 50 (55) 59 Mad 202 (F B)  
(Finding in another suit in which decree and

#### Note 2a

1 (15) AIR 1915 Cal 297 (298) (12 Cal 252, Followed)

firmation of the sale)

2 (14) AIR 1914 Cal 210 (211)

(15) AIR 1915 Cal 297 (298)

(38) AIR 1938 Nag 54 (54) I L R (1938) Nag 456

#### Note 3

O. 21 R. 93  
Notes 3-4

now makes it clear that the purchaser is not entitled to apply for refund of purchase money unless the sale is set aside *under Rule 92* <sup>4</sup>

Where a court sale is set aside on an application under Rule 91 *ante* and the auction purchaser thereupon withdraws the money but the sale is subsequently confirmed by the Appellate Court the Court can under its inherent powers compel the auction purchaser to refund the money so withdrawn <sup>5</sup>

**4 Suit for purchase-money in such cases.** — Where it is found that the judgment debtor has no saleable interest in the properties sold, can the purchaser institute a suit for refund of purchase money?

Under the Code of 1859 there was no provision for the return of the purchase money in cases where the judgment debtor was found to have no saleable interest. It was therefore, held applying the general principle of *causat emptor* that a purchaser could not claim to recover the purchase money on the ground that the judgment debtor had no saleable interest <sup>1</sup> Section 315 of the Code of 1882 gave the purchaser the right to set aside the sale and recover the purchase money where the judgment debtor had no saleable interest in the property sold. That Section also provided that such right may be enforced under the rules provided by this Code for the execution of a decree for money. It was held, however, that the purchaser's remedy was not limited to the procedure prescribed in the execution department but that he could file a separate *suit* for the purchase money <sup>2</sup>

Material alterations have been made in this rule and there is a conflict of opinion under this Code as to whether a separate suit will lie. The words 'may be enforced' etc. have now been omitted and the words 'the purchaser shall be entitled to an order for repayment of his purchase money' have been substituted. It has been held in several decisions that the auction purchaser's right of *suit* has been taken away under this Code and that his only remedy is the one prescribed in Rule 91 *ante* and in this rule <sup>3</sup> The result according to this view is that where a purchaser finds after the expiry of thirty days from the date of the sale that the judgment debtor has no saleable interest in the property sold he has no remedy whatever. Where however the purchaser is

4 (18) AIR 1918 Mad 1266 (1287)

5 (17) AIR 1917 Pat 435 (437) 9 Pat L Jour 301 (Section 144 does not apply to such a case)

**Note 4**

1 (80) 2 All 780 (783-84)

(80) 2 All 833 (830)

(74) 6 N W P H C R 163 (170)

(71) 9 Bom H O R 92 (97)

(69) 6 Bom H O R 253 (262)

(67) 4 Bom H C R A O 114 (118)

(67) 12 Suth W R 8 (10) (P B)

(71) 15 Suth W R 1,66n (196n)

(69) 2 Beng L R A C 82 (83)

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tion maintainable. Note — This case is dissent-  
ed from in 2 All 780 above)

(78) 2 All 107 (111)

(67) 2 Igra 50 (51)

ably distributed)

(66) 3 All L Jour 810 (800) (Suit held maintain-  
able when there has been a total failure of con-  
sideration)

(10) 7 Ind Gas 955 (966) 35 Bom 29 (Such a sit  
cognizable by Small Cause Court)

(93) 22 Bom 783 (785)

(66) 8 Bom L R 369 (3 0) (Suit = cognizable by  
Court of Small Causes)

(69) 2 Ind Gas 459 (500) 37 Cal 67

(66) 10 Cal W N 274 (275 276)

(63) 7 Cal W N 105 (107)

(61) 5 Cal W N 240 (241)

(96) 1 Cal W N 140 (141) (Suit cognizable by  
Small Cause Court)

(63) 12 Cal L Rep 331 (332)

(10) 6 Ind Gas 291 (291) (Mad) (Can recover

5 Loe

3 (21) AIR 1921 All 577 (331 334) 43 All 60.

induced to buy the property on account of fraud or misrepresentation or gross neglect of duty on the part of the decree holder he can maintain a suit for the recovery of purchase money.<sup>4</sup> The High Court of Lahore and the Chief Court of Oudh have taken the view that Rule 93 *ante* and this rule have no application to a case where the auction purchaser has been deprived of the property purchased by him after the confirmation of the sale owing to the action of a person having paramount title to it and on the ground that the judgment debtor had no saleable interest in it and that in such cases he obtains a right under the *substantive law* for refund of the purchase money and not under this rule.<sup>5</sup> A Full Bench of the Madras High Court has also held that where a sale turns out to be futile by a finding in another suit the auction purchaser can sue the decree holder for refund of the purchase money but that his remedy is not by *application*. The decision proceeds on the ground that there is an implied warranty in court sales to the extent that there is *some* title in the judgment debtor though there is no warranty as to the *extent* of the title of the judgment debtor.<sup>6</sup>

O 21 R 93  
Note 4

- (16) AIR 1918 All 325 (3-6)  
(17) AIR 1917 All 363 (304) 39 All 114  
(22) AIR 1922 Bom 905 (206) 46 Bom 833  
(26) AIR 1920 Cal 971 (9-3 974) 53 Cal 58  
(34) AIR 1924 Cal 172 (172)  
(20) AIR 1920 Cal 791 (791)  
(18) AIR 1918 Cal 148 (148)  
(18) AIR 1918 Cal 505 (506)  
(111) AIR 1923 Cal 85 (85-89) 50 Cal 110 (Surt

der for damages is maintainable)  
(See (38) AIR 1938 Cal 263 (270) I L M (1938)  
1 Cal 512 (Where invalidity of proceeding is  
due to fraud or negligence of decree holder  
auction purchaser is entitled to sue him for

ing the sale there might be some remedy by  
way of damages against the person responsible))  
5 (32) AIR 1932 Lah 401 (411-412) 18 Lah  
618 (F B)  
(24) AIR 1924 Lah 115 (115) 4 Lah 354  
(30) AIR 1930 Oudh 148 (153-159) 5 Luck 552  
(F B)  
(37) AIR 1937 Oudh 145 (146) 12 Luck 626  
(Decree-holder purchaser losing property under  
decree obtained by third party — Decree holder  
can sue for refund from another decree holder to  
whom payment had been made by way of rate-  
able distribution)  
(37) AIR 1937 Oudh 286 (287) 18 Luck 138

- (19) AIR 1919 Low Bur 90 (101) 10 Low Bur  
Bul 76  
(37) AIR 1937 Nag 140 (142)  
(38) AIR 1938 All 503 (501) I L R (1938) All  
223 (F B)  
(35) AIR 1935 All 470 (473) 57 All 690

sale is not set aside there is no inherent power  
to order refund of purchase money)

(37) AIR 1937 All 18 (19) (No inherent power  
to grant refund))

[But see (14) AIR 1914 All 252 (253) 36 All

to belong to the surety—Decree finally passed  
in favour of the decree-holder and latter trying  
to execute the decree — Judgment debtor is  
entitled to credit for the amount lost by him

cription of extent of property in sale proclamation  
— Suit by auction purchaser against decree hol

6 (36) AIR 1936 Mad 50 (55) 33 Mad 207 (F B)  
(Overruling 17 Ind Crs 437 and 1 I M 1919  
Mad 498)

**O. 21 R. 93**  
**Notes 4-10**

See also the undermentioned case "

The right of the auction purchaser to maintain a suit for refund of purchase-money in cases where the sale took place while the old Code was in force, must be determined with reference to the provisions of that Code<sup>8</sup>

Where certain properties are sold in execution of a mortgage decree and, in a separate suit by a defendant, it is declared that the *decree* and the sale in execution are not binding on him and the auction purchaser is deprived of the property, he is entitled to apply for refund of the purchase money under Section 47<sup>9</sup>

**5. Sale set aside for irregularity.** — Where a sale is set aside on account of material irregularity, the auction purchaser is entitled to sue and recover from the decree holder the amount of poundage which was deducted from the purchase-money deposited by him, as well as interest on such deposit<sup>1</sup> The reason is that the right of suit in such a case exists *independently of the Code* and the words "shall be entitled to an order for repayment" do not take away the right of suit to enforce the same.

**6. What the purchaser is entitled to under this Rule.** — See Note 5 to 10 below

**7. Interest.** — When a sale is set aside and a refund of purchase-money is ordered under this rule, the Court has got power to award interest on the amount of the purchase money<sup>1</sup>

**8. Value of improvements effected by him.** — Where the auction purchaser gets into possession of the properties sold to him and effects improvements thereon, he is entitled to compensation for such improvements, upon the sale being set aside<sup>1</sup>

**9. Poundage fee.** — Where a sale is set aside under Rule 92, the purchaser is entitled to a refund of the poundage fee paid by him, but is not entitled to recover it from the judgment debtor<sup>1</sup> The High Court of Madras<sup>2</sup> has held that there is no means of obtaining a refund of the poundage fee and that the most that could be done would be to give a certificate to the party that the case is a fit one for refund and leave it to the revenue authorities to comply with it

As to a suit for recovery of poundage fee, see Note 5 above.

**10. Liability for mesne profits.** — When an order for refund of purchase money is made under this rule, the purchaser must account to the judgment debtor for the rents and profits realized by him, if he has been in possession of the property purchased<sup>1</sup>

7 (33) AIR 1933 All 213 (22) 55 All 221 (Entitled to refund)

8 (23) AIR 1943 Cal 5 (90) 50 Cal 115

9 (33) AIR 1933 All 374 (39) 45 All 303 (FF)  
[See also (71) 1 All 565 (573)]

**Note 5**

1 (10) AIR 1916 Mad 300 (J.J.) 33 Mad 303

**Note 7**

1 (21) AIR 1921 P O 7 (27) 45 Ind App 24  
61 Cal LJ 113 (PC) (Even though the decree holder did not prove that he was in possession of the property, the Court awarded interest.)  
(14) All 111 (512)  
(14) All 111 (512)  
(14) All 111 (512)  
(14) All 111 (512)

(55) 8 Mad 101 (103) (If the purchaser himself has contributed to the loss he has no right to interest may be refused.)

(91) 13 All 303 (30) (Where a purchaser is entitled to more than what he is entitled to, the Court may refuse interest.)  
[See (10) 5 All 111 (45) 300 (FF)]

**Note 8**

1 (75) 3 Sath WR 333 (374)

(16) AIR 1920 Nag 160 (161)

**Note 9**

1 (12) 13 Ind Cas 303 (80) (Cal).

2 (34) AIR 1934 Mad 407 (410)

**Note 10**

1 (75) 23 Sath WR 333 (374).

(12) 14 Ind Cas 303 (407) (Cal).



**11. Limitation.**—The period of limitation for an application under this rule is three years under Article 181 of the Limitation Act, 1908, from the date of the order setting aside the sale<sup>1</sup>. Article 120 of the Limitation Act will apply to cases where it has been held that a suit lies for the refund of purchase money<sup>2</sup>.

O. 21 R. 93  
Notes 11-13

**12. Order under this Rule — Executability of.** — A purchaser who has obtained an order for refund of purchase money under this rule can execute the order as if it were a decree<sup>3</sup>.

**13. Appeal and revision.** — No appeal lies against an order under this rule, granting, or refusing refund of the purchase money to the purchaser<sup>4</sup>. But where the executing Court ordered refund in a case where the judgment debtor had some saleable interest, it was held that the order was without jurisdiction and should be set aside in revision<sup>5</sup>.

## R. 94. [S. 316.] Where a sale of immoveable property

O. 21 R. 94

Certificate to purchaser.

has become absolute, the Court shall grant a certificate<sup>2</sup> specifying<sup>5</sup> the property sold and the name of the person<sup>4</sup> who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

[1877, S. 316; 1859, S. 259]

### Local Amendment

#### NAGPUR

Add a comma after the word "sold" and insert the words "the amount of the purchase money" between the word "sold" and the word "and"

### Synopsis

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. "The Court shall grant a certificate."</li> <li>3. Certificate, if transfers title.</li> <li>4. To whom certificate should be granted.</li> <li>5. Contents of certificate of sale.</li> <li>6. Construction of sale certificate.</li> <li>7. Amendment of certificate.</li> <li>8. What passes at a court sale.</li> <li>9. Variance between proclamation of sale and sale certificate.</li> </ol> | <ol style="list-style-type: none"> <li>10. Effect of new interpretation of law on sale.</li> <li>11. Effect of certificate of sale.</li> <li>12. Certificate, if operates as res judicata.</li> <li>13. Limitation.</li> <li>14. Registration of sale certificate.</li> <li>15. Court fee on application for sale certificate.</li> <li>16. Appeal.</li> </ol> |
|--|--|

#### Note 11

Limitation either under Art. 97 or 62 and not by Art. 120 Limitation Act.}}

#### Note 12

1. (19) AIR 1919 Mad 894 (895)

#### Note 13

1. (90) IL All 397 (399)  
 (84) 1884 All W N 178 (178)  
 (17) AIR 1917 Mad 217 (217 218)  
 (86) 9 Mad 437 (439)  
 (39) AIR 1939 Mad 740 (742) (Reverang on Letters Patent Appeal A I R 1937 Mad 779 —  
 ¶ 47 does not apply to such order)  
 2. (86) 9 Mad 437 (439)

applies.)

(57) AIR 1937 Oudh 286 (287) 13 Luck 138  
 (Auction purchaser a suit for refund of purchase money—Suit is governed by three years' rule of

O. 21 R. 94  
Notes 1-3

### Other Topics (miscellaneous)

Absence of certificate—Title See Note 3

Legal representative entitled to certificate See Note 4

**1. Legislative changes.** — This rule corresponds with the first part of Section 316 of the old Code. The latter part of that Section has been re enacted under the present Code in Section 65

The only important alteration under the present rule is the addition of the words 'such certificate shall bear date the day on which the sale became absolute'

**2. "The Court shall grant a certificate."** — The provisions of this rule are mandatory and impose a positive and imperative duty on the Court to grant a sale certificate<sup>1</sup>. In granting such certificate it is the duty of the Court, not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. Its action in granting the certificate is *ministerial* and not judicial<sup>2</sup>.

The provisions of this Order do not apply to sales by receivers and the Court neither confirms nor grants certificates in the case of such sales<sup>3</sup>.

This provision applies to sales under the Chota Nagpur Tenancy Act, VI of 1920. See Section 50 of the Act.

**3. Certificate if transfers title.** — The title of the court auction purchaser becomes complete on the confirmation of the sale under Rule 92,<sup>1</sup> and under Section 65 the property vests in the purchaser *from the date of sale*<sup>2</sup>. The certificate of sale does not, by itself, create title but is merely evidence of title<sup>3</sup>. As already observed in the previous Note, the certificate simply records an accomplished fact and states what has been sold<sup>4</sup>. Hence a mere omission to obtain the certificate does not destroy or take away the title of the purchaser<sup>5</sup>. He can prove his title and purchase by evidence

#### Order 21 Rule 94 — Note 2

1. (17) AIR 1917 Pat 697 (697) 1 Pat L Jour 446  
(71) 9 Bom H O R A C 64 (65)  
(30) AIR 1936 Bom 137 (188)  
2. (25) AIR 1925 Pat 615 (616) 4 Pat 760  
3. (26) AIR 1926 All 124 (126) 48 All 209

#### Note 3

1. (10) 5 Ind Cas 263 (264) (All)  
(11) 9 Ind Cas 85 (25) (All)  
(09) 2 Ind Cas 61 (62) (All)  
(87) 1887 All W N 217 (218)  
(63) 9 Cal 542 (543)  
(07) 30 Mad 214 (215)  
(15) AIR 1915 Lah 9 (9) 1915 Pun Re No 81

- (93) 17 Bom 375 (382)  
(87) 11 Bom 589 (590)  
(86) 10 Bom 453 (455, 456)  
(85) 9 Bom 10 (14)  
(66) 12 Cal 597 (601)  
(28) 2 Cal W N 589 (591)  
(08) 7 Cal L Jour 1 (28)  
(15) AIR 1915 Mad 800 (806) (Case decided)

- (72) 18 Suth W R 157 (158)

(Limits  
tion starts from date of sale and not from date

of title]]  
[But see (11) 12 Ind Cas 360 (361) 7 Nag L R 134]

4. (16) AIR 1916 Cal 319 (321) 43 Cal 124  
5. (83) 7 Bom 254 (255, 256)  
(56) 10 Bom 444 (448)  
(81) 6 Bom 139 (142)  
(7c) 25 Suth W R 493 (494)  
(93) 1893 Pun Re No 92 page 364  
(14) AIR 1914 Oudh 306 (306)  
(82) 6 Mad 54 (60)  
(91) 1891 All W N 54 (54)

of certificate See the following cases  
(100) 22 All 169 (174)  
(57) 19 All 189 (190)

*aliunde*<sup>6</sup> The production of the order of confirmation of sale is sufficient to prove his title<sup>7</sup>

O 21 R.94  
Notes 3-6

**4. To whom certificate should be granted.** — The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate should be granted<sup>1</sup> If there are joint purchasers the certificate should be issued in the names of all of them<sup>2</sup> If the purchaser is dead, his legal representative is entitled to the certificate<sup>3</sup> But the Court cannot issue the certificate in favour of an undisclosed principal<sup>4</sup>

It has been held by the Bombay High Court<sup>5</sup> that a sale certificate can be granted to an assignee from the auction purchaser But the contrary view has been held by the Allahabad High Court<sup>6</sup>

**5. Contents of certificate of sale.** — What is sold at a judicial sale is nothing but the property attached and that property is conclusively described in, and by, the schedule to the order of attachment The certificate should be granted only in respect of the property attached and proclaimed for sale, and not in respect of some other property treating the case as one of misdescription It was so laid down in *Raja Thakur Barmha v Jiban Ram Marwari*<sup>1</sup> In that case, A mortgaged a ten annas share of a *mouza* belonging to him B, in execution of a simple money decree against A, attached a six annas share which was described in the sale proclamation as being subject to a mortgage and got the same sold in court auction The auction purchaser, in applying for the sale certificate contended that the property sold to him was the unencumbered six annas share and the word 'not' was omitted in the sale proclamation It was held by the Judicial Committee that the Court had no jurisdiction to issue the certificate describing the property as unencumbered If in the above illustration no mention is made of the existence of any encumbrance in the sale proclamation the *prima facie* presumption would be that it is the *unencumbered* six annas share that is sought to be attached and sold and the purchaser would be entitled to the share purchased free from encumbrance<sup>2</sup>

The encumbrances existing on the property subject to which the property is sold should be entered in the sale certificate<sup>3</sup> It is incumbent on the Court to see that the certificate is clear and does not furnish materials for fresh litigation<sup>4</sup>

The sale certificate should bear the date of the confirmation of the sale<sup>5</sup>

**6. Construction of sale certificate.** — Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed Where there is no ambiguity in the words of the certificate, the object of the certificate would be defeated if it were possible to change its plain meaning by reference to other documents<sup>2</sup> The

5 (36) AIR 1936 Bom 137 (133)

6 (38) AIR 1938 All 471 (473)

Note 5

Note 4

by parties or established by decree should be entered)

(85) 9 Bom 47 (49) (Do)

4 (32) AIR 1932 Bom 210 (212)

5 (36) AIR 1936 Mad 733 (735)

Note 11

1 (22) AIR 1922 P C 252 (253) 44 Mad 433 48

Ind App 155 (PC)

(1900) 1 Bom L 11 533 (535)

O. 21 R. 94  
Notes 1-3

### Other Topics (miscellaneous)

Absence of certificate—Title See Note 3

Legal representative entitled to certificate—See Note 4

**1. Legislative changes.**—This rule corresponds with the first part of Section 316 of the old Code. The latter part of that Section has been re-enacted under the present Code in Section 65.

The only important alteration under the present rule is the addition of the words "such certificate shall bear date the day on which the sale became absolute."

**2. "The Court shall grant a certificate."**—The provisions of this rule are mandatory and impose a positive and imperative duty on the Court to grant a sale certificate.<sup>1</sup> In granting such certificate it is the duty of the Court not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. Its action in granting the certificate is *ministerial* and not *judicial*.<sup>2</sup>

The provisions of this Order do not apply to sales by receivers and the Court neither confirms nor grants certificates in the case of such sales.<sup>3</sup>

This provision applies to sales under the Chota Nagpur Tenancy Act VI of 1920. See Section 50 of the Act.

**3. Certificate if transfers title.**—The title of the court auction purchaser becomes complete on the confirmation of the sale under Rule 92<sup>1</sup> and under Section 65 the property vests in the purchaser *from the date of sale*.<sup>2</sup> The certificate of sale does not by itself, create title but is merely evidence of title.<sup>3</sup> As already observed in the previous Note the certificate simply records an accomplished fact and states what has been sold.<sup>4</sup> Hence a mere omission to obtain the certificate does not destroy or take away the title of the purchaser.<sup>5</sup> He can prove his title and purchase by evidence

#### Order 21 Rule 94 — Note 2

1 (17) AIR 1917 Pat 697 (697) 1 Pat L Jour  
446

(93) 17 Bom 375 (382)  
(87) 11 Bom 558 (590)  
(86) 10 Bom 453 (455 456)  
(85) 9 Bom 10 (14)  
(86) 19 Cal 597 (601)  
(90) 11 Cal W N 599 (591)  
(08) 7 Cal L Jour 1 (28)  
(15) AIR 1915 Mad 800 (806) (Case decided  
under the old Code)

#### Note 3

1 (10) 5 Ind Cas 263 (264) (All)  
(11) 9 Ind Cas 25 (25) (All)  
(09) 2 Ind Cas 81 (81) (All)  
(87) 1887 All W N 217 (218)  
(83) 9 Cal 812 (813)  
(07) 30 Mad 214 (215)  
(15) AIR 1915 Lah 9 (9) 1915 Pun Re No 81  
2 (18) AIR 1918 Oudh 9 (10)  
(32) AIR 1932 Pat 60 (63) 10 Pat 670  
(75) 7 N W P H C R 310 (312)  
(85) 11 Cal 341 (342)  
(1864) 1864 South W R Gap 279 (279) (Limita-  
tion starts from date of sale and not from date  
of confirmation)

(9) 1 AIR 1922 All 471 (471)  
(05) 8 O R Cas 907 (907)

of title]]

[But see (11) 13 Ind Cas 360 (361) 7 N W L R  
134]

4 (16) AIR 1916 Cal 319 (321) 43 Cal 174  
5 (83) 7 Bom 254 (255 256)  
(66) 10 Bom 444 (445)  
(81) 6 Bom 139 (142)  
(76) 9 South W R 433 (434)  
(03) 1893 Lun Re No 37 page 364  
(14) AIR 1914 Oudh 306 (306)  
(82) 5 Mad 54 (50)  
(94) 1894 All W N 4 (54)

of certificate See the following cases  
(1806) 14 All 169 (174)  
(27) 19 All 169 (170)

*abundant* <sup>6</sup> The production of the order of confirmation of sale is sufficient to prove his title <sup>7</sup>

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**4. To whom certificate should be granted.** — The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate should be granted <sup>1</sup> If there are joint purchasers the certificate should be issued in the names of all of them <sup>2</sup> If the purchaser is dead, his legal representative is entitled to the certificate <sup>3</sup> But the Court cannot issue the certificate in favour of an undisclosed principal <sup>4</sup>

It has been held by the Bombay High Court <sup>5</sup> that a sale certificate can be granted to an assignee from the auction purchaser But the contrary view has been held by the Allahabad High Court <sup>6</sup>

**5. Contents of certificate of sale.** — What is sold at a judicial sale is nothing but the property attached and that property is conclusively described in, and by, the schedule to the order of attachment The certificate should be granted only in respect of the property attached and proclaimed for sale and not in respect of some other property treating the case as one of misdescription It was so laid down in *Raja Thakur Barmha v Jiban Ram Varuani* <sup>1</sup> In that case, A mortgaged a ten annas share of a *mouza* belonging to him B, in execution of a simple money decree against A, attached a six annas share which was described in the sale proclamation as being subject to a mortgage and got the same sold in court auction The auction purchaser in applying for the sale certificate contended that the property sold to him was the unencumbered six annas share and the word not was omitted in the sale proclamation It was held by the Judicial Committee that the Court had no jurisdiction to issue the certificate describing the property as unencumbered If in the above illustration no mention is made of the existence of any encumbrance in the sale proclamation the *prima facie* presumption would be that it is the *unencumbered* six annas share that is sought to be attached and sold and the purchaser would be entitled to the share purchased free from encumbrance <sup>2</sup>

The encumbrances existing on the property subject to which the property is sold should be entered in the sale certificate <sup>3</sup> It is incumbent on the Court to see that the certificate is clear and does not furnish materials for fresh litigation <sup>4</sup>

The sale certificate should bear the date of the confirmation of the sale <sup>5</sup>

**6. Construction of sale certificate.** — Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed Where there is no ambiguity in the words of the certificate, the object of the certificate would be defeated if it were possible to change its plain meaning by reference to other documents <sup>1</sup> The

6 (88) 11 Mad 296 (300)

5 (36) AIR 1936 Bom 137 (138)

6 (39) AIR 1938 All 471 (473)

Note 5

1 (14) 41 Cal 590 (593 599) 41 Ind App 33 (PC)

entered )

(85) 9 Bom 47 (49) (Do)

4 (32) AIR 1932 Bom 210 (212)

5 (36) AIR 1936 Mad 733 (735)

Note 3

1 (22) AIR 1922 P C 252 (253) 44 Mad 483 (485)

Ind App 155 (PC)

(1900) 2 Bom L R 533 (535)

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Court ought not to embark upon an enquiry as to what was intended to be sold and must be deemed to have been sold, by reference to surrounding circumstances and other documents.<sup>2</sup> Thus, where, in execution of a mortgage decree, the sale certificate was issued in respect of "the whole of the *pannai* lands belonging to and enjoyed by the sons of the first defendant," the certificate cannot by reference back to the mortgage deed be construed as limiting, in any way, the extent of the *pannai* lands to which it referred or to exclude any portion of the *pannai*.<sup>3</sup> Where, however, the terms of the certificate are *ambiguous* and stand in need of explanation, evidence may be adduced to clear the ambiguity.<sup>4</sup> Evidence may also be let in to identify the property described in the sale certificate.<sup>5</sup> The Court can thus for this purpose look into the decrees<sup>6</sup> and even into the suit document.<sup>7</sup>

The boundaries of the property sold as given in the certificate prevail over the areas mentioned therein.<sup>8</sup> But where the certificate contains only a general description of the boundaries of the whole area sold without specifying the boundaries of the plots sold, the *patmask* and survey numbers should be taken as far more correct description of what is sold than the boundaries.<sup>9</sup>

**7. Amendment of certificate.**—The Court has inherent jurisdiction to amend a sale certificate incorrectly describing the property actually sold.<sup>1</sup> Thus, the Court can rectify a mistake in the description of the boundaries<sup>2</sup> or correct an apparent error therein as, for instance, where the certificate includes properties which were not sold but advertised for sale.<sup>3</sup> But the Court has no jurisdiction to amend the certificate so as to show the purchase of a larger share of the property than what is stated in the proclamation of sale.<sup>4</sup>

A sale certificate should not be amended without notice to the judgment debtor.<sup>5</sup>

Where the same error has crept into the decrees as well as the sale certificate, both should be amended and it would not be proper to amend the sale certificate alone.<sup>6</sup>

**8. What passes at a court-sale.**—The general rule in the case of all private sales is that there is an implied warranty of title, in the absence of a contract to the

{ 35 } AIR 1935 Oudh 804 (305) (Sale certificate not including grove—Mere mention of it in details of incumbrances—Grove is not included in sale)

{ See also ( 23 ) AIR 1923 Mad 48 (49) }

2. { ( 27 ) AIR 1927 Mad 311 (312) }

{ 70 } 14 Suth W R 435 (426)

looked to }

{ 11 } AIR 1911 Cal 109 (94) (Mere

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certificate

{ 02 } 15 O P L R 163 (166)

9. { 12 } 13 Ind Cas 324 (325) (Mad)

{ See also ( 20 ) AIR 1920 Cal 922 (924) (S1) }  
(Boundaries not mentioned in sale certificate—  
Estate described by name—Purchaser takes  
estate as it stood at date of sale )

{ See also ( 17 ) AIR 1917 Pat 576 (576) 2 Pat

{ 67 } 7 Suth W R 245 (245) (Misdescription of  
property sold—Intention of parties must be

amendment

contrary.<sup>1</sup> This rule however does not apply to sales *in invitum*. The principle applicable to such sales is *caveat emptor*.<sup>2</sup> What is sold in such sales is nothing but the *right title and interest* of the judgment debtor. All that is guaranteed is that the purchaser shall have the right and interest whatever they may be of the judgment debtor and that the judgment debtor shall not recover back the properties sold.<sup>3</sup> The purchaser gets the property with all the risks and defects in the judgment debtor's title.<sup>4</sup> In the absence of fraud he has no remedy of suit against the judgment debtor or the decree holder for any defect in the property sold. It is only in cases where the judgment debtor is proved to have *no saleable interest at all* that the purchaser has got the remedy provided for in Rule 91 *viz* to apply to set aside the sale.<sup>5</sup> If the sale is set aside he would be entitled to a refund of the purchase money under Rule 93. The purchaser gets the property subject to the same restrictions and equities to which the judgment debtor himself was subject.<sup>6</sup> Thus if the property is subject to any valid

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1 See Section 55 of the Transfer of Property Act 1882

(36) 33 Pun L R 539 (541)

(37) AIR 1937 Lab 29 (32) (Where by a formal order of the Court certain portion of the property is released from execution the judgment debtor ceases to be the judgment-debtor in respect of such and therefore the auction purchaser cannot resist the claim of the judgment debtor in res-

(01) 28 Cal 955 (237)

(00) 19 Cal W N 270 (272 273)

(23) AIR 1923 Cal 166 (168)

(75) 24 Suth W R 109 (109)

(72) 17 Suth W N 511 (512)

(68) 9 Suth W R 118 (119)

(1866) 11 Suth W R 63 (65)

of area of  
quantity  
of land — No compensation to the purchaser

(70) 4 Cal 142 (146) (FB) (A a Mahomedan mortgaged his property — Death of A — Decree upon mortgage against some of A's heirs — The interest of other heirs does not pass in execution on sale)

(82) 11 Cal L Rep 268 (272) (4 Cal 142 (FB) followed)

(76) 2 Cal 395 (398) (Sale in execution of decree against some heirs of deceased Mahomedan—

(24) AIR 1924 Cal 172 (172) (Suit by auction purchaser for refund of purchase-money on ground that judgment debtor had no saleable interest is not maintainable)

(1900) 27 Cal 264 (267)

(94) 17 Mad 228 (230 231)

(30) AIR 1920 Mad 316 (317 318) 43 Mad 309

valid—Such restrictive co-tenant runs with land —Right of treating transferee as trespasser accrues not only to lessor but also to purchaser in rent execution sale)

(81) 3 All 12 (14)

(68) 3 Agra 194 (195)

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encumbrance, the purchaser gets it subject to the same,<sup>7</sup> although, if the encumbrance turns out to be invalid, the benefit of it goes exclusively to the purchaser.<sup>8</sup> Similarly, if the property is subject to a lease or liable for arrears of revenue, the purchaser is also bound by the same.<sup>9</sup> So also where any plea of limitation could have been successfully urged against the judgment debtor, it can also be availed of against the purchaser.<sup>10</sup> If the judgment debtor had sold the property *benami* in the name of his wife and she as ostensible owner mortgaged it to a third person, the subsequent purchaser in court sale cannot require any superior right to that of the mortgagee.<sup>11</sup> But a mere omission on the part of the judgment debtor to take an objection as to want of jurisdiction to execute the decree in another execution proceeding against him will not operate as an estoppel so as to defeat the rights of the purchaser.<sup>12</sup> The court sale would also be affected by *lis pendens* if the sale is held during the pendency of a suit relating to the same property.<sup>13</sup>

The words "right, title and interest of the judgment debtor" are ambiguous words and, in order to determine what passes to the purchaser at a court sale, regard must be had to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place.<sup>14</sup> In the absence of any limitation, they mean all the interest which the judgment debtor could have honestly disposed of in the property.<sup>15</sup> The question to be decided in each case is, as pointed out

(25) AIR 1925 Cal

(84) 18 Cal 189 (198)

(76) 1 Cal 337 (808)

9 (81) 6 Cal 389 (391)

(68) 10 Suth W R 325 (325)

(64) 1864 Suth W R 207 (207)

[See also (04) 31 Cal 380 (383)]

10. (88) 6 Bom H C R 220 (228)

11. (95) 22 Cal 909 (919) 22 Ind App 129 (PC)

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(05) 2 Cal L Jour 202 (214, 216)

(1900) 28 Cal 23 (27)

(99) 26 Cal 966 (970)

(88) 15 Cal 94 (99)

(86) 12 Cal 299 (301, 302)

(79) 4 Cal 789 (792)

(03) 9 Cal L Jour 96 (98, 103)

(03) 26 Mad 230 (236)

(16) AIR 1916 Oudh 232 (238) 18 Oudh Cas 303

14 (02) 29 Cal 813 (819)

(89) 15 Bom 13 (18, 19)

(27) AIR 1927 Lah 685 (687) (Purchaser not bound to look behind the decree)

(74) 22 Suth W R 56 (59) 1 Ind App 321 (PC) (Do)

(87) 14 Cal 18 (25) 13 Ind App 106 (PC) (Do)

15 (81) 6 Bom 193 (202) (F B)

(81) 6 Bom 490 (493)

(80) 5 Bom 14 (19 20)

(17) AIR 1917 Cal 19 (20)

(18) AIR 1918 Cal 93 (925)

(75) 24 Suth W R 263 (264)

(13) 12 Ind Cas 444 (446) 36 Mad 194

(1663) March 617

(74) 22 Suth W R 209 (209)

(90) 13 Mad 15 (16) (Right to grow: if crop also

see)

8. (07) 31 All 533 (550) 26 Ind App 203 (PC)

(09) 1 Ind Cas 106 (108) 33 Bom 311

(37) AIR 1937 Oudh 159 (164) 12 Luck 540

(Where property has been sold subject to a mort-



by the Judicial Committee what did the Court intend to sell and what did the purchaser understand that he bought <sup>16</sup> and this is a mixed question of law and fact in each case <sup>17</sup>

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Where a right to receive royalty is attached and sold only the right to the money which has already become due on the date of the sale is sold as money which has not become due is not an existing debt <sup>18</sup>

*Sale in execution of mortgage decree* — In the case of a sale in execution of a mortgage decree the purchaser acquires the interest of the mortgagor and the mortgagee as on the date of the mortgage <sup>19</sup> whereas in a sale in execution of a simple money decree the purchaser gets the interest of the judgment debtor as it stood on the date of the attachment freed from all subsequent private alienations <sup>20</sup> See also Note 56 to Section 11

*Sale in execution of decree against member of Hindu family* — In a sale in execution of a decree against an undivided member of a joint Hindu family the purchaser buys only an uncertain and fluctuating interest with the right of converting

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|---|---|
| (74) 22 Suth W R 522 (522) (R ght to easement also passes)  | (86) 9 Mad 188 (197 200)                              |
| (70) 2 N W P H O R 251 (252) (Trees on the land not severed also pass)                            | (99) 22 Mad 110 (112)                                 |
| (72) 18 Suth W R 32 (32) (Right of decree holder to quest on val d ty of any transaction does not | (90) 13 Mad 480 (483 484)                             |
|   | (97) 21 Bom 339 (543)                                 |
|   | 16 (87) 10 Mad 241 (248 251) 14 Ind App 84 (PC)       |
|   | (23) AIR 1923 Nag 383 (384)                           |
|   | [See also (1900) 27 Cal 407 (413) 27 Ind App 33 (P O) |
|   | (74) 22 Suth W R 408 (408) ]                          |

*Sales in execution of rent decree*

- (78) 8 Cal L Rep 561 (566 568) 6 Ind App 47 (1 C)

- (15) AIR 1915 Mad 208 (208) 37 Mad 22  
(14) AIR 1914 Cal 305 (308)  
IN (36) AIR 1936 Pat 572 (577)  
19 (98) 22 Bom 940 (948)  
(80) 5 Bom 8 (12 13)  
(86) 10 Bom 224 (226)  
(80) 5 Bom 2 (5)  
(80) 5 Bom 614 (618)

- (98) 2 Cal W N 251 (253 254)  
(99) 28 Cal 677 (690 691 699)  
(70) 4 Cal 814 (815)  
(87) J All 138 (139)  
(23) AIR 1923 Pat 532 (535)  
(18) AIR 1918 Pat 412 (412)

*Rent due sales*

- (19) 16 Ind Cas 210 (212) 40 Cal 89 89 Ind App

App 131

(1 C)

- (95) 11 Mad 153 (157) (Mortgagee purchasing with leave of Court is not a trustee for the mortgagor)]

- 20 (81) 7 Cal 107 (118) 8 Ind App 63 (PC)  
(70) 2 N W P H C R 33 (40 41)  
(82) 4 Mad 1 (63)  
(95) 19 Bom 2 6 (232 235)  
(66) 6 Suth W R 223 (224 225)  
(63) 3 Agra 15 (15)

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it at any moment after the purchase, by partition into definite property<sup>21</sup> If the purchaser buys certain specific properties as belonging to the share of the judgment debtor, and in a subsequent partition between the members of the family some of the items purchased are allotted to the share of the other members, the purchaser cannot compel the judgment debtor to give him other properties which the judgment debtor got in substitution. The reason is that in sale *in invitum* there is no privity of contract between the judgment debtor and the purchaser, there being no act or representation on the part of the former, he is not bound by any rule of estoppel<sup>22</sup> If the judgment debtor is the *manager* of the undivided family and if he is sued substantially in his capacity as manager, the sale of the right, title and interest of the judgment debtor will pass the entire interest of all the members of the family, provided the debt in respect of which the decree is obtained was incurred for a *legal necessity* or for the benefit of the family<sup>23</sup> In a joint Hindu family, the father has a disposing power over the ancestral family property to pay off his antecedent debts not tainted with illegality or immorality. If, therefore, a decree is obtained against a Hindu father in respect of a debt which is neither illegal nor immoral, and his right, title and interest is sold in execution without any limitation, the sale has the same effect as a private conveyance by the father and the purchaser gets the entire interest in the family property including that of the sons<sup>24</sup> "All the sons can claim is that, not

[See (17) AIR 1917 Cal 2 (4) 45 Cal 294 (Sale in execution of rent decree)]

21 (78) 3 Cal 193 (209) 4 Ind App 247 (PC)

(91) 14 Mad 408 (418) (FB)

(84) 10 Cal 628 (635, 636) 11 Ind App 26 (PC)

(74) 11 Bom H O R 76 (80, 82, 83)

(74) 11 Bom H O R 72 (73, 74)

(84) 10 Cal 214 (216)

(15) AIR 1915 All 111 (112) 37 All 120 (123)

[See (16) AIR 1916 Mad 430 (431 432)]

(82) 5 Mad 125 (126 129) (KB)

(84) 11 All 362 (365)

(84) 7 Mad 130 (138) (Seems to be of doubtful authority in view of 15 Cal 70 (PC))

(82) 5 Mad 12 (14)

Decree against karnatan in a Malabar tarwad

(87) 10 Mad 357 (361) [Decree passed against a person not in his capacity of karnatan — Property of tarwad does not pass]

(82) 5 Mad 201 (207)

(95) 18 Mad 451 (453) (Tarwad property—Parti-

mortgage

al property

not pass.)

(1900) 25 All 214 (216 223) (FB)

(11) 33 All 436 (439 440)

(92) 14 All 150 (152)

(92) 14 All 179 (182) (FB).

(86) 11 All 205 (213)

(81) 11 All 72 (74)

(75) 7 N W P H O R 110 (112, 113)

(11) 8 All L Jour 322 (324)

(80) 15 Cal 303 (303)

(80) 15 Cal 70 (81, 82) 14 Ind App 167 (180)

Pun Ro No 1 (PC)

See however the following cases

(87) 11 Bom 700 (702)

(83) 7 Bom 91 (94 95)

(50) 12 Mad 325 (323, 330)

being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own . . . If the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings <sup>25</sup> There are only two cases in which the sons' interests do not pass in a sale in execution of a decree against the father —

- (1) when the father's interest in the property is alone sold excluding that of the sons, and
- (2) when the debt is proved to be not binding on them <sup>26</sup>

As to what are antecedent debts and as to how far a decree against a father can be executed against the sons, see the undermentioned cases <sup>27</sup>

*Sale in execution of decree against Hindu limited owner* — In order to determine the interest that passes to a purchaser in execution of a decree against a limited owner such as a *Hindu widow*, the test to be applied is whether the suit in respect of which the sale was directed was brought against the widow upon a cause of action *personal* to herself or one which affected the *whole inheritance* of the property in suit <sup>28</sup> Where it appears that the decree against the widow is in respect of the

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(81) 8 All 294 (297) (Suit against father on hypothecation bond—In execution father's rights and interest only sold—Held that such interest only passed)

(88) 12 Bom 625 (631, 632)  
(83) 12 Cal L Rep 104 (113, 118)  
(83) 9 Cal 508 (510)  
(80) 5 Cal L Rep 26 (40)  
(81) 6 Cal 135 (140, 141)

execution entire family property, only interest of

by him — Whether the whole of family estate passes at execution sale is a question of fact )  
(83) 9 Cal 495 (504)  
(82) 8 Cal 638 (637)  
(83) 9 Cal 389 (393, 394)  
(82) 11 Cal L Rep 263 (264)  
(93) 20 Cal 328 (337, 348)  
(50) 5 Cal 855 (863) (FB)  
(50) 5 Cal 845 (853)  
(82) 9 Cal L Rep 350 (352)  
(81) 7 Cal L Rep 218 (220) (Money decree against father—Only the right, title and interest of father passes)  
(50) 5 Cal 425 (435, 436)

(87) 14 Cal 572 (579, 580) 14 Ind App 77 (PC)  
(Held father's interest alone sold)  
27. (33) AIR 1933 All 235 (239) 55 All 283.  
(Nature of debt)  
(32) AIR 1932 Bom 522 (523)  
(32) AIR 1932 Bom 483 (483) (Decree against father can be executed against sons)  
(32) AIR 1932 Bom 433 (439) (Antecedent

(33) AIR 1933 Oudh 103 (104) (Antecedent debt.)  
(32) AIR 1932 Pat 12 (14) (Pious duty to discharge all debts of father is limited to the extent of assets in his hands.)  
28. (34) AIR 1934 Cal 163 (164, 165, 169) 60 Cal 1236

Jour 309  
surety for a stranger's crime—In execution sale father's interest only passes )  
ability as

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inheritance and binds the reversionary heirs, the purchaser of her right, title and interest takes the estate absolutely. No inference can be drawn from the circumstance that the certificate describes the property sold as the right, title and interest of the widow.<sup>29</sup> The matters for consideration in such cases are, as pointed out by Sir Lawrence Jenkins, C. J.

(1) What property could have been brought to sale in properly constituted suit

(2) What property was actually intended to be sold and bought

(3) Has there been such an error in the constitution of the suit or the conduct of the proceedings, that effect cannot be properly given to the intention, or to state it conversely, has there been a substantial representation of those interested in the property intended to be sold and bought?<sup>30</sup>

Where there is record available other than the judgment and the sale certificate to show whether the limited owner represented the inheritance or not, the nature of the debt will determine what passed at the sale.<sup>31</sup>

**9. Variance between proclamation of sale and sale certificate.**—When there is a variance between the description of the property as given in the proclamation of sale and as given in the sale certificate, the description in the former should be taken as conclusive and correct.<sup>1</sup> The description in the sale proclamation follows the description of the property attached and, as pointed out by the Judicial Committee "what is sold in a judicial sale is the property described in the schedule to the order of attachment."<sup>2</sup>

A obtains a decree against five brothers and takes out execution against them all. The proclamation of sale describes that the interests of all the brothers are to be sold. B purchases in court auction. But the order of confirmation of sale as well as the sale certificate by mistake mentioned only the share of the eldest brother as being

incurred for personal benefit of such member—  
Surviving member can recover the interest sold  
in execution of such decree from auction  
purchaser.)

(96) 23 Cal 374 (398, 399)

[See also (93) 17 Bom 393 (399, 400) (Widow's  
right of residence vanishes)]

(89) 12 Mad 260 (265, 267, 272) (K.B.) (Decree  
?)

(71) 7 Beng L R 213 (216) 16<sup>1</sup> Suth W R 49  
(If the debt by widow was incurred for legal  
necessity it would bind the reversioner)

(1662) 1662 Suth W R 119 (121) (F.B.)

(73) 20 Suth W R 30 (31)

(75) 21 Suth W R 3 (4) (Decree declaring sale  
of widow's interest only — Reversioners not  
affected)

(75) 21 Suth W R 306 (308) 1 Cal 133 2 Ind  
App 275 (I.C.)

(79) 3 Cal L Rep 530 (532, 533) (Decree against

(Decree

in execution of such decree her right of  
residence vanishes.)

(But see (34) AIR 1931 Cal 162 (163) 60 Cal  
1236 (Property of so and so as widow and  
means sale of only limited interest)

(74) 8 Mad H O R 186 (183) (Widow held to  
be her husband's representative)]

30. (1900) 21 Bom 135 (146 147)

31. (32) AIR 1932 Mad 23 (31)

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(94) 17 Mad 203 (200) (Do)

(11) 34 Mad 188 (201 203)

(03) 30 Cal 550 (555) 30 Ind App 81 (P.C.)

(Decree against daughter — Held only limited  
interest passed)

[See (76) 25 Suth W R 285 (289, 290) 1 Cal  
226 11 Ind App 7 (P.C.) (Decree against widows  
of undivided member of Hindu family for debts

(33) AIR 1933 Mad 232 (233) (Property not  
included in proclamation of sale but included in  
sale certificate — Purchaser does not get title to  
such property)

purchased In such a case, it has been held that the entire interest of all the brothers as described in the sale proclamation nevertheless passes to B<sup>3</sup>

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**10. Effect of new interpretation of law on sale.** — The rights of the parties in an execution sale are fixed with reference to the state of the law at the time of sale and any subsequent interpretation of the law will not operate so as to affect the result of that sale<sup>1</sup> In *Abdul Aziz v Appayasami*,<sup>2</sup> a purchase was made in court auction, of the right, title and interest of a zamindar in an impartible zamindari By the law as it stood at the time of the sale, the zamindar took only a life estate But subsequent to the sale, the law was changed by the Judicial Committee holding that the zamindar took an absolute estate Taking advantage of the subsequent change in the interpretation of the law the purchaser contended that the entire absolute estate passed to him under the court sale The Judicial Committee negatived this contention holding that "The reversal of the previously accepted interpretation of the law does not displace its application to the construction of the contracts contained in the certificate of sale under consideration and that the parties must be taken to be bound by the law as it was at the time understood."

**11. Effect of certificate of sale.** — The irregularities if any in the execution proceedings are cured by the certificate of sale<sup>1</sup> The purchaser's title becomes complete on the issue of the certificate and he is entitled to apply for possession of the property<sup>2</sup>

**12. Certificate if operates as res judicata.** — A sale certificate does not operate as *res judicata* inasmuch as there cannot be said to have been any litigation as to the title of the property purchased But persons who are parties to the suit under which the sale took place or their representatives in interest cannot, by virtue of Section 47, question the title of the purchaser<sup>1</sup> The rights of third parties are, however, not affected by the court sale<sup>2</sup>

**13. Limitation.** — The provisions of the Limitation Act do not apply to an application for the issue of a sale certificate The reason is that there is no duty imposed on the purchaser to apply for the certificate The Court is bound as a matter of course to grant the certificate on the sale becoming absolute, and its function in granting the certificate is ministerial and not judicial<sup>1</sup>

**14. Registration of sale certificate.** — Under Section 17, clause (12) of the Registration Act a certificate of sale is not compulsorily registrable<sup>1</sup> Under Section 89,

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| 3. ('03) 27 Bom 334 (339, 341)<br>Note 11  | (16) AIR 1916 Pat 362 (362) (Purchaser suing for possession—Defendant pleading that decree was tainted by fraud—Onus is on the defendant.) |
| 2. ('19) AIR 1918 Pat 73 (76) 2 Pat L Jour 725   |  |
| 2 ('03) 27 Mad 131 (142, 143) 31 Ind App 1 (PC)  |  |
| Note 11  |  |
| 1. (82) 5 All 142 (157) 9 Ind App 182 (PC)   |  |
| { See also (81) 7 Cal 91 (95, 96)  |  |
| { 87) 11 Cal 376 (378) }   |  |
| 2. (33) 17 Bom 228 (229)   | Note 13  |
| (79) 3 Bom 433 (436)   |  |
| ('02) 24 All 475 (476)   |  |
| { See (93) 17 Bom 718 (721)  |  |
| { 72) AIR 1932 Rang 11 (12) 9 Rang 565 }   | Note 14  |
|  |  |
|  | (sale)   |
| (19) AIR 1919 Pat 309 (310) (Purchaser not bound by statement in sale certificate as to situation of property purchased) | of certificate purchaser does not acquire priority as  |

O. 21 R. 94  
Notes 14-16

clause (3) of the same Act the Court should send a copy of the sale certificate to the registering officer<sup>2</sup>

**15. Court-fee on application for sale certificate.** — It has been held in the undermentioned cases<sup>1</sup> that an application by the purchaser for the certificate need bear no court fee stamp as the rule does not even require the application to be in writing

**16. Appeal.** — No appeal lies against an order amending or refusing to amend a sale certificate<sup>1</sup> In the undermentioned case<sup>2</sup> it was held that an order refusing to grant a certificate in favour of the decree holder purchaser was not a matter coming under Section 47 and was not appealable

### Local Amendment

#### RANGOON

The following shall be inserted as Rules 94A and 94B

O 21 R 94A  
(Rangoon)

Copy of sale certificate to the Sub Registrar

94A A copy of every sale certificate issued under Rule 94 shall be sent forthwith to the Sub Registrar within whose sub district the land sold or any part thereof is situate

O 21 R. 94B  
(Rangoon)

Certification of name and address of purchaser to Superintendent of Land Records

94B If in execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under Rule 92 (1)

O. 21 R. 95

**R. 95. [S 318]** Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may

Delivery of property in occupancy of judgment-debtor

against a mortgagee whose mortgage is option-ally registrable ]  
( 84 ) 7 Mad 418 (419) (Do)

to bear stamp expenses )  
( 84 ) 10 Cal 112 (96) 19 Cal L Rep 164

The following cases under the old and repealed Registration Act are no longer law

( 70 ) G Mad H C R App 39 (40) (Proceedings 18th November 1871)

( 10 ) 7 Bom H C R A G 136 (137)

( 81 ) 8 Mad 37 (41) (FB)

( 73 ) 10 Bom H C R 435 (439)

( 80 ) 2 All 392 (393)

[See also ( 83 ) 11 All 568 (573) ]

2 ( 82 ) 1882 All W 51 (51)

( 93 ) 1903 Pun Re No 142, page 652

Note 15

1 ( 89 ) 13 Bom 670 (671)

As for the stamp requisite for the certificate see the following cases

( 30 ) AIR 1930 Bom 392 (393) (FB) (Purchaser

of mortgagee )

stamp duty )

Note 16

1 ( 97 ) 20 Mad 487 (459)

( 01 ) 23 All 476 (478)

( 99 ) 26 Cal 529 (530, 531)

2 ( 08 ) 7 Cal L Jour 436 (438)

appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

O. 21 R. 95  
Note 1

[1877, S. 318; 1859, S. 263. See S. 74 and O. 21 R. 35.]

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Delivery of possession to purchaser.</li> <li>2. Purchase of undivided share See Note 4, Rule 96</li> <li>3. Effect of formal possession on limitation. See Note 4, Rule 35</li> <li>3a. "Immoveable property"</li> <li>4. Successive applications for delivery of possession. See Note 4 Rule 97</li> </ol> | <ol style="list-style-type: none"> <li>5. Limitation for application.</li> <li>6. Application, if a step-in-aid of execution.</li> <li>7. Separate suit for possession. See Note 8 and Note 19 to Section 47.</li> <li>8. Procedure under this Rule.</li> <li>9. Appeal. See Note 19 to Section 47</li> </ol> |
|--|---|

### Other Topics (miscellaneous)

And a certificate of sale has been granted " See Note 1  
' Nature of possession " See Note 1

#### 1. Delivery of possession to purchaser. — See Note 8, *infra*.

The holder of a decree for possession of immovable property may obtain possession of the property under Rules 35 and 36. An auction-purchaser to whom a sale certificate has been granted under Rule 94 has to apply under this rule or under Rule 96 to obtain delivery of possession<sup>1</sup>

If the property is in the possession of the judgment debtor, or of some person on his behalf the purchaser is entitled to *actual* possession under this rule<sup>2</sup> If it is in the possession of tenants or other persons entitled to occupy the same, the purchaser is only entitled to *symbolical* possession under Rule 96. The Code thus prescribes two modes of delivery of possession based upon the nature of the property concerned. In respect of the *same* property there cannot be two modes of giving possession, one symbolical and the other actual<sup>3</sup>

Unless the delivery of possession through Court to the auction purchaser is effected in one of the modes prescribed under Rules 95 and 96, no possession can be deemed to be given<sup>4</sup> Therefore if a person is dispossessed otherwise than in due course of law as provided by these rules, he may institute a summary suit under Section 11 of the Specific Relief Act to recover possession<sup>5</sup>

But when once the auction puts the auction purchaser in possession and the formalities of law are complied with, the delivery is complete,<sup>6</sup> and thereafter the possession of the judgment debtor or any person becomes that of a trespasser<sup>7</sup> Therefore if the auction purchaser is subsequently dispossessed, it will be a cause of action for a regular suit, but no application under these rules is thereafter maintainable<sup>8</sup> When a

#### Order 21 Rule 95 — Note 1

1. (92) 15 Mad 203 (200) (Delivery of possession follows peremptorily from grant of sale certificate)

(17) AIR 1917 All 312 (312) 39 All 460 (462)

2. (72) 17 South W R 60 (80)

(30) AIR 1932 Pat 151 (153) (In case of zamindari property or tank or mineral rights physical removal of judgment debtor is not possible and mode of delivery in such cases is by proclaiming that decree holder or auction purchaser has been put in possession—such delivery is actual and not symbolical)

[See (63) 3 Bom L R 977 (978)]

3. (32) AIR 1932 Pat 145 (147) 11 Pat 65.

[See also (31) AIR 1931 Pat 119 (120) (Mode of delivery of possession does not depend on discretion of Court but depends on nature of property)]

4. (20) AIR 1920 Lah 30 (32)

5. (05) 11 Cal W N 694 (696)

6. (66) 6 South W R Misc 103 (103)

(23) AIR 1923 Mad 25 (26)

7. (22) AIR 1922 Pat 147 (199)

**O. 21 R. 95**  
**Notes 1-5**

purchaser is put in possession of a field with crops on it, he is entitled to such crops<sup>9</sup>

As to whether the judgment debtor can file a *suit* where a wrong property is delivered to the auction purchaser or should only apply under Section 47, see Section 47 Note 19 Rules 95 to 103 are applicable to proceedings under the Chota Nagpur Tenancy Act, VI of 1920 See Section 50

As to whether a question relating to the delivery of possession to the auction purchaser or decree holder falls under Section 47 of the Code, see Note 19 to Section 47, *ante*

**2. Purchase of undivided share.** — See Note 1 to Rule 96, *infra*

**3. Effect of formal possession on limitation.** — See Note 4 to Rule 35, *ante*

**3a. "Immoveable property."** — It is only upon a sale of immoveable property that delivery of possession of that property can be ordered under this rule. A usufructuary mortgage is not immoveable property and a purchaser cannot proceed under this rule<sup>1</sup>

**4. Successive applications for delivery of possession.** — See Note 4 to Rule 97 *infra*

**5. Limitation for application.** — The period of limitation for an application for delivery of possession by a purchaser of immoveable property at a sale in execution of a decree is three years from the date when the sale becomes *absolute* see Article 180 of the Limitation Act<sup>1</sup> As to when the sale becomes *absolute*, see O 21 R 93<sup>2</sup>

suit for possession, see Note 19 to Section 47, *ante*

An order for delivery of possession is not a decree for possession and therefore cannot be kept alive by periodical applications<sup>3</sup> Where an application for delivery was made within three years of the date when the sale became absolute, but delivery was not effected by reason of laches on the part of the purchaser, a second application under this rule more than three years after confirmation of sale will be barred, Article 181 does not apply to such a case<sup>4</sup> But if the delivery could not be effected owing to causes beyond the control of the purchaser and the application had been "closed," it has been held that the second application should be considered to be a revival of the first and consequently is not barred under Article 180<sup>5</sup>

(97) 1 Cal W N 192 (194)

(28) AIR 1928 Lah 910 (911)

9 (36) AIR 1936 Cal 157 (158) (He is entitled to cut the crop)

**Note 3a**

1 (32) AIR 1932 Mad 283 (284)

**Note 5**

1. (03) 30 All 390 (392)

(83) AIR 1933 Cal 311 (311)

(32) AIR 1932 Cal 75 (75)

(12) 1912 Mad W N 1136 (1137)

(30) AIR 1930 Cal 86 (89) 56 Cal 608

(09) 5 Ind Cas 89 (90) (Cal)

(35) AIR 1933 Mad 803 (803) 58 Mad 893 (PB)

[But see (27) AIR 1927 Nag 294 (295)]

The view that the period is to be reckoned from the date of issue of the sale certificate adopted

in the undermentioned cases under the Limita

(193) AIR 1933 Mad 745 (745)



**6. Application, if a step-in-aid of execution.** — Where the decree holder himself purchases the property in execution, and applies under this rule for delivery of possession of the property, the question arises whether such an application is a step in aid of execution within the meaning of Article 182, clause (5) of the Limitation Act. That question depends again upon another question, *viz*, whether the purchase by the decree holder is *pro tanto* satisfaction of the decree. For, unless the decree is satisfied, a fresh application for execution will lie. It has been held by the High Courts of Allahabad and Patna that there is no difference between an application by decree-holder purchaser and by a third party purchaser to obtain delivery of possession of the property purchased by him and therefore such an application is *not* a step in aid of execution,<sup>1</sup> the ground of the decisions being that execution comes to an end as soon as the property is sold and the failure to obtain possession does not affect the satisfaction of the decree. But it has been held by the High Courts of Calcutta,<sup>2</sup> Bombay<sup>3</sup> and Madras<sup>4</sup> that an application by a decree holder purchaser under this rule is still an application in execution and therefore a step in aid of execution of the decree within the meaning of Article 182, the ground of those decisions being that until possession is secured to the decree holder purchaser, the decree cannot be said to be satisfied. The same view has been taken in the Judicial Commissioner's Court of Nagpur.<sup>5</sup>

**7. Separate suit for possession.** — See Note 8 below and Note 19 to Section 47, *ante*.

**8. Procedure under this Rule.** — It is not obligatory on the purchaser to apply for delivery of possession under this rule, it is open to him to obtain possession out of Court.<sup>1</sup> If he is a stranger purchaser the remedies by way of an application under this rule and by way of suit are concurrent.<sup>2</sup> He may bring a suit for possession in the first instance,<sup>3</sup> or may apply under this rule, and if unsuccessful<sup>4</sup> or if the summary remedy is barred<sup>5</sup> he may institute a regular suit for possession. If, however, the decree holder himself is the purchaser, there is a conflict of decisions as to whether a suit for possession will lie: see Note 19 to Section 47 *ante*, and the undermentioned cases.<sup>6</sup> See also Note 5 to Rule 97, *infra*.

The jurisdiction of the Court to order delivery under this rule exists only if the property is in the occupancy of judgment debtor, or of some person on his behalf or of some person claiming under a title created subsequent to the attachment of such

(19) AIR 1919 Mad 1001 (1004) (Per Oldfield, J.)  
(See also (35) AIR 1935 Mad 803 (808) 55 Mad 803 (113))

**Note 6**

1. (28) AIR 1928 All 868 (370) 50 All 670  
AIR 1919 All 890, Dissented from)
- (23) AIR 1923 Pat 22 (22, 24) 2 Pat 249
- (08) 31 All 82 (97, 104, 107) (F.B.) (19 All 477,  
Dissented from)

tion of auction purchaser is different from that of decree holder.)

2. (1900) 27 Cal 703 (712, 713)

(09) 13 Cal W N 4 (695)

3. (11) 11 Ind Cas 957 (959) 35 Bom 452

4. (27) AIR 1927 Mad 283 (289) 50 Mad 403.

5. (33) AIR 1933 Nag 369 (370)

**Note 8**

1. (30) AIR 1930 Cal 536 (587)  
(See also (36) AIR 1936 Mad 733 (739) (Attempted delivery of actual possession—No objection by judgment-debtor—Objection only by tenants—Delivery as far as the former is concerned must be held to be complete)
2. (26) AIR 1926 All 120 (121).  
(16) AIR 1916 Mad 430 (431, 432).  
(87) 14 Cal 644 (648)
3. (16) AIR 1916 Mad 430 (432)
4. (86) 11 Cal 169 (173)
5. (26) AIR 1926 All 120 (121)  
(07) 23 All 463 (466)
6. (32) AIR 1932 Nag 140 (141) 23 Nag L R 250 (Suit for possession by decree holder purchaser is not barred)

**O. 21 R. 95**  
**Notes 8-9**

property.<sup>7</sup> Therefore, if the Court is satisfied on *prima facie* evidence that the person in possession of the property is holding it on his own account, it has no option but to dismiss the application under this rule.<sup>8</sup> Thus a prior mortgagee who purchased property in execution of his own mortgage decree and who is in possession, is not a judgment-debtor and cannot be dispossessed by the auction purchaser under this rule.<sup>9</sup>

In the undermentioned case<sup>10</sup> it was held by the High Court of Calcutta that where possession was ordered to be delivered under this rule, the decree holder was entitled to get possession without the property being burdened with huts, etc., erected on the property by the judgment-debtor and that it was not necessary that the order should specifically mention the removal of such burden. A contrary view has, however, been taken in a later case by the same High Court.<sup>11</sup>

Where possession is delivered under this rule, no proclamation by beat of drum is necessary.<sup>12</sup> Where a house sold in auction is ordered to be delivered to the purchaser under this rule but is found locked, the Court can direct the breaking open of the lock in order to put the purchaser in possession.<sup>13</sup>

It has been held in the undermentioned case<sup>14</sup> that when an application is made under this rule for actual delivery, the Court cannot order symbolical delivery.

As regards the extent of the inquiry to be made in proceedings for delivery of possession under this and the succeeding rules, the same considerations apply to such an inquiry as are applicable to proceedings under O. 21 R. 58 and a thorough inquiry into questions of title is not contemplated.<sup>15</sup>

**9. Appeal.** — See Note 19 to Section 47, *ante*

**O. 21 R. 96**

**R. 96. [S. 319.]** Where the property sold is in the occu-

**Delivery of property in  
occupancy of tenant.**

pancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

[ 1877, S. 319; 1859, S. 264. ]

7. ('87) AIR 1937 Cal 301 (303) (Mo against executors in their represents — Sale of property — Purchaser succeeding under Rr 95 and 97 obtain against beneficiaries under will — possession is not 'on behalf' of exo ('87) AIR 1937 Mad 582 (584) (Moi against Hindu father — Decision in partition suit that father fully represented the sons and that the decree was binding on them — They must be treated as parties to mortgage decree and delivery of possession can be ordered against

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1:

however, does not seem to be sound 1935 Mad 547)

15. ('35) AIR 1935 Rang 159 (159)

# Synopsis

O. 21 R. 96  
Notes 1-5

1. Legislative changes.
2. Scope of the Rule.
3. Delivery of property in the occupancy of a tenant.

4. Purchase of undivided share.
5. Symbolical delivery.
6. Limitation.
7. Appeal. See Note 19 to S. 47.

**1. Legislative changes.**—The words 'on the application of the purchaser' are new. See Note 6 *infra*.

**2. Scope of the Rule.**—This rule provides for cases where the judgment debtor himself is not entitled to actual possession of the property as where the property is in the occupancy of tenants or other persons entitled to occupy the same.<sup>1</sup> The delivery of possession in such cases has to be made in the manner provided by this rule. See Rule 35 *ante*, and Note 3 below. When once the Court passes an order for delivery of possession under this rule it has thereafter no jurisdiction to stop the issue of the warrant for delivery and to order an enquiry into any objections subsequently raised in the matter.<sup>2</sup>

**3. Delivery of property in the occupancy of a tenant.**—If the property is in the occupancy of a tenant or other person entitled to occupy the same, the auction purchaser is only entitled to *symbolical* delivery of possession under this rule.<sup>1</sup> Therefore, where the auction purchaser *dispossessed* a tenant under a warrant for delivery of possession under Rule 95 *ante*, the tenant will be entitled to bring a suit for possession under Section 11 of the Specific Relief Act, as the dispossession could not be said to be in due course of law.<sup>2</sup>

**4. Purchase of undivided share.**—The holder of a decree for possession of an undivided share in a property may obtain joint possession in the manner provided in Rule 35, *ante*. There is no corresponding provision for delivery of joint possession to the purchaser of an undivided share in a property. But in such cases possession should be delivered under the provisions of O. 21 R. 95, read with Rule 35 sub rule (2) this rule does not apply to such a case.<sup>1</sup> Where the purchase is of an undivided share in a joint Hindu family, the remedy of the purchaser is only to institute a suit for partition and for possession of the share of the judgment debtor.<sup>2</sup> Where the judgment-debtor is a co-sharer and is himself in exclusive possession,<sup>3</sup> or where the entire rights of the joint family are sold in auction,<sup>4</sup> the purchaser is entitled to actual possession of the property under Rule 95, *ante*.

**5. Symbolical delivery.**—See Rule 35, *ante*. Symbolical possession is different from "paper possession" that is, the possession obtained by a party who being entitled to *actual* possession, only obtains *delivery* of possession on paper, without getting actual possession.<sup>1</sup> See also Note 3 above.

Delivery of symbolical possession is effective only as against the judgment debtor.

## Order 21 Rule 96 — Note 2

1. See (59) 1889 Bom P J 92 (92) (Mortgages in possession of property sold in auction)

- 2 (27) AIR 1927 Oudh 304 (304) 1 Luck 226

### Note 3

- 1 (27) AIR 1927 Rang 127 (128)  
(18) AIR 1918 Mad 207 (208)  
(35) AIR 1935 Mad 547 (548) 58 Mad 936  
2. (08) 12 Cal WN 694 (696)

### Note 4

1. (14) AIR 1914 All 511 (511) 30 All 181 (182)

- (16) AIR 1916 Mad 430 (430)

- (27) AIR 1927 Sind 199 (201)

- [See (35) AIR 1935 Rang 11 (12)]

2. (06) 29 Mad 294 (295)

- (78) 2 Bom 676 (678)

- (27) AIR 1927 Sind 199 (201)

- (81) 5 Bom 499 (501 to 505)

- [But see (81) 5 Bom 505n (506n)]

3. (17) AIR 1917 Cal 232 (233)

4. (93) 17 Bom 718 (721)

### Note 5

1. (14) AIR 1915 Mad 207 (208)

O. 21 R. 96  
Notes 5-7

and is of no effect against a third person who is in possession of the property. The possession of such third person continues to be undisturbed in spite of the delivery of symbolical possession.<sup>2</sup>

**6. Limitation.** — See Note 5 to Rule 95 *ante*

Under Section 319 of the Code of 1882, it was held that it was the duty of the Court to order symbolical delivery of possession and that there was no period of limitation for delivery of possession under that Section.<sup>1</sup> The insertion of the words '*on the application of the purchaser*' in this rule as well as in Rule 9a, and the insertion of a new Article, *viz* Article 180 in the Limitation Act, 1908, has made it clear that such applications should be made within three years from the date when the sale becomes absolute.

**7. Appeal** — See Note 19 to Section 17, *ante*

**RESISTANCE TO DELIVERY OF POSSESSION TO  
DECREE-HOLDER OR PURCHASER**

O. 21 R. 97

Resistance or obstruction to possession of immoveable property

**R. 97.** [Ss 328, 334] (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

[1877, S. 334; 1859, Ss 226, 268. See O 21 R. 35]

**Local Amendment**

PATNA

Add the following as sub rule (3)

'(3) The provisions of Section 5 of the Limitation Act 1908, shall apply to applications under this rule'

**Synopsis**

- 1 Applicability of the Rule
- 2 "Decree for possession" — Partition decree
- 2a "Court"
- 3 Limitation
- 4 Fresh application for delivery, if can be made

- 5 Remedies of a person obstructed
- 6 Order 9 if applies re proceedings under this Rule See S 141 Note 2 and O 9 R 9 Note 1
- 7 Appeal
- 8 Revision

**1 Applicability of the Rule** — According to the High Court of Allahabad,<sup>1</sup> an application under this rule is not maintainable unless it is shown that the decree

2 (40) AIR 1940 Cal 16 (17) 70 Cal L Jour 111 (114) (Order for delivery of possession of land in actual possession of tenants made in favour of the decree holder purchaser under O 21 R 96 does not amount to dispossession.)  
(35) 39 Cal W N 1306 (1308) (When the purchaser who has got symbolical possession removes

crops grown on the land by the third person in actual possession he is guilty of theft.)

Note 6

1 (18) AIR 1918 Cal 545 (546)

Order 21 Rule 97 — Note 1

1 (24) AIR 1924 All 495 (493 500) 46 All 695 (F B)

O.21 R.97  
Note 1:

holder or the auction purchaser has applied for delivery of possession or at least, he made an attempt to obtain possession *out of Court* and has been *obstructed or resisted* in obtaining it. The High Court of Calcutta has dissented from the view that this rule has any application to resistance to obtain possession *out of Court*, and has held that in the absence of an attempt *on the part of the Court* to give delivery in execution, this rule has no application.<sup>3</sup> There must be some *overt act* of opposition to delivery of possession,<sup>4</sup> though it is not necessary that the person resisting should be *actually present* at the obstruction.<sup>4</sup> Thus, the locking of the house by the judgment debtor amounts to resistance within the meaning of this rule.<sup>5</sup>

It is necessary, before an investigation is made under this rule, that an *application* should be made to the Court by the *decree holder or auction purchaser*.<sup>6</sup> The Court cannot order investigation *suo motu*,<sup>7</sup> or on the Amin's or Nazir's report,<sup>8</sup> or on the application of the judgment debtor,<sup>9</sup> or of third parties.<sup>10</sup> It has, however, been held that the Court may direct investigation under this rule on an *oral* application by the person obstructed.<sup>11</sup> It has also been held that where the decree holder was present when the report of the bailiff was placed before the Court, it is reasonable to hold that the further proceeding was taken at the instance of the decree holder.<sup>12</sup> The Court has to see *prima facie* whether there is any just cause for resistance and obstruction and need not investigate the question of title thoroughly,<sup>13</sup> though it may adjudicate upon questions of *title* between the contending parties in regard to their right to possession and pass orders under Rule 98, or Rule 99.<sup>14</sup> Where the auction-purchaser is present but does not adduce evidence with regard to one lot and one witness is examined by the opposite party and regarding another plot there is no opposition and the Court passes an order it has been held that there is sufficient investigation so as to bring it within Article 11A of the Limitation Act.<sup>15</sup> The order passed on such investigation is final subject to the result of the suit under Rule 103, *infra*.

The procedure under this rule is *permissive and not mandatory*.<sup>16</sup> See Notes 3, 4 and 5 below.

This rule applies also to decrees for possession under Section 9 of the Specific Relief Act,<sup>17</sup> and to proceedings under Section 78 of the Madras Hindu Religious Endowments Act, II of 1927,<sup>18</sup> but does not apply to proceedings for delivery of possession under the Provincial Insolvency Act<sup>19</sup> or the Mamlatdars Act<sup>20</sup> (Bombay Act III of 1876).

2. (33) AIR 1933 Cal 246 (250) 60 Cal 8

L R

3. (24) AIR 1924 All 495(500 501) 46 All 693(FB)

[See also (33) 7 Cal L Jour 93 (99) (Obstruction

(But see (81) 3 Mad 104 (106, 107) (Decision prior to Amendment Act of 1879 — Enquiry limited to fact of possession)]

15. (35) AIR 1935 Cal 267 (267)

16. (19) AIR 1919 Pat 425 (430) 4 Pat L Jour 42 (P R)

9. (36) 33 Cal 457 (459)

10. (29) 14 All 417 (419)

(38) 11 Cal W N 113 (117)

O. 21 R. 97  
Notes 2-4

2. "Decree for possession" — Partition decree. — A decree for partition of immovable property is a decree for possession within the meaning of this rule<sup>1</sup> The rule applies also to an order for delivery of possession<sup>2</sup>

2a. "Court." — It has been held that a Court to which a decree is sent for execution can entertain an application under this rule although the decree has not been passed by it or the property has not been sold by it<sup>1</sup>

3. Limitation. — The period of limitation for an application under this rule is thirty days from the date of the resistance or obstruction (Limitation Act, Article 167) The resistance or obstruction is not necessarily the first resistance or obstruction, and every time the decree holder or auction purchaser is obstructed, he obtains a fresh cause of action and he may apply within thirty days of such obstruction<sup>1</sup> See Notes 4 and 5 below

An application under this rule may be treated as an application in an execution proceeding but cannot be treated as an application for execution within the meaning of Section 15 of the Limitation Act<sup>2</sup>

For fuller discussion, see Note, to Article 167 in the Authors' Commentaries on the Limitation Act

4. Fresh application for delivery, if can be made. — If the holder of a decree for possession applies for delivery of possession, but is resisted or obstructed in obtaining possession it is not obligatory on him to proceed under this rule, he may either apply again for execution of the decree under Rules 35 and 36 *ante*,<sup>1</sup> or he may institute a regular suit for possession against the persons obstructing if they are third parties<sup>2</sup>

But if an auction purchaser is resisted or obstructed in the delivery of possession and he does not apply for an investigation under this rule within the period prescribed (thirty days), is it open to him to apply again under Rules 95 or 96, and if again resisted, to apply under this rule? If the first resistance was by the judgment debtor or by any person on his behalf, there is nothing to prevent the purchaser from applying again for delivery of possession under Rule 95, within the period of limitation prescribed and the resistance offered afresh will furnish a fresh cause of action for proceeding under this rule<sup>3</sup> But if the original obstruction was by third parties and not by the judgment debtor or any person claiming through him, it has been held

- Note 2  
1. (93) 18 Mad 127 (129 130)  
2. (39) AIR 1939 Cal 491 (496) (Order for receiver to obtain possession — Application under O. 21, R. 97 made on his behalf is proper)

- Note 2a  
1 (36) AIR 1936 Sind 11 (13) 30 Sind L.R.290

- (99) 13 Cal W N 724 (727, 728)  
(28) 1928 Mad W N 236 (236)  
(21) AIR 1921 Mad 559 (561)  
(96) 18 All 233 (237)  
[But see (10) ■ Ind Cas 649 (649) (Lab)]  
2 (81) ■ Bom 602 (603)  
[See (35) AIR 1935 Mad 803 (603) 56 Mad 893 (F B) (Decree holder purchaser seeking delivery of possession obstructed by judgment-debtor — His remedy ■ under Order 21 R. 97, O. P. C. — If obstructed by judgment debtor and

- Note 3  
1. (81) 5 Mad 113 (114)  
(33) AIR 1933 Bom 457 (459) (F B)  
(96) 18 All 233 (236)  
(99) 13 Cal W N 724 (727 728)  
(25) 1928 Mad W N 236 (236)  
(39) AIR 1939 Cal 491 (497)  
2. (35) AIR 1935 Cal 333 (334) 62 Cal 66

- Note 4  
1 (82) 5 Mad 113 (114)  
(33) AIR 1933 Bom 457 (458) (F B)

- (14) AIR 1914 Mad 117 (117)

that a second application for delivery of possession under Rule 95 is not maintainable<sup>4</sup> Where once possession has been effectively delivered to the purchaser a subsequent obstruction by the judgment debtor will not entitle the purchaser to apply under this Rule<sup>5</sup> See Note 5 below

O. 21 R. 97  
Notes 4-5

After a final decree for foreclosure the decree holder obtained delivery of possession as against the judgment debtor but was unable to get it against a transferee *pendente lite* from the judgment debtor The decree holder then put in a second application for delivery of possession as against the transferee It was held that the second application must be treated as one under O 21 R 11 and not under this rule<sup>6</sup>

### 5. Remedies of a person obstructed — See Notes 3 and 4 above

It is not obligatory on the decree holder or auction purchaser to resort to the summary remedy provided under this rule<sup>1</sup> But if he applies under this rule and an order is made on investigation against him then under Rule 99 his remedy is only to file a suit under Rule 103 within one year from the date of the order to establish his right to the property The following tabular statement will illustrate the various remedies open to the person obstructed —

#### *Remedies of a person obstructed*

Person obstructed	Obstruction by whom	Remedy
I Holder of a decree for possession	a On obstruction by judgment-debtor or by person claiming under him	1 May proceed under Rule 97 2 May apply again in execution of the decree under Rules 85 and 86 and if obstructed again may apply under Rule 97 <sup>2</sup>
	b On obstruction by third parties	1 May proceed under Rule 97 2 May apply again in execution of the decree under Rules 85 and 86 (Note 4) 3 May institute a regular suit for possession (Note 4)
II Purchaser in sale in execution	a On obstruction by judgment-debtor or any person claiming under him	1 May proceed under Rule 94 2 May apply again for delivery under Rules 85 and 86 (See Note 4) 3 May file a suit for possession But if the decree holder is the purchaser see Note 19 to Section 47
	b On obstruction by third parties	1 May proceed under Rule 97 2 May file a suit for possession (Note 3) Note — There is a conflict of decisions as to whether a second application for delivery of possession will lie

4 (O) 196 All 365 (367)

#### Note 5

1 (19) AIR 1919 Lat 425 (40) 4 Pat L Jour 34 (F B)  
2 (32) AIR 1932 Cal 241 (412) 59 Cal 739 (11)  
3 Not necessarily bound to proceed under R. 97

**O.21 R.98**  
**Notes 1-5**

judgment debtor<sup>3</sup> inasmuch as, in such case, his obstruction cannot be said to be without just cause

By virtue of Section 146 *ante*, an application under this rule can be maintained against any person claiming under the judgment debtor and bound by the decree, such as a tenant,<sup>4</sup> or a transferee *pendente lite*,<sup>4</sup> or a subsequent purchaser from the judgment debtor in execution of a money decree against him.<sup>5</sup> The Court can pass an order under this rule only on an application made to it under Rule 97 and cannot therefore pass an order under this rule on an application for possession under Rule 95.<sup>6</sup>

**2. Presidency Small Cause Court.** — Under Section 48 of the Presidency Small Cause Courts Act, the provisions of the Code of Civil Procedure are made applicable to proceedings under Chapter VII of the Act, and, therefore, the Small Cause Court has power to direct removal of improper obstruction on the part of the judgment debtor under this rule.<sup>1</sup>

**3. Alienee from judgment-debtor pending attachment.** — Under Rule 95, the Court may order delivery of possession against a person "claiming under a title created by the judgment debtor subsequently to the attachment of such property." It has been held by the High Court of Madras<sup>1</sup> that this rule should be read along with Rule 95 and an order can be made under this rule against such a person, and further that such person is a representative of the judgment debtor within the meaning of Section 146. See Note 1 and also Note 2 to Rule 102.

or as  
and

and he resists delivery of possession, the Court cannot order delivery of possession under this rule.<sup>2</sup> But the Court ought to decide the question of the existence or otherwise of just cause, on the evidence before it and not on a consideration that has no basis at all.<sup>3</sup>

**5. "Is still resisted or obstructed."** — If the judgment debtor or any person acting at his instigation, again resists delivery of possession after an order for delivery is passed under this rule, the Court has the power to commit such person to prison, on an application by the person obstructed.

<sup>4</sup> (20) AIR 1920 Mad 504 (507, 508)  
(10) 7 Ind Cas 418 (419) 34 Mad 450  
[See also (21) AIR 1921 Mad 559 (561, 562)]

<sup>5</sup> (20) AIR 1920 Mad 943 (944)

<sup>6</sup> (28) AIR 1928 Lab 215 (216)

[See also (37) AIR 1937 Mad 366 (366) (Order under this rule can be passed only after notice to the judgment debtor and investigation of the case as contemplated by R. 97 (2)]]

**Note 2**

<sup>1</sup> (24) AIR 1924 Mad 74 (74)

**Note 3**

<sup>1</sup> (10) 7 Ind Cas 418 (419) 34 Mad 450,

**Note 4**

<sup>1</sup>. (10) 8 Ind Cas 133 (133) (Mad)

(90) 13 Mad 504 (507, 508)

(20) AIR 1920 Mad 105 (107) 48 Mad 540  
(Unmarried sisters are not bound by sale of the judgment-debtor's interest and cannot be removed from possession.)

(39) AIR 1939 Nag 287 (293) (Between date of mortgage and suit thereon, land declared as under S. 68 G P Tenancy Act 1920 and mortgagor becoming entitled to benefit of S. 49 of Act—Mortgagor can claim such benefit in execution proceedings and although decree directs delivery of possession, decree holder will get only possession of proprietary rights subject to the occupancy rights that have accrued to the judgment debtor.)

<sup>2</sup> (28) AIR 1928 Mad 806 (809)

(10) 1910 Mad IV N 641 (642)

(90) 13 Mad 504 (507)

<sup>3</sup>. (20) AIR 1920 Pat 137 (138)



6 "In obtaining possession," meaning of — The word possession in this rule is not restricted to actual or *physical* possession but includes also constructive possession or possession in law by receipt of rent or otherwise<sup>1</sup>

O. 21 R. 98  
Notes 6-8

7. Renewal of resistance — Fresh cause of action — See Order 21, Rule 97 Note 4

8. Appeal — See Section 47 Note 19 and Order 21 Rule 101

**R. 99.** [Ss 331, 335] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application

O. 21 R. 99

[1877, Ss 331, 335, 1859, Ss 229, 269]

#### Local Amendments

##### ALLAHABAD

For the words in brackets (other than the judgment debtor) read the words in brackets (other than persons mentioned in Rules 95 and 98 hereof)

##### CALCUTTA

Insert the words to have a right after the words in good faith

##### MADRAS

For the words in brackets (other than the judgment debtor) read the words in brackets (other than those mentioned in Rule 98)

##### NAGPUR

For the word judgment debtor where it occurs in brackets substitute the words persons mentioned in Rule 95 or 98

##### N W F P

For the words (other than the judgment debtor) substitute the words (other than the persons mentioned in Rules 95 and 98)

##### ODDH

For the words in brackets (other than the judgment debtor) read the words in brackets (other than the persons mentioned in Rules 95 and 98 hereof)

##### PATNA

For the brackets and words (other than the judgment debtor) substitute the brackets and words (other than the persons mentioned in Rules 95 and 98)

##### RANGOON

Substitute the following

99 Where the Court is not so satisfied it shall make an order dismissing the application

#### Synopsis

1 Procedure under the old Code

2 Scope of the Rule

3 Person other than the judgment debtor  
See Note 2 to Rule 100

4 Claiming in good faith to be in possession

5 On his own account<sup>2</sup>

6 Transferee pendente lite See Rule 102.

7 Inherent power to order delivery of possession

8 Appeal See Sect 47 Note 19 and Ord r 21  
It 1 101

Note 6

1 (01) 95 Bo 148 (49) 493)

(06) 3 C 145 (191 433)

{See also (01) 27 Mad 67 (71) (1 B) }

O. 21 R. 99  
Notes 1-5

**1. Procedure under the old Code.** — This rule corresponds to Sections 331 and 335 of the Code of 1882. Section 331 related to the procedure to be adopted in the case of obstruction to delivery of possession to the holder of a decree for possession and Section 335 related to the case of obstruction to auction purchaser.

Under Section 331, however, the Court had to register the application as a suit between the decree holder as plaintiff, and the claimant as defendant, and to investigate into the claim as if a suit for the property had been instituted by the decree holder against the claimant. The undermentioned cases<sup>1</sup> which were decided under the old Code are no longer of any importance.

**2. Scope of the Rule.** — When delivery of property in execution of a decree is resisted, the Court can only deal with the matter on application to remove the obstruction and only in the manner provided by law. It cannot direct that unless the obstructor filed a suit within a certain time to establish his right, his title to the property should cease.<sup>1</sup> The order passed under this rule is final subject to the result of the suit if any, under Rule 103.<sup>2</sup>

**3 "Person other than the judgment-debtor."** — See Note 2 to Order 21 Rule 100.

**4. "Claiming in good faith to be in possession."** — The word possession in this rule is not restricted to actual possession, it includes also constructive possession.<sup>1</sup> See Note 6 to Rule 99.

The party resisting delivery of possession should satisfy the Court that he is in good faith in possession of the property on his own account or on account of a person not the judgment debtor.<sup>2</sup> If the obstructor has a good and legal right to obstruct the fact that he acts at the instigation of the judgment debtor will not prevent an order being made under this rule in his favour.<sup>3</sup> It has also been held in the undermentioned case<sup>4</sup> that the words 'claiming in good faith to be in possession' do not mean 'claiming in good faith to have a right to be in possession' but mean only that the claimant claims to be in possession as a matter of fact. See Rule 101, *infra*.

**5 "On his own account."** — The person in possession, resisting delivery of possession may claim to be in possession on his own account or as tenant of or on

#### Order 21 Rule 99 — Note 1

- 1 (57) 14 Cal 231 (23-3)  
(85) ■ Mad 548 (551) (F B) (Section 331 confers special jurisdiction to try claim below pecuniary value of Court)

- (95) 22 Cal 630 (632) (Do)  
(79) 4 Bom 123 (125) (Suit is only a continuation of original suit)

- (71) 15 South W R 327 (328) (Do)  
(92) 18 Bom 37 (40)  
(10) 6 Ind Cas 285 (230) (Mad)

#### Note 2

- 1 (23) AIR 1923 Lah 145 (146)  
2 (20) AIR 1920 Lah 517 (520) 1 Lah 5

#### Note 4

- 1 (01) 25 Bom 478 (480 481)  
2 (28) AIR 1928 Mad 909 (909)  
(26) AIR 1926 Mad 78 (50 61) 18 Mad 76  
(16) AIR 1916 Mad 820 (820)  
(10) ■ Ind Cas 809 (810) 1910 Pun Re 11

register

of title

- dismissal of application under O 21 B proper  
4 (20) AIR 1920 Cal 706 (701) 47 Cal 907

account of some person *other* than the judgment debtor. Therefore, in execution of a decree against a tenant, a tenant of the tenant, *i. e.*, a sub tenant cannot resist delivery of possession to the landlord.<sup>1</sup> The Calcutta High Court<sup>2</sup> has held that if the lessee granted the sub lease against a covenant in the lease not to sub let, the sub lessee is a trespasser and therefore is a person claiming to be in possession on his own account and that the remedy of the landlord is to file a suit for possession against the sub lessee. See Note 2 to Rule 101, *infra*.

O. 21 R. 99  
Notes 5-8

Under Hindu law, unmarried sisters are not bound by a decree against their brother, and as they have a right of residence in the family house they cannot be removed from possession in execution of a decree against their brother.<sup>3</sup>

It has been held that a decree against executors does not bind the beneficiaries under the will and that their possession of the testator's estate is not on behalf of the executors.<sup>4</sup>

6. *Transferee pendente lite.* — See Order 21 Rule 102, *infra*.

7. *Inherent power to order delivery of possession.* — It has been held in the undermentioned case<sup>1</sup> that the Court can, under its *inherent* powers, order delivery of possession to a decree holder, where the property is in the possession of a *third* person who has no *bona fide* claim to the possession of the property on his own account.

8. *Appeal.* — See Note 19 to Section 47 and Order 21 Rule 101.

## R. 100. [S. 332.] (1) Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

Dispossession by  
decree holder or  
purchaser.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

[1877, S. 332; 1859, S. 230.]

### Synopsis

- |  |   |
|--|---|
| <p>1. Scope of the Rule.</p> <p>2. "Any person other than the judgment-debtor."</p> <p>3. "Is dispossessed."</p> <p>4. Dispossession under order of Collector.</p> | <p>4a. "By the purchaser thereof."</p> <p>5. Nature of investigation under this Rule. See Rule 101.</p> <p>6. Limitation.</p> <p>7. Applicability of Order 9 to applications under this Rule. See Rule 101.</p> |
|--|---|

3. (20) AIR 1930 Mad 106 (107) 43 Mad 635.

4. (37) AIR 1937 Cal 301 (301, 303)

Note 7

1. (10) 6 Ind Cas 120 (120, 121) (Cal).

**0.21 R.100**  
**Notes 1-2**

**1. Scope of the Rule.** — Where, in obtaining possession of property the holder of a decree for possession or the auction purchaser, as the case may be, dispossesses any person other than the judgment debtor, such person may apply to the Court for a summary investigation of the matter under this rule<sup>1</sup> It is, however, not obligatory on such person to apply under this rule, he may bring a separate suit against the person who dispossessed him for possession of the property<sup>2</sup> The Court cannot, however, act under this rule unless there is an application of the party dispossessed<sup>3</sup>

Where an application is made under this rule, the Court should register the application,<sup>4</sup> make an investigation therein and should either dismiss the application or pass an order under Rule 101, *infra*<sup>5</sup> It has no jurisdiction to pass a declaratory order under this rule<sup>6</sup> The fact that the applicant's suit for declaration of title to the property has been dismissed is no bar to his application under this rule, the question involved in such application being only one of possession<sup>7</sup> As to the scope of the investigation under this rule, see Rule 101, *infra*

The remedy of the party against whom an order is made under Rule 101 is to file a suit under Rule 103 to establish his right to the possession of the property

A third person dispossessed in execution of a decree under Section II of the Specific Relief Act can also apply under this rule<sup>8</sup>

This rule applies to cases of exclusive as well as of joint possession<sup>9</sup>

Where after an application was filed under this rule, the opposite party filed a suit for an injunction restraining the applicant from proceeding with his application it was held that under Section 56 (a) of the Specific Relief Act the injunction could not be granted as the prosecution of the application could not be said to amount to a multiplicity of proceedings<sup>10</sup>

See also the undermentioned cases<sup>11</sup>

**2. "Any person other than the judgment-debtor."** — This rule has to be read along with Rule 101, *infra* A judgment debtor or his representative cannot apply under this rule<sup>1</sup> As to who are "representatives," see the undermentioned cases<sup>2</sup> and

**Order 21 Rule 100 — Note 1**

1. (26) AIR 1926 Cal 377 (377)  
(89) 18 Bom 218 (214)
- (98) 8 Mad L Jour 258 (259) (Third party purchaser should apply under this rule and not by way of restitution)
- (22) AIR 1922 Pat 210 (211) (Where possession has been effectively delivered by a Civil Court, the only course open to the aggrieved person (other than the judgment-debtor) is to apply under this rule, proceedings under II 145, Cr P C, are not proper)  
(See also (94) 18 Bom 522 (524))
2. (31) AIR 1931 Lah 686 (687)  
(67) 1867 Beng L R Sup Vol 638 (642) (F B)  
(1864) 1864 Suth W II 61 (61)  
(See also (85) AIR 1935 Oudh 462 (464) 11 Luck 283 (Tenant having alternative remedy of suit under S 108 (10), Oudh Rent Act — Right of making application under O 21 R 100, II P C is not barred on that account))
3. (31) AIR 1931 Lah 686 (687)
4. (24) AIR 1924 Pat 698 (700)
5. (26) AIR 1926 Cal 377 (377)
6. (27) AIR 1927 Nag 300 (301)
7. (37) AIR 1937 Oudh 400 (400, 401)

8. (70) 12 Suth W II 25 (25) (FB)  
(But see (67) 7 Suth W R 171 (172))

9. (33) AIR 1933 Pat 132 (133)  
10. (1931) 171 1072 Pat 1070 (1931) 995) 12 Pat 727

tion 170, Ben Ten Act does not exclude under O 21 R 100 C P C)

**Note 2**

- 1 (23) AIR 1923 Pat 76 (82)  
(17) AIR 1917 Pat 597 (597) 2 Pat L Jour 478  
(95) 17 All 478 (481)
2. (31) AIR 1931 Mad 634 (635) (Tenants and servants of judgment debtor are bound by decree)  
(07) 17 Mad L Jour 321 (321) (Mortgagee after attachment is a representative of judgment-debtor)
- (29) AIR 1929 Pat 227 (223) (Purchaser of non transferable holding is representative of judgment debtor)
- (26) AIR 1926 Cal 956 (956) (Do)
- (18) AIR 1918 Mad 673 (674) (Do)
- (18) AIR 1918 Pat 483 (484) 3 Pat L Jour 579  
(Purchaser of the whole or part of an occupancy

Section 4 Notes 17 and 21, *ante*. The Calcutta High Court<sup>3</sup> has, however, held that the word "judgment debtor" in this rule does not include any person other than the actual judgment debtor, the question according to that Court is not whether the applicant is a representative of the judgment debtor but if he is in possession on his own account, and this should be investigated under Rule 101. See Rule 101, *infra*.

A person who is a party to the suit, but against whom no decree has been passed, is not a judgment debtor and, therefore, can apply under this rule.<sup>4</sup> If, however, the decree is binding on him, his remedy is to apply under Section 47.<sup>5</sup>

Rules 100 and 101 are not exhaustive and do not include a case where the judgment debtor himself is in possession on account of some third person and not on his own account. It has been held, however, that in such a case the third person is entitled to apply under this rule if the judgment debtor is dispossessed by the decree holder or auction purchaser.<sup>6</sup>

Where the judgment debtor or his representative is dispossessed of property not included in the decree, his remedy is to apply under Section 47.<sup>7</sup>

3. "Is dispossessed." — Unless the applicant is *dispossessed* of the property, he has no cause of action to apply under this rule.<sup>1</sup> The dispossession should be in the course of the delivery of possession<sup>2</sup> and should be proved as a fact.<sup>3</sup> Thus, mere delivery of *symbolical* possession to the decree-holder or auction purchaser will not amount to dispossession of the party in possession, it must be shown that the applicant was *actually* dispossessed of the property.<sup>4</sup>

Where dispossession does not take place in the course of the delivery of possession in execution but *subsequent* thereto, this rule has no application, and the remedy of the party aggrieved is to file a regular suit for possession.<sup>5</sup>

Where a person is in possession of the property by receipt of rent or otherwise, and the tenant in actual possession is dispossessed of the property by the decree holder or auction purchaser, the landlord is a person who is *dispossessed* of the property

holding not transferable by custom is a representative of the judgment debtor)

7. (16) AIR 1916 All 104 (106) 38 All 339  
(33) AIR 1933 Mad 569 (570)

#### Note 3

1. (69) 111 Suth W R 231 (232, 233)

(35) AIR 1935 Pat 253 (253, 254)

2. (29) AIR 1929 Pat 553 (554, 555)

3. (1865) 3 Suth W R 203 (206)

4. (04) 27 Mad 262 (268, 270)

(33) AIR 1933 Cal 144 (144)

(96) 20 Bom 351 (353) (FB)

(03) 30 Cal 710 (712)

(96) 1 Cal W N 343 (344)

(69) 11 Suth W R 191 (192) (Planting a bamboo and making proclamation to occupants is suffi-

(35) AIR 1935 Pat 253 (253) (Sons of Hindu judgment-debtor are prima facie bound by decree other

(Pur  
repr

representative of judgment-debtor)

3. (28) AIR 1928 Cal 792 (794)

(30) AIR 1930 Cal 348 (348)

5.

(967)

(27) AIR 1927 Pat 404 (405)

5. (28) AIR 1928 Mad 1270 (1270).

6. (01) 25 Bom 473 (493)

formal delivery to decree-holder—He alternately praying that if legal effect of formal delivery to decree-holder be dispossession, he (objector) should be given possession—Application is

O. 21 R. 100  
Notes 3-7

within the meaning of this rule,<sup>6</sup> even though the tenant is the judgment debtor.<sup>7</sup> See Note 2 above

**4. Dispossession under order of Collector.** — This rule has no application to a case where the decree has been transferred to the Collector for execution under powers conferred on him by the Local Government under Section 70 of the Code. The Court which passed the decree is for the time being *functus officio*, and has no jurisdiction to enquire into a complaint of dispossession under this rule,<sup>1</sup> but as soon as the Collector has exhausted all the powers conferred upon him, the Civil Court has jurisdiction to inquire into any matters requiring to be done in execution such as those provided in Rules 97 to 103 of the Code.<sup>2</sup>

**4a. "By the purchaser thereof."** — Although the wording of this rule refers only to the auction-purchaser, it must be taken to be intended to include his legal representatives.<sup>3</sup>

**5. Nature of investigation under this Rule.** — See Rule 101, *infra*

**6. Limitation.** — The period of limitation for an application under this rule is thirty days from the date of dispossession.<sup>4</sup> See Article 165 of the Limitation Act, 1908

**7. Applicability of Order 9 to applications under this Rule.** — See Order 21 Rule 101

O. 21 R. 101

**R. 101.** [Ss. 332, 335.] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Bona fide claimant to be restored to possession.

### Synopsis

1. Procedure under the old Code.

1a. Applicability of Rule to proceedings under the Madras Estates Land Act, 1908.

2. "On his own account."

3. Transferee pendente lite. See Rule 102

4. Transfer of decrees to Collector. See Rule 100, Note 4

5. Nature of investigation under this Rule.

6. Applicability of the provisions of Order 9 to proceedings under this Rule.

7. Appeal.

8. Revision.

**1. Procedure under the old Code.** — Rules 100 and 101 correspond to Sections 332 and 335 of the Code of 1882. Section 332 related to the procedure to be

6. (CC) 33 Cal 487 (491, 493)  
(O1) 25 Bom 478 (488, 493)

(24) AIR 1924 Nag 309 (311).

2. (14) AIR 1914 Bom 252 (253) 33 Bom 613 (676, 678)

(Posses-  
possession)

Note 4a

1. (33) AIR 1933 Cal 293 (293)

Note 6

7. (O1) 25 Bom 478 (493)

Note 4

1. (13) 37 Bom 489 (490)

1. (16) AIR 1916 All 104 (106) 33 All 339.  
(31) AIR 1931 Cal 335 (337) 53 Cal 53.

adopted in the case of a person dispossessed by the holder of a decree, for possession, and Section 330 related to the case of dispossession by the auction purchaser. But under Section 332, the Court had to examine the applicant, and on being satisfied that there was probable cause for making the application, had to ascertain on investigation if the following grounds existed, viz —

- (1) Whether the property was *bona fide* in the possession of the applicant on his own account or on account of some person other than the judgment debtor
- (12) Whether the property was not comprised in the decree and
- (111) If the property was comprised in the decree, whether the applicant was not a party to the suit in which the decree was passed

If the Court was satisfied that these grounds existed, it had to order re delivery of the property to the applicant—otherwise it had to dismiss the application

As to the nature of the investigation under this rule see Note 5 below

**1a. Applicability of Rule to proceedings under the Madras Estates Land Act, 1908.** — By virtue of Section 193 of the Madras Estates Land Act, 1908, this rule is applicable to proceedings under that Act<sup>1</sup>

**2. "On his own account."** — Rules 100 and 101 are not confined, in their application, to cases of *exclusive* possession, but are applicable also to cases where the person dispossessed was in joint possession<sup>1</sup>. Therefore, if a co owner or a member of an undivided family is dispossessed in execution of a decree against another co owner or coparcener, he may apply under Rule 100 to be put in joint possession with the decree holder or the auction purchaser<sup>2</sup> but he cannot claim to be put in possession of *specific portions* of the property as the Court cannot adjudicate on such questions of title under this rule<sup>3</sup>

A mortgagee in possession of the property<sup>4</sup> or an occupancy tenant,<sup>5</sup> if dispossessed, can get back the possession under this rule as he is in possession on his own account, but not as mortgagee or transferee *pendente lite*. See Rule 102, *infra*. It has been held by the High Court of Patna that a usufructuary mortgagee is not entitled to object under O 21 R 58 to the attachment of the property of his mortgagor, and that if such an objection is made and disallowed, Rule 63 will not operate to debar him from making an application under this rule when he is dispossessed by the purchaser in execution of a decree<sup>6</sup>. It has been held by the High Court of Calcutta<sup>7</sup> that if the claimant was in possession on his own account or on account of some person other than the judgment debtor, he is entitled to succeed under this rule, though he is a trespasser or has no title to the property

#### Order 21 Rule 101 — Note 1a

1 (35) AIR 1935 Mad 309 (310)

Note 2

ment debtor's co owners on application under O 21 R 100 are not entitled to possession of entire set of fields but only to the extent of their share.]

4 (14) AIR 1914 Cal 500 (531)

(78) 2 All 94 (95)

(95) 17 All 222 (224 225) (FB)

(28) AIR 1928 Rang 127 (127) ¶ Rang 122

(39) AIR 1933 Pat 63 (63)

5 (31) AIR 1931 Cal 534 (535)

6 (2) AIR 1922 Pat 403 (405) 1 Pat 157

(37) AIR 1937 Pat 63 (64)

7 (27) AIR 1927 Cal 339 (340)

[See (20) AIR 1920 Cal 706 (705) 47 Cal 907

The Court is not entitled on an application under this rule to investigate into the question of *benami* in order to determine whether the applicant was in possession of the property on his own account.<sup>9</sup>

**4 Transfer of decree to Collector** — See Order 21 Rule 100 Note 4

Where subsequent to the dispossession events have happened which disentitle the applicant to retain possession the Court cannot refuse to take notice of such events in passing an order under this rule<sup>11</sup>

**6 Applicability of the provisions of Order 9 to proceedings under this Rule** — See Section 141 Note 2 *ante* and Note 1 to Order 9 General. If the application under Rule 100 is dismissed for *default* or ordered *ex parte* it has been held by the High Court of Calcutta<sup>1</sup> that the Court may restore the application or set aside the *ex parte* order as the case may be.

**Note 5**

(See (17) AIR 1917 Nag 53 (54 55) 14 Nag  
LR 60)

■ (1865) 3 *Suth W R* 203 (206)

( 69) 12 Suth W R 16 (17)

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( 98) 1898 Bom P J 50

( 94) 1894 Born P J 88  
( 95) 1895 Born P J 88

( 80) 5 Cal 278 (290)  
( 80) 9 Cal 94 (95, 96)

(70) 14 South W R 358

(70) 13 Suth W R 80 (81 82) (F B)

( 73) 20 South W R 114 (115)

(03) 6 Oudh Cas 110 (112)

(69) 11 Suth W R 255 (256)

8 (30) AIR 1930 Pat 416 (417)

9 (26) AIR 1926 Mad 1127 (1128)  
10 (27) AIR 1928 Cal 933 (934)

10 (33) AIR 1933 Cal 233 (234)  
1034 (1035) (Claim case dismissed)

1034 (1035) (Claim case & simplified  
(95) AIR 1935 Pat 122 (123) (Cl

( 35) AIR 1935 Pat 122 (145) (omitted summarily)

(35) 158 Ind Cas 398 (378) (Pat)

11 (83) AIR 1993 Cal 534 (535) CO

**Note 6**

But under the old Code if the application itself was registered as a suit it was held that

(35) 158 Ind Cas 398 (378) (Pat) CO Cal 685.

Csl 534 4  
M. 1. 6

Note 6  
 1. 1991-1992 1993-1994 1995-1996 1997-1998 1999-2000



**7. Appeal.** — If the proceedings relating to delivery of possession under Rules 97 to 102 are 'between the parties or their representatives,' an order passed in such proceedings will fall under Section 47 according to the view of the High Courts of Calcutta and Madras and of the Judicial Commissioner's Court of Sind. See Note 19 to Section 47 *ante*. An order under Rule 98 against a *stranger* will not fall under Section 47 even according to this view and no appeal will, therefore, lie in such a case.<sup>1</sup> But if the proceedings under this rule are between *parties* to the suit, and an order is passed under this rule, the High Court of Madras<sup>2</sup> has held that the aggrieved party will have only a right of *appeal* under Section 47, *ante*. In the undermentioned case<sup>3</sup> Mr Justice Odgers observed as follows:

O. 21 R. 101  
Notes 7-8

"It was not open to the plaintiffs to proceed at their option, either by a suit or by way of appeal. It is also to be observed that Section 47 expressly bars a suit in contradistinction to Rule 103 which says that the order on obstruction proceedings shall be conclusive subject to the result of the suit if any. It has as far as I know, never been suggested in any case that the procedure under Section 47 and under Rule 103 is cumulative."

See also Note 84 to Section 47

**8. Revision.** — As the remedy of the party against whom an order under Rules 98, 99 or 101 has been passed is to file a suit under Rule 103 *infra*, ordinarily orders passed under these rules are not open to revision.<sup>1</sup> But if the lower Court refuses to order investigation,<sup>2</sup> or rejects the application on a misconstruction of the law,<sup>3</sup> or the lower Appellate Court erroneously entertains appeals from orders under those rules,<sup>4</sup> or if there are illegalities or material errors in the proceedings in the lower Court,<sup>5</sup> the High Court may interfere in revision.

## R. 102. [S. 333.] Nothing in rules 99 and 101 shall

O. 21 R. 102

Rules not applicable to  
transferee pendente lite

apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

[1877, S. 333; 1859, S. 231.]

Note 7

is revivable)

[See also { 35 } AIR 1933 Mad 302 (310) ]

**O. 21 R. 101**  
**Notes 2-6**

The Court is not entitled, on an application under this rule, to investigate into the question of *bonams* in order to determine whether the applicant was in possession of the property on his own account.<sup>8</sup>

**3. Transferee pendente lite.** — See Order 21 Rule 102

**4. Transfer of decree to Collector.** — See Order 21 Rule 100 Note 4

**5. Nature of the investigation under this Rule.** — Where a third party applies for re delivery of property under this rule, the question which the Court has to decide is whether the applicant was in possession on his own account or on account of some person other than the judgment debtor.<sup>1</sup> It cannot reject the application on the ground that originally the applicant had not obtained possession in a lawful manner.<sup>2</sup> The applicant has to prove that he was in possession and was dispossessed in the course of the delivery of possession to the decree holder or purchaser<sup>3</sup> (see Notes 2 and 3 to Rule 100, *ante*). The onus lies upon him to prove his right to possession,<sup>4</sup> and it is a serious irregularity to ask the decree holder or auction purchaser to begin.<sup>5</sup> The Court should dispose of the application only after allowing the parties to produce whatever evidence they desire, oral or documentary.<sup>6</sup> The investigation under this rule being a summary one, the Court should confine itself to the question of possession and should not decide questions of title<sup>7</sup> or questions regarding the construction of the decrees<sup>8</sup> or the equities of the parties.<sup>9</sup> An unsuccessful applicant under O 21 R 58 is not competent to apply under O 21 R 100 inasmuch as the order against him will be conclusive against him subject to the result of a suit instituted under O 21 R 63 to set aside the order.<sup>10</sup>

Where subsequent to the dispossession events have happened which disentitle the applicant to retain possession, the Court cannot refuse to take notice of such events in passing an order under this rule.<sup>11</sup>

**6. Applicability of the provisions of Order 9 to proceedings under this Rule.** — See Section 141, Note 2 *ante* and Note 1 to Order 9, General. If the application under Rule 100 is dismissed for default or ordered *ex parte*, it has been held by the High Court of Calcutta<sup>1</sup> that the Court may restore the application or set aside the *ex parte* order, as the case may be, under its inherent powers.

**8** (24) AIR 1924 Pat 506 (507)

**Note III**

**1.** (01) 25 Bom 478 (488)

[See (17) AIR 1917 Nag 53 (54, 55) 14 Nag

L R 66]

**2.** (74) 22 Suth W R 406 (406)

**3.** (1865) 3 Suth W R 205 (206)

**4.** (67) 8 Suth W R 8 (9)

(69) 12 Suth W R 16 (17)

**5.** (31) AIR 1931 Mad 534 (538)

**6.**

**7.**

**8.**

**9.**

**10.**

**11.**

*the question of title should be gone into See the following cases*

(70) 14 Suth W R 140 (141)

(1865) 3 Suth W R 213 (215)

(98) 1898 Bom P J 66

(94) 1894 Bom P J 88

(80) 5 Cal 278 (280)

(78) 2 All 91 (95 96)

(70) 14 Suth W R 358 (359, 360)

(70) 13 Suth W R 80 (81, 82) (F B)

(73) 20 Suth W R 114 (115)

(03) 6 Oudh Cas 110 (112)

(69) 11 Suth W R 255 (256)

**8** (30) AIR 1930 Pat 416 (417)

**9** (1901) AIR 1906 Mad 1197 (1128)

*But under the old Code, if the application itself was registered as a suit, it was held that*

**12.** (00) AIR 1900 Cal 179 (180)  
**Note 6**

**1.** (28) AIR 1928 Cal 179 (180)

The right of suit under this rule is a statutory one, and the mere fact that a party has failed to prefer a claim under Rule 58 *ante*, will not debar him from maintaining a suit under this rule<sup>3</sup>. On the other hand, the failure to file a suit under this rule by a party against whom an order is made under the previous rules will render the order under those rules conclusive against him and his representatives<sup>4</sup>. However, where subsequent to the adverse order against a person his right to the possession of the property is established in another suit between the parties it is not necessary to sue again under this rule to establish the right<sup>5</sup>. It will be useful here to compare Rule 63, *ante*, with this rule. A suit under the former is instituted for the purpose of establishing the right which the plaintiff claims to the property in dispute, while a suit under this rule is for the purpose of establishing the right which he claims to the present possession of the property<sup>6</sup>. Such right to possession may be based on title even without showing that the plaintiff was in actual possession at the date of the order against him<sup>7</sup>. Another point of distinction between Rule 63 and this rule is that while under the former even an order *without investigation* will be conclusive such an order will not be conclusive under this rule<sup>8</sup>. The reason is that under Rule 63 the party against whom any order is made should institute a suit under that rule whereas under this rule only a party against whom an order is made under Rules 98, 99 or 101 need institute a suit under this rule, and an order under Rules 98, 99 or 101 can only be made *where the Court is satisfied*, etc., which can only be on an investigation of the question<sup>9</sup>.

The scope of a suit filed under this rule is not the mere determination of the question of possession of the parties concerned, but the establishment of the right or title by which the plaintiff claims the present possession of the property<sup>10</sup>. It has been held that a suit under this rule is by way of defence of one's rights and pleas available only by way of defence can be urged by the plaintiff in such suit. Thus the plaintiff can rely on Section 53A of the Transfer of Property Act (doctrine of part

(84) 6 Mad 82 (83) (It is unnecessary to sue to have the order cancelled.)

(29) AIR 1922 Mad 63 (68) (Decree holder a own property sold by mistake—Obstruction by him for delivery to auction purchaser—Application by latter allowed for delivery—Decree holder must sue under this rule.)

3 (31) AIR 1931 Lah 538 (508)

4 (24) AIR 1924 Sind 97 (93) 17 Sind L R 63

(32) AIR 1932 All 703 (704)

(17) AIR 1917 Cal 5 (5 6)

(20) AIR 1926 Lah 317 (320) 1 Lah 57

(87) 10 Mad 357 (361)

(15) AIR 1915 Mad 586 (587) (Claim for sole possession—Joint possession ordered—Suit must be filed by claimant.)

(21) AIR 1924 Mad 602 (602) (The pendency of another suit will not prevent the order from becoming conclusive.)

(68) 12 Bom 603 (633)

5 (37) AIR 1937 Mad 582 (583 584) (What makes order conclusive is not failure to institute suit but failure to have the right established.)

6 (29) AIR 1929 Bom 379 (380) 53 Bom 668

(30) AIR 1930 Lah 517 (520) 1 Lah 57 (It is not sufficient to show that the summary order is erroneous.)

7. (21) AIR 1921 Mad 317 (318) 44 Mad 227

(29) AIR 1929 Bom 379 (380) 53 Bom 668

[See (36) AIR 1936 Lah 530 (532)]

[See also (32) AIR 1932 All 703 (704) (Suit

- -

was in possession when he obstructed the deli

9. (26) AIR 19 C Nag 423 (424, 425) 22 Nag

- - - - - (Policy underlying this rule is to have a speedy settlement of the questions of title raised in execution sales.)

O. 21 R. 103  
Note 1

performance) in such suit although that Section is available only by way of defence<sup>11</sup> in a suit under this rule is not one under Section 9 of the Specific Relief Act, inasmuch as the dispossession on which it is based is not one *otherwise* than in due course of law<sup>12</sup> It is not open to a defendant in a suit by the decree holder under this rule to question the validity of the decree<sup>13</sup>

Where an order becomes conclusive under this rule, it will bar a suit as well as a defence by the party against whom the order is passed or his representative<sup>14</sup> Where however, the order also falls under Section 47 of the Code, this rule does not, according to the High Court of Allahabad, operate as a bar to an appeal under that Section<sup>15</sup>

The provisions of Rules 97 to 103 are of a restrictive nature and strict compliance with them is necessary If, in a particular case, it is shown that the provisions of any of these rules have not been strictly complied with, the penal consequence of barring the right of suit cannot legally flow therefrom<sup>16</sup>

A suit instituted under this rule is not a continuation of the summary application but an independent proceeding governed by the relevant provisions of the Code within the al limits of whose jurisdiction the plaintiff has a subsisting title is *prima facie* on the other party has been driven to institute a suit under this rule cannot shift that burden on to that party<sup>17</sup>

Where the plaintiff in a suit under this rule succeeds the order complained of must be set aside and the parties must be restored to the status quo ante and where the plaintiff has been removed from possession of the property, he must be put back in possession<sup>20</sup>

Where an auction purchaser of an undivided share of a co owner gets delivery of possession in execution but, on objection by a party to the suit, *re delivery is ordered* in his favour and the auction purchaser thereupon sues for partition of the share

11 (40) AIR 1940 Oudh 1 (7) 184 Ind Cas 401 (408)

12 (32) AIR 1932 All 703 (704)

13 (37) AIR 1937 Cal 68 (91) (Contention that decree was passed without jurisdiction not *affected*)

14, and L R 63

( if order is remains in

( but the order is not conclusive as to questions which could not have been raised in the prior proceeding )  
(See also (37) AIR 1937 Oudh 401 (402) 17

Cal 8 (Application not falling under Rule 97—Dismissal—Suit for possession thereafter is not one under Rule 103)

(34) AIR 1934 Lah 457 (458) (Objections not falling under Rule 100—Dismissal—Suit under

purchased by him, such a suit is not governed by either this rule or by Article 11A of the Limitation Act, inasmuch as the re delivery proceedings fall within Section 47<sup>21</sup>

O. 21 R. 103  
Notes 1-3

**1a. Applicability of Section 42 of the Specific Relief Act to suit under this Rule.** — In a suit under this rule to establish the plaintiff's right to the present possession of the property, it is not necessary to ask for the further relief of possession. The proviso to Section 42 of the Specific Relief Act, 1877, does not take away the special right conferred by this rule of merely asking for a declaration of the plaintiff's right<sup>1</sup>. But the plaintiff is not precluded from claiming consequential relief in such a suit<sup>2</sup>.

**2. Suit by decree-holder or auction-purchaser under a different right.** — The cause of action for a suit under this rule is the *adverse order passed under Rules 98, 99 or 101, ante*. This rule does not therefore apply where the auction purchaser or the claimant institutes a suit relating to the property in *any other capacity* or based on a cause of action *different* from the adverse order under Rules 98, 99 or 101, *ante*<sup>1</sup>.

#### Illustrations

1 A purchased certain property in execution of a decree and took delivery of possession of the property through Court. B filed an application under Rule 100 but the Court dismissed it on the ground that B was not dispossessed and had, therefore, no cause of action under Rule 100. B was subsequently dispossessed, and he brought a suit for possession, alleging as the cause of action the *subsequent dispossession*, more than one year after the date of the order under Rule 100. It was held that the suit was not barred<sup>2</sup>.

2 In execution of a decree for possession A was obstructed by B, and an order under Rule 98 was passed against B. B filed a suit to set aside the decree on the ground of *fraud* and for delivery of possession as a consequential relief. It was held that since the basis of the claim was distinct and different and the possession claimed was not present possession but only by way of consequential relief the suit was not barred<sup>3</sup>.

3 A dispossessed B in execution of a decree. B filed an application under Rule 100 and the same was granted. Subsequently A became aware of the fact that the judgment debtor a tenant, of a non transferable holding had transferred the holding to the defendants. He thereupon filed a suit in ejectment against the defendant in the *capacity of a landlord*. It was held that the suit was not barred and that the cause of action was not the loss of possession but the fact that the tenant had unlawfully transferred a non transferable holding to the defendants<sup>4</sup>.

Inasmuch as an order under Rules 98, 99 or 101 is conclusive under this rule only so far as the *present right to possession* is concerned, this rule will not operate so as to bar a party against whom an order has been passed under those rules, from maintaining a suit for *redemption of property*<sup>5</sup> or for enforcing a mortgage lien over the property<sup>6</sup>. See also the undermentioned case<sup>7</sup>.

**3. "Any party against whom an order is made."** — As has been observed in Note 1 *ante*, an order cannot be said to have been made against any party, within

21 (27) AIR 1927 Mad 952 (953)

Note 1a

lish the plaintiff's right)

Note 2

1 (26) AIR 1926 Mad 683 (684) 49 Mad 596 (Suit for partition by a purchaser from a Hindu coparcener is not barred by a prior decision against him in a suit by him for declaration of his right to possession under O. 21 R. 103)

party claiming a share — Claim of applicant dismissed under O. 21 R. 99 — Suit by applicant for partition and possession of his share not barred.)

O. 21 R. 103  
Notes 3-4

the meaning of this rule, unless it was made after investigation into the matter<sup>1</sup> It is also necessary that the Court should have come to a definite conclusion on the matter under enquiry, if it declines to give any decision at all on the matter, it will not be conclusive so as to bar a suit instituted more than one year from the date of the order.<sup>2</sup> The mere fact, however, that the investigation is not a complete one will not detract from the conclusiveness of the order.<sup>3</sup> Nor, where an application has been rejected after investigation, will the mere fact that the Court refers the parties to a regular suit, detract from the conclusive character of the order.<sup>4</sup> It has been held in the following cases that there is no order against a party within the meaning of this rule—

(1) Where the applicant withdraws his application and the Court makes an endorsement on the application that no investigation was made by reason of the withdrawal.<sup>5</sup>

(2) Where the application is dismissed for default of appearance<sup>6</sup> or for non prosecution<sup>7</sup> without inquiry. But where the Court fixes a day for the enquiry and, on the plaintiff's failure to produce evidence in support of the case, dismisses the application in the presence of the parties, it cannot be said to be a dismissal for default without inquiry.<sup>8</sup>

(3) Where the application of the claimant is allowed for default of appearance of the decree holder.<sup>9</sup>

(4) Where the application is simply dismissed without investigation.<sup>10</sup>

(5) Where the application is rejected on the ground that it has been filed beyond time.<sup>11</sup>

(6) Where the party was a minor and was not properly represented in the proceedings.<sup>12</sup>

Where A files an application and the same is decided against him, he cannot be said not to be a party "against whom an order has been passed" merely because he is a *benamidar* for another person.<sup>13</sup>

Although Rule 101 speaks of an order directing the applicant to be put in possession of property, it has been held that an order dismissing an application under Rule 100 to be put in possession is nevertheless an order against the applicant under Rule 101 for the purposes of this rule, and that the applicant would be bound to file a suit under this rule within one year from the date of the order.<sup>14</sup>

4. Order dismissing application under Rule 93. — An order on an application under so on under

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5 (61) 3 Bom 410 (411)

6. (17) AIR 1917 Nag 53 (54, 55) 14 Nag L.R. 66

Don Re  
o direct

9 (28) AIR 1923 Cal 179 (180).

10 (16) AIR 1918 Mad 534 (534)

(16) AIR 1916 Cal 755 (756)

11 (82) 4 All 131 (134)

12 (80) 32 Bom 404 (409)

13. (10) 8 Ind Cas 264 (266, 267) (Mad)

14. (17) AIR 1917 Bom 133 (134) 42 Bom 10.

this rule will not apply to such orders<sup>1</sup> Nor will this rule apply where the decree holder applying under Rule 95 gets possession without any resistance on the part of any one, and the party dispossessed is not bound to sue the auction purchaser within one year under this rule<sup>2</sup>

O. 21 R. 103  
Notes 4-6

4a. Parties to suit. — See the undermentioned cases<sup>1</sup>

5. Limitation. — A suit under this rule is governed by Article 114 of the Limitation Act and should be brought within one year of the date of the order *against* the plaintiff<sup>1</sup> It has been held in the undermentioned case<sup>2</sup> that where an order against a person in possession has remained unexecuted, he is, in a suit against him for possession, not estopped from pleading that plaintiff has no title to the properties. As has been seen in Note 3 above, where an order is passed without investigation, or where a suit is filed on a cause of action other than that of dispossession or of resistance or obstruction to delivery of possession, this rule does not apply and consequently Article 11A of the Limitation Act also does not apply<sup>3</sup>

In computing the period of one year prescribed by Article 11A, the time taken in revision proceedings cannot be excluded under Section 14 of the Limitation Act<sup>4</sup>

6. Court-fee. — A plaint in a suit under this rule is chargeable with a fixed fee under Article 17 of Schedule II of the Court fees Act, 1870<sup>1</sup>

### Local Amendments

#### ALLAHABAD

The following rules shall be *added* to Order XXI

"104 When the certificate prescribed by Section 41 is received by the Court which sent the decree for execution it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room

O 21 R 104  
(Allahabad)

105 Every attachment of moveable property under Rule 43, of negotiable instruments under Rule 51, and of immovable property under Rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that

O 21 R 105  
(Allahabad)

#### Note 4

(83) AIR 1933 Cal 577 (577 579) (Revision)

1 (24) AIR 1924 All 495 (499 500) 46 All 693

(FBI)

2. (24) AIR 1924 Rang 261 (262)

" 1 "

1

1

1

not a necessary party)

(35) AIR 1935 Sind 129 (131) (Suit against obstructor — Judgment-debtor is not necessary party)

#### Note 5

1. (22) AIR 1922 All 403 (404) 44 All 607.

(17) AIR 1917 All 426 (427)

(56) 10 Bom 604 (603 610)

(02) 26 Bom 146 (149)

(02) 26 Bom 730 (734)

(25) 90 Ind Cas 527 (S.C.) (Cal)

(20) AIR 19 0 Lah 517 (510) 1 Lah 57

(30) 9 Mad L Jour 131 (133)

(16) AIR 1916 Lah 253 (193)

#### Note 6

1. (1900) 22 All 334 (336)

[See also (83) 9 Bom 20 (22)]

(35) AIR 1933 Nag 300 (302) 1 LR (1933) Nag

422 (Suit under is in substance suit for setting aside executing Court's order — Relief for possession is implicit and, if prayed for, does not necessitate levy of court fee on *ad valorem* basis)

(30) AIR 1933 Pat 321 (321) (No court-fee payable on prayer for possession)]

**O. 21 R. 105** any other agency should be employed, in which case those reasons shall be stated in  
(Allahabad) the handwriting of the presiding Judge himself in the order for attachment

**O. 21 R. 106** 106 When the property which it is sought to bring to sale is immovable  
(Allahabad) property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree holder shall file with his application for an order for sale a certificate from the Sub Registrar within whose sub district such property is situated, showing that the Sub Registrar has searched his book Nos I and II and their indices for the twelve years preceding the mortgage or attachment as the case may be and stating the encumbrances, if any, which he has found on the property.

**O. 21 R. 107** 107 Where an application is made for the sale of land or of any interest in  
(Allahabad) land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No 1887 I—238 10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary, and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting

**O. 21 R. 108** 108 When the property which it is sought to bring to sale is revenue paying or  
(Allahabad) revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under Section 68, the Court, before ordering sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government

**O. 21 R. 109** 109 The certificate of the Sub Registrar and the report of the Collector shall  
(Allahabad) be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry

No fees are payable in respect of the report by the Collector

**O. 21 R. 110** 110 The result of the enquiry under Rule 66 shall be noted in an order made  
(Allahabad) for the purpose by the presiding Judge in his own handwriting The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing and that no more adjournments are made than are necessary for the purposes of the inquiry

*Note* It is necessary that the result of the enquiry under O. 21 R 66, should be drawn up by the Judge in his own handwriting<sup>1</sup>

- O. 21 R. 105 (Allahabad)**  
1. (35) AIR 1935 All 490 (491)  
**O. 21 R. 106 (Allahabad)**  
1. (90) AIR 1930 All 188 (189).  
**O. 21 R. 110 (Allahabad)**  
1. (32) AIR 1932 All 55 (56)



111 If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale **O. 21 R. 111 (Allahabad)**

112 The costs of the proceedings under Rules 66, 106 and 108 shall be paid in the first instance by the decree holder, but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom **O. 21 R. 112 (Allahabad)**

113 Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser **O. 21 R. 113 (Allahabad)**

114 Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act **O. 21 R. 114 (Allahabad)**

115 When an application is made for the attachment of live stock or other moveable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid **O. 21 R. 115 (Allahabad)**

116 Live stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court **O. 21 R. 116 (Allahabad)**

117 If the custody of live stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound keeper, who shall enter in a register **O. 21 R. 117 (Allahabad)**

(a) the number and description of the animals,

(b) the day and hour on and at which they were committed to his custody,

(c) the name of the attaching officer or his subordinate by whom they were committed to his custody, and shall give such attaching officer or subordinate a copy of the entry

*Note* See the undermentioned case<sup>1</sup>

118 For every animal committed to the custody of the pound keeper as aforesaid a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues according to the scale prescribed under Section 12 of Act No I of 1871 **O. 21 R. 118 (Allahabad)**

And the sums so levied shall be sent to the Treasury for credit to the Municipal

**O. 21 R. 117 (Allahabad)**

faith handing over property to third person is liable to pay its price.

1. (30) AIR 1936 All 553 (556). (Sagardar in goal

**O. 21 R. 118** or District Board, as the case may be, under whose jurisdiction the pound is. All such  
(Allahabad) sums shall be applied in the same manner as fines levied under Section 12 of the said Cattle Trespass Act

**O. 21 R. 119** 119 The pound keeper shall take charge of, feed and water, animals attached  
(Allahabad) and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time prescribed under proper authority. Such rates shall, for animals specified in the Section mentioned in the last preceding rule, not exceed the rates for the time being fixed under Section 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

**O. 21 R. 120** 120 The charges herein authorized for the maintenance of live stock shall be  
(Allahabad) paid to the pound keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound keeper shall be refunded by him to the attaching officer.

**O. 21 R. 121** 121 Animals attached and committed as aforesaid shall not be released from  
(Allahabad) custody by the pound keeper except on the written order of the Court or of the attaching officer, or of the officer appointed to conduct the sale, the person receiving the animals on their being so released, shall sign a receipt for them in the register mentioned in Rule 118.

**O. 21 R. 122** 122 For the safe custody of moveable property other than live stock while  
(Allahabad) under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

Notes See Note 2 to Section 122, ante

The ac  
lawful powers  
the Court th  
purposes of Se  
not become a  
of attachment  
case 3

**O. 21 R. 123** 123 With the permission of the Court the attaching officer may place one or  
(Allahabad) more persons in special charge of such property.

**O. 21 R. 124** 124 The fee for the services of each such person shall be payable in the manner  
(Allahabad) prescribed in 1  
be more than 5  
but if it do so,

Note See the undermentioned case 1

**O. 21 R. 125** 125 When the services of such person are no longer required the attaching  
(Allahabad) officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him, and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge.

Provided that where the amount does not exceed Rs 5, it may be paid to the

**O. 21 R. 122 (Allahabad)**

54 All 263

venement — Act approved by Court — Supardar is liable)

**O. 21 R. 124 (Allahabad)**

1. (37) 169 Ind Cas 634 (635) (All) (It is the execution Court only which can settle the fee which is to be paid to the custodian under the rule, and it is only the decree-holder, as the

Commissioner appointed to attach moveables—He appointing supardar without permission of Court for con

*sahna* by money order on requisition by the *amin*, and the presentation of the certificate may be dispensed with

O. 21 R. 125  
(Allahabad)

*Note* There is no provision in this rule or in any other part of Order 21 authorizing the executing Court to adjudicate on a dispute between the decree holder and his *sahnas* (persons employed to watch crops and to see that they are not taken away) <sup>1</sup>

126 When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be

O. 21 R. 126  
(Allahabad)

127 Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments

O. 21 R. 127  
(Allahabad)

128 When any sum levied under Rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the treasury as rent for the use of the pound, will be recorded on the extract from the pass book

O. 21 R. 128  
(Allahabad)

129 The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree holder to the attaching officer. In the event of the decree holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid

O. 21 R. 129  
(Allahabad)

130 Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment debtor simultaneously the notices required by O 21, Rr 22, 66 and 107

O. 21 R. 130  
(Allahabad)

#### GARNISHEE ORDERS

131 The Court may, in the case of any debt due to the judgment debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution

O. 21 R. 131  
(Allahabad)

*Notes* — Where an objection is raised to a notice issued under this rule and the objections are disallowed, the Court should pass an order under Order 21 Rule 133 <sup>1</sup>

Money left with the mortgagee for payment to the creditors is not a debt within the meaning of this rule and cannot be attached <sup>2</sup>

132 If the garnishee does not forthwith or within such time as the Court may allow pay or deliver into Court the amount due from or the property deliverable by

O. 21 R. 132  
(Allahabad)

133 If the garnishee disputes his liability, the Court, instead of making such order, may order that any issue or question necessary for determining his liability be

O. 21 R. 133  
(Allahabad)

person who has got the property attached that can be called upon to pay the fee.)

O. 21 R. 125 (Allahabad)

1. (35) AIR 1935 All 102 (102)

O. 21 R. 131 (Allahabad)

1. (34) AIR 1934 All 770 (771)

(34) AIR 1934 All 1056 (1057)

2. (34) AIR 1934 All 954 (956)

**O. 21 R. 118**  
(Allahabad)

or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under Section 12 of the said Cattle Trespass Act

**O. 21 R. 119**  
(Allahabad)

119 The pound keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time prescribed under proper authority. Such rates shall, for animals specified in the Section mentioned in the last preceding rule, not exceed the rates for the time being fixed under Section 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

**O. 21 R. 120**  
(Allahabad)

120 The charges herein authorized for the maintenance of live stock shall be paid to the pound keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound keeper shall be refunded by him to the attaching officer.

**O. 21 R. 121**  
(Allahabad)

121 Animals attached and committed as aforesaid shall not be released from custody by the pound keeper except on the written order of the Court or of the attaching officer, or of the officer appointed to conduct the sale, the person receiving the animals on their being so released, shall sign a receipt for them in the register mentioned in Rule 118.

**O. 21 R. 122**  
(Allahabad)

122 For the safe custody of moveable property other than live stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

*Notes:* See Note 2 to Section 122, ante.

h = 318

case 3

**O. 21 R. 123**  
(Allahabad)

123 With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

**O. 21 R. 124**  
(Allahabad)

124 The fee for the service of each such person shall be payable in the manner prescribed in 1 but if it do so,

*Note:* See the undermentioned case 1.

**O. 21 R. 125**  
(Allahabad)

125 When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him, and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge.

Provided that where the amount does not exceed Rs 5, it may be paid to the

**O. 21 R. 122 (Allahabad)**

1. (31) AIR 1931 All 567 (571, 573) 54 All 263

(FB) (AIR 1926 All 406, Overruled)

2. (34) AIR 1934 All 357 (358)

3. (35) AIR 1935 All 737 (739) (Commissioner

appointed to attach moveables—He appointing  
supardar without permission of Court for con

sentence— Act approved by Court— Supardar  
is liable)

(O. 21 R. 124 (Allahabad))

1

rule, and it is only the decree-holder, —

*sakna* by money order on requisition by the *amin*, and the presentation of the certificate may be dispensed with

O. 21 R. 125  
(Allahabad)

*Note* There is no provision in this rule or in any other part of Order 21 authorizing the executing Court to adjudicate on a dispute between the decree holder and his *saknas* (persons employed to watch crops and to see that they are not taken away) <sup>1</sup>

126 When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be

O. 21 R. 126  
(Allahabad)

127 Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments

O. 21 R. 127  
(Allahabad)

128 When any sum levied under Rule 119 is remitted to the treasury it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board as the case may be. A note that the same has been paid into the treasury as rent for the use of the pound, will be recorded on the extract from the pass book

O. 21 R. 128  
(Allahabad)

129 The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree holder to the attaching officer. In the event of the decree holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid

O. 21 R. 129  
(Allahabad)

130 Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment debtor simultaneously the notices required by O. 21, Rr. 29, 66 and 107

O. 21 R. 130  
(Allahabad)

#### GARNISHEE ORDERS

131 The Court may, in the case of any debt due to the judgment debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment debtor issue a notice liable to pay such debt, or to deliver upon him to appear before the Court into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution

O. 21 R. 131  
(Allahabad)

*Notes* — Where an objection is raised to a notice issued under this rule and the objections are disallowed, the Court should pass an order under Order 21 Rule 133 <sup>1</sup>

Money left with the mortgagee for payment to the creditors is not a debt within the meaning of this rule and cannot be attached <sup>2</sup>

132 If the garnishee does not forthwith or within such time as the Court may allow pay or deliver into Court the amount due from or the property deliverable by  
to decree and  
deliver such  
on the Court  
in such order

O. 21 R. 132  
(Allahabad)

133 If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be

O. 21 R. 133  
(Allahabad)

person who has got the property attached that  
can be called upon to pay the fee)

O. 21 R. 125 (Allahabad)

1. (35) AIR 1935 All 102 (102)

O. 21 R. 131 (Allahabad)

1. (34) AIR 1934 All 770 (771)

(34) AIR 1934 All 1006 (1007)

2. (34) AIR 1934 All 934 (936)

**O. 21 R. 133** (Allahabad) tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

**O. 21 R. 134** (Allahabad) 131 Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person, or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary

**O. 21 R. 135** (Allahabad) 135 After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

**O. 21 R. 136** (Allahabad) 136 Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set aside or reversed

**O. 21 R. 137** (Allahabad) 137 Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction. Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm

**O. 21 R. 138** (Allahabad) 138 The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court

**O. 21 R. 139** (Allahabad) 139 (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

(2) Orders not covered by clause (1) shall be appealable as orders made in execution

*Illustration* — An application for a garnishee order is dismissed either on the ground that there is no *prima facie* evidence of a decree which virtually becomes part of the decree passed in the original suit and payment is made in execution of the decree

**O. 21 R. 140** (Allahabad) 140 All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order 7 or Order 8 shall apply to all proceedings taken under Order 21 or Section 47

The following form shall be used under the provisions of Rule 131 of Order 21

Suit No	of 19	Plaintiff,
	Versus	Defendant
To		
WHEREAS it is alleged that a debt of Rs		is due from you to
the judgment-debtor		

**O. 21 R. 139 (Allahabad)**

1 (34) AIR 1934 All 1066 (1057)

[See also (38) AIR 1933 All 254 (255, 256)]

(Application for garnishee order allowed and

liability of garnishee held to exist — Order has force of decree — Id. talorem court is payable on appeal from such order))

Or that you are liable to deliver to the abovenamed judgment debtor the property set forth in the schedule hereto attached

Take notice that you are hereby required on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_ to pay into this Court the said sum of Rs \_\_\_\_\_

O. 21 R. 140  
(Allahabad)

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_  
Munsif Sub-Judge,  
at \_\_\_\_\_

# **CALCUTTA**

Insert the following as Order XXIA

## **ORDER XXIA**

1 Every person applying to a Civil Court to attach moveable property shall, in addition to the process fee, deposit such reasonable sum as the Court may direct, if it think necessary for the cost of its removal to the court house, for its custody, and if such property is live stock, for its maintenance according to the rates prescribed in Rule 2 of this Order. If the deposit, when ordered be not made, the attachment shall not issue. The Court may, from time to time, order the deposit of such further fees as may be necessary. In default of due payment the property shall be released from attachment.

O. 21A R. 1  
(Calcutta)

2 The following daily rates shall be chargeable for the custody and maintenance of live stock under attachment

O. 21A R. 2  
(Calcutta)

Goat and pig	...	Annas 2 to annas 4
Sheep		Annas 2 to annas 3
Cow and bullock		Annas 6 to annas 10
Call		Annas 8 to annas 6
Buffalo		Annas 8 to annas 12
Horse		Annas 8 to annas 19
Ass		Annas 3 to annas 5
Poultry		Annas 2 to annas 3 pies 6

*Explanation* — Although the rates indicated above are regarded as reasonable, the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima or maxima. If any specimen of special value in any of the above classes is seized a special rate may be fixed by the Court. If any animal not specified is attached, the Court may fix the cost as a special case.

3 Where the property attached consists of agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to Rule 43 Order 21, he may, unless the Court has otherwise directed, leave it in the village or place where it has been attached —

O. 21A R. 3  
(Calcutta)

(a) in the charge of the judgment debtor or decree holder or of some other

(b) in the charge of an officer of the Court if a suitable place for its safe custody be provided and the remuneration of the officer for a period of fifteen days paid in advance

4 If attached property (other than live stock) is not sold under the proviso to Rule 43 Order 21, or retained in the village or place where it is attached, it shall be brought to the court house at the decree holder's expense and delivered to the proper officer of the Court. In the event of the decree holder failing to make his own arrangement for the removal of the property with safety, or paying the cost thereof in advance to the attaching officer, then unless such payment has previously been

O. 21A R. 4  
(Calcutta)

**O. 21A R. 4**  
(Calcutta)

made into Court, the attachment shall at once be deemed to be withdrawn and the property shall be made over to the person in whose possession it was before attachment

**O. 21A R. 5**  
(Calcutta)

5 When live stock is attached it shall not, without the special order of the Court, be brought to the Court or its compound or vicinity, but shall be left at the village or place where it was attached in the manner and on the conditions set forth in Rule 3 of this Order

Provided that live stock shall not be left in the charge of any person under clause (a) of the said rule unless he enters into a bond for the proper care and maintenance thereof as well as for its production when called for, and that it shall not be left in charge of an officer of the Court under clause (b) of the said rule unless in addition to the requirements of the said clause provision be made for its care and maintenance

**O. 21A R. 6**  
(Calcutta)

6 When *it is found it impossible to obtain compliance with the said rule so as to entitle him to leave the attached live stock in the village or place where it was attached and no order has been made by the Court for its removal to the Court, the attaching officer shall not proceed with the attachment and no attachment shall be deemed to have been effected*

**O. 21A R. 7**  
(Calcutta)

7 Whenever it shall appear to the Court that live stock under attachment *are* not being properly tended or maintained, the Court shall make such orders as are necessary for their care and maintenance and may, if necessary, direct the attachment to cease and the live stock to be returned to the person in whose possession they were when attached. The Court may order the decree holder to pay any expenses *so* incurred in providing for the care and maintenance of the live-stock and may direct that any sum so paid, shall be refunded to the decree holder by any other party to the proceedings

**O. 21A R. 8**  
(Calcutta)

8 If under a special order of the Court live stock is to be conveyed to the Court, the decree holder shall make his own arrangement for such removal and if he fails to do so, the attachment shall be withdrawn and the property made over to the person in whose possession it was before attachment

**O. 21A R. 9**  
(Calcutta)

9 Nothing in these rules shall prevent the judgment debtor or any person claiming to be interested in attached live stock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe *order of the Court*

**O. 21A R. 10**  
(Calcutta)

*from the sale proceeds of the attached property, if sold, or be paid by the decree holder declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings*

**O. 21A R. 11**  
(Calcutta)

11 In the event of the custodian of attached property failing, after due notice, to produce such property at the place named to the officer deputed for the purpose, or to restore it to its owner if so ordered or failing in the case of live stock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings

**O. 21A R. 12**  
(Calcutta)

12 When property other than live stock is brought to the Court, it shall immediately be made over to the nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court. If the property cannot from its nature or bulk be conveniently stored, or kept on the court premises or in the personal custody of the nazir, he may, subject to the approval of the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical. If any premises are to be hired and persons are to be engaged for watching the property the Court shall fix the charges for the premises



and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept. All such costs shall be paid into Court by the decree holder in advance for such period as the Court may from time to time direct.

O. 21A R. 12  
(Calcutta)

13 When attached live stock is brought to Court under special order as aforesaid it shall be immediately made over to the nazir who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court.

O. 21A R. 13  
(Calcutta)

14 If there be a pound maintained by Government or local authority in or near the place where the Court is held, the nazir shall, subject to the approval of the Court, be at liberty to place in it such live stock as can be properly kept there, in which case the pound keeper will be responsible for the property to the nazir and shall receive from the nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

O. 21A R. 14  
(Calcutta)

15 If there be no good pound available or if in the opinion of the Court it be inconvenient to lodge the attached live stock in the pound, the nazir may keep them in his own premises or he may entrust them to any person selected by himself and approved by the Court.

O. 21A R. 15  
(Calcutta)

16 All costs for the keeping and maintenance of the live stock shall be paid into Court by the decree holder in advance for not less than fifteen days at a time as often as the Court may from time to time direct. In the event of failure to pay the costs within the time fixed by the Court, the attachment shall be withdrawn and the live stock shall be at the disposal of the person in whose possession it was at the time of attachment.

O. 21A R. 16  
(Calcutta)

17 So much of any sum deposited or paid into Court under these rules as may not be expended shall be refunded to the depositor.

O. 21A R. 17  
(Calcutta)

#### LAHORE

Add the following rule

104 For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11, subject to the provisions of O. 7 R. 24, provided that this rule shall not apply to the notice prescribed by Rule 23 of this Order.

O. 21 R. 104  
(Lahore)

#### ODDH

Add the following rules

104 The Court may, in the case of any debt due to the judgment debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

O. 21 R. 104  
(Oudh)

Note See the undermentioned cases 1

105 If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver to the notice, then the such notice, and on such

■ 21 R. 105  
(Oudh)

ee against him

#### O. 21 R. 104 (Oudh)

1. (34) AIR 1934 Oudh 11 (13) 9 Luck 278 attachment — Effect of notice under S. 104 —  
(39) AIR 1939 Oudh 86 (87, 89, 90) (Rule 104 Debt," meaning of—Ascertainment of accounts  
and following rules do not involve question of is not necessary)

**O. 21 R. 106**  
(Oudh)

106 If the garnishee disputes his liability the Court instead of making such order may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just

**O. 21 R. 107**  
(Oudh)

107 Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon or an interest in it the Court may order such third person to appear and state the nature of his claim, if any upon such debt or property and prove the same if necessary

*Note* See the undermentioned case<sup>1</sup>

**O. 21 R. 108**  
(Oudh)

108 After hearing such third person, and any other person who may subsequently be ordered to appear or in the case of such third or other person not appearing when ordered the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit upon such terms in all cases with respect to the lien charge or interest, if any of such third or other person as to such Court shall seem just and reasonable

**O. 21 R. 109**  
(Oudh)

109 Payment or delivery made by the order under these rules or otherwise shall be a judgment debtor or any other person ordered to paid delivered or realized although such order or the judgment may be set aside or reversed

**O. 21 R. 110**  
(Oudh)

110 Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules although one or more members of such firm may be resident out of the jurisdiction

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order An appearance by any member pursuant to an order shall be sufficient appearance by the firm

**O. 21 R. 111**  
(Oudh)

111 The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court

**O. 21 R. 112**  
(Oudh)

112 (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree

(2) Orders not covered by sub rule (1) shall be appealable as orders made in execution

*Illustration* — An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due This order is appealable as an order in execution

**O. 21 R. 113**  
(Oudh)

113 All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order 7 or Order 8 shall apply to all proceedings taken under Order 21 or Section 47

**O. 21 R. 114**  
(Oudh)

114 The following form shall be used under the provisions of Rule 104 of Order 21

EXECUTION CASE NO

OF 19

Decree holder  
Versus  
Judgment debtor

To

WHEREAS it is alleged that a debt of Rs. \_\_\_\_\_  
Or that you are liable to deliver to the abovesaid

Rs. \_\_\_\_\_ from you to the judgment debtor

**O. 21 R. 107 (Oudh)**

1 (36) AIR 1936 Oudh 167 (168) (No second appeal lies from an order of a Civil Court under

sch Nale 11 n to attached take notice that you are hereby required on or before the day of **O. 21 R 114**  
 19 to pay into this Court the said sum of Rs to deliver or account to the nazir of this **(Oudh)**

Do it this day of 19 .

Munsif  
 Subordinate Judge .  
 16

**PATNA**

**21 R 104**  
**(Patna)**

shall be  
 R 11, subject to the provisions of O 7 R 21 provided that this rule shall not apply to the notice prescribed by Rule 23 of this Order

**SIND**

add the following as Rule 101

**21 R 104**  
**(Sind)**

Address for service filed to hold good during execution proceedings. 101 (1) Subject to the provisions of sub rules (3) and (4) the address for service filed under Rule 19 of Order VII or Rule 11 of Order VIII, or, if the address has been subsequently altered under Rule 31 of Order VII or under Rule 12 of Order VIII, the amended address shall hold good during all execution proceedings

(2) Every application for execution shall state the address for service given by the opposite party in the Court which passed the decree or the Court to which the decree was last transferred for execution and notices and processes shall issue to such address

(3) Rules 22 23 24 and 25 of Order VII shall apply so far as may be to execution proceedings

(4) If an appeal or an application for review or revision against the decree or order sought to be executed is pending at the time when the application for execution is filed the provisions of Rule 38 of Order XVI shall so far as may be apply to such execution proceedings

(5) Nothing in sub rules (1) to (3) shall apply to the notice prescribed by Rule 22 of Order XVI

## ORDER XXII.

### DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

#### General — Synopsis

#### 1 Survey of the Order } 2 Scope and applicability of the Order

**1. Survey of the Order** — This Order deals with the creation assignment or devolution of interest during the pendency of suits. Such creation assignment or devolution may be brought about by

**Order 22**  
**General**

- (i) the death of a party (Rules 1 to 6)
- (ii) his marriage (Rule 7)
- (iii) his insolvency (Rule 8) or
- (iv) other circumstances such as transfer inter vivos etc (Rule 10)

Order 22  
General  
Notes 1-2

*Death of a party* — If the suit is one in which the "right to sue" does not survive, the death puts an end to the suit. If, on the other hand, it is a suit in which the right to sue survives, the death will not put an end to the suit (Rule 1). In the latter class of suits, that is suits which are not put an end to on the death of a party, the following questions arise for consideration, viz: What is the procedure to be followed in such suits? And what are the consequences of not following that procedure? The answer to the questions will depend upon (1) who is the party that died, and (2) to whom or against whom does the right survive? From these standpoints the following six alternative cases are possible

- (1) One of two or more plaintiffs may die and the right to sue may survive to the surviving plaintiff or plaintiffs alone
- (2) One of two or more defendants may die and the right to sue may survive against the surviving defendant or defendants alone
- (3) One of two or more plaintiffs may die and the right to sue may survive either to the surviving plaintiff or plaintiffs along with third persons or exclusively to third persons
- (4) A sole plaintiff or sole surviving plaintiff may die in which case the right to sue must, if at all, survive to persons who are not plaintiffs
- (5) One of two or more defendants may die and the right to sue may survive either against the surviving defendant or defendants along with third persons or exclusively against third persons
- (6) A sole defendant or sole surviving defendant may die in which case the right to sue must, if at all, survive against persons who are not defendants

Rule 2 provides for the first two of the above alternatives. Rule 3 applies to the third and fourth and Rule 4 to the fifth and sixth alternatives. Rule 5 provides for determining the question as to who is the person to whom or against whom the right to sue survives, in case there should be a dispute about it. The provisions of Rules 3 and 4 do not apply when the death occurs between the conclusion of the hearing of the suit and pronouncement of judgment in it (Rule 6).

*Marriage* — See Rule 7

*Insolvency* — Rule 8 deals with the insolvency of a plaintiff. The insolvency of a defendant does not fall within Rule 8, but comes under Rule 10.

*The effect of an abatement under the provisions of any of the previous rules is dealt with by Rule 9 and sub rule (2) thereof provides the remedy by the person aggrieved by the abatement. Other cases of creation, assignment and devolution are dealt with by Rule 10. It will be noted that under this rule there is no abatement and even a substitution is within the discretion of the Court.*

**2. Scope and applicability of the Order.** — The provisions of this Order apply only to cases of creation, transfer or devolution of interest during the pendency of suit. Thus there can be no substitution of legal representatives under this Order if the party is dead before the institution of the suit.<sup>1</sup> Nor can the provisions of the Order apply if the death occurs after the suit has been disposed of.<sup>2</sup> Rule 6 itself is an illustration of this principle.

Order 22 (General) — Note 2

1 (20) AIR 1950 Sind 82 (83)

(32) AIR 1932 Sind 270 (220) 26 Sind L R 362

2 (39) AIR 1939 Lab 31 (34) (If a plaintiff sues

*Applicability to appeals* — By virtue of Rule 11 the provisions of this Order apply to appeals. But in so applying them the following points should be noted

- (i) Since an appeal is but a continuation of the suit the provisions of the Order will apply even though the death may have occurred *between* the date of the lower Court's decree and that of the filing of the appeal (vide Notes under the several rules)
- (ii) Though a suit on a personal action will abate on the death of a party during its pendency yet if the suit is decreed and pending an appeal from the decree the death occurs the appeal will not abate.<sup>9</sup> The reasons for this distinction have been discussed under Rr 1 3 4 and 11

The word *appeal* in Rule 11 does not include appeals before the Privy Council and the provisions of this Order do not apply to such appeals. The reason is that judgments and orders of the Privy Council are in effect orders of the Sovereign and are of full force and effect despite the death of parties<sup>6</sup> and Courts in India have no power to treat an order of the Sovereign as a nullity.<sup>5</sup> However if a party dies after the grant of leave to appeal to the Privy Council and before the transmission of papers to England the High Court can order substitution of legal representatives to avoid technical objections. But this power exists not by virtue of this Order and there is no limitation of time for such substitution.<sup>8</sup>

*Applicability to execution proceedings* — By virtue of Rule 12 the provisions in Rules 3 4 and 8 of this Order do not apply to execution proceedings.<sup>7</sup> As to whether an *appeal* against an order made in execution proceedings is itself a proceeding in execution of a decree or order within the meaning of Rule 12 see Note 1 to that rule

*Applicability to miscellaneous proceedings* — By virtue of Section 141 of the Code the provisions of this Order may be made applicable whenever possible to proceedings other than a suit or an appeal. For proceedings arising out of a reference to arbitration see Schedule II Para 1 Note 17 *infra*. A conciliation proceeding under the Dekkhan Agriculturists Relief Act (XVII of 1879) pending before a Sub Judge has been held to be a proceeding in a Civil Court to which the provisions of this Order are applicable.<sup>6</sup> But they have been held to be inapplicable to proceedings in a Mamlatdar's Court under the Mamlatdars Act (Bombay Act III of 1876) on the ground that the said Act provides for a summary procedure in certain matters and that by implication the elaborate procedure contained in the Code was not intended to be applied to such proceedings.<sup>9</sup> The provisions of the Order apply to proceedings under the U P Encumbered Estates Act (25 of 1934).<sup>10</sup> This Order is also applicable to proceedings under the Chota Nagpur Tenancy Act VI of 1908 see Section 265 (3) of that Act

*Applicability to revision proceedings* — There is a conflict of decisions as to the applicability of this Order to applications for revision. It has been held by the High Courts of Madras and Calcutta that this Order applies to such applications.<sup>11</sup> But

<sup>9</sup> (33) 17 Bom 645 (647 648) (Act III of 1876 (Bombay) has been repealed by Act II of 1906

as the defendant)

<sup>11</sup> (38) AIR 193 Mad 115 (116 117)

(13) 21 Ind Cas 407 (407) (Cal)

**Order 22  
General  
Note 2**

a contrary view has been held by the Sind Judicial Commissioners Court and the Oudh Chief Court<sup>13</sup>

*applicability to applications for leave to appeal* — This Order does not apply to applications for leave to appeal to the Privy Council<sup>13</sup>

*Death of person against whom insolvency petition has been filed*—*Proceedings if can be continued against the estate* — It has been held in the undermentioned cases<sup>14</sup> that a person against whom a petition in insolvency has been presented can be declared insolvent in spite of the fact that he dies before the application is decided

*Effect of abatement* — Where an action fails under this Order, all reliefs or claims incidental to the action also fail. Thus if an appeal abates as regards an injunction sought for the appellant cannot press the appeal so far as the costs incurred by him in the lower Court are concerned<sup>15</sup>

**O. 22 R. 1**

**R. 1. [S 361] The death of a plaintiff or defendant shall**

Not abatement by party's death if right to sue survives not cause the suit to abate<sup>17</sup> if the right to sue<sup>2</sup> survives<sup>4</sup>

[1877, S 361; 1859, S 99 See S 146]

*Synopsis*

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|---|--|
| <ol style="list-style-type: none"> <li>1 Legislative changes</li> <li>2 Scope of the Rule</li> <li>3 'Right to sue,' meaning of</li> <li>4 When right to sue survives</li> <li>5 Right to sue in personal actions             <ul style="list-style-type: none"> <li>■ Suit to establish right to personal office</li> </ul> </li> <li>7 Right to sue in respect of torts</li> <li>8 Right to sue on contracts</li> <li>9 Right to sue for pre-emption</li> <li>9a Right to sue for partition</li> <li>10 Application for leave to sue in forma pauperis</li> </ol> | <ol style="list-style-type: none"> <li>11 Claim to guardianship</li> <li>12 Right to letters of administration</li> <li>13 Right to sue in representative actions</li> <li>14 Suit under Section 92 of the Code See Section 92 Note 80</li> <li>15 Suit by or against limited owners or reversioners</li> <li>16 Suit under Sections 14 and 18 of the Religious Endowments Act</li> <li>17 Partial abatement</li> <li>18 Death of either party pending appeal</li> <li>19 Suit or appeal against a dead person</li> <li>20 No abatement by reason of death after decree</li> <li>21 Appeal and revision</li> </ol> |
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*Other Topics (miscellaneous)*

Death of defendant in account suit — Right to sue whether survives See Note 4  
 Death of defendant in an injunction suit — Abatement See Note 7  
 Death of plaintiff — Suit when abates See Notes 5 and 7  
 Hindu widow or daughter suit for possession whether survives See Note 4

**1 Legislative changes** — This rule corresponds to Section 361 of the old Code without any change except that the four illustrations which had been given under the old Section have been omitted as being unnecessary<sup>1</sup>

**2 Scope of the Rule.** — Where during the pendency of a suit a party dies the first question to be decided is whether th

- 12 (33) AIR 1933 Sind 200(202) 28 Sind L.R. 167  
 (39) AIR 1939 Oudh 277(278) 184 Ind Cas 81(82)  
 (Hence no rule of limitation governs the application for substitution of parties in a revision application)  
 [See also (20) AIR 1920 Sind 120 (121)]  
 13 (34) AIR 1934 Sind 36(37) 28 Sind L.R. 100  
 14 (32) AIR 1932 Lah 264 (264)

- 15 (24) AIR 1924 Rang 217 (219) 2 Rang 91  
 [See also (37) AIR 1937 Nag 216 (217) 1 I.L.R. (1938) Nag 280]

**Order 22 Rule 1—Note 1**

- 1 See the Report of the Special Committee Note 2  
 1 (12) 17 Ind Cas 101(105 106) 8 Nag L.R. 113

10', there is an end of the suit. If it does, the suit can be continued, though the *trial* of the suit cannot be proceeded with immediately and without anything more. The reason is, that on the death of a party, the suit is in a state of suspense<sup>2</sup> and its trial cannot be taken up without following the procedure laid down in Rules 2, 3 or 4 in the case may be.

**3. "Right to sue," meaning of.** — The words 'right to sue' must be interpreted to mean 'right to seek relief'.

#### Illustrations

1. I file a suit against B for damages. I die during the pendency of the suit. Here I have the right to sue as to the survival of which a question might arise is the right to claim damages from B which I had at the time of his death.

2. In the above suit, suppose I get a decree for damages and B appeals against the decree and during the pendency of the appeal B dies. Here B's right to sue about the survival of which a question might arise is to have the decree of the lower Court set aside which is a very different thing from I's right to sue.<sup>3</sup>

3. Suppose in the above case B's appeal is allowed and I prefer a second appeal and during the pendency thereof I dies. Here I's right to sue, about the survival of which a question might arise is the right to have restored the benefit of the first Court's decree in his favour, and not his original right to claim damages against B.<sup>4</sup>

4. Suppose I's suit in the first Court is dismissed and I appeals and during the pendency thereof he dies. The right to sue will remain the same as the one on which he instituted the suit.<sup>4</sup>

In each of the above cases a person claiming that the right to sue of the deceased plaintiff or appellant has survived to him must show that he asserts the right to the same relief which the deceased plaintiff or appellant asserted at the time of his death.

**4. When right to sue survives** — The general rule is that all rights of action and all demands whatsoever existing in favour of or against a person at the time of his death survive to and against his representatives. For illustrations see the under-mentioned cases.<sup>1</sup> There are, however, exceptions to this general rule. Rights intimately

2 (19) AIR 1920 Mad 802 (603) 52 Mad 933

Note 3

father a heir — Right to sue survives to her father's brother's heirs.)

(16) 23 Cal 636 (633-639) (Suit by the reversionary heir of a Hindu to recover property from trespassers.)

(11) 1901 Pun Re No 12 p 44 (Suit to set aside a gift of land.)

(15) AIR 1915 Mad 655 (656) (Suit for possession of property.)

(13) 5 Bom L R 1041 (1044-1046) (Suit by a minor who on attaining majority sued to have his rights declared respecting property which by a consent decree and conveyance to which he was no party his grandmother father and uncle conveyed to the defendants.)

(19) AIR 1919 All 189 (190) 41 All 515 (Suit for specific performance of contract to sell immovable property.)

(68) 10 Suth W R 59 (59) (Suit for money received and for account against an agent — Cause of action survives on death of defendant.)

(72) 17 Suth W R 475 (476) (Suit by a Hindu widow to recover possession of her husband's estate.)

(16) AIR 1916 All 34 (35-36) 33 All 111 (Suit for possession.)

3 (17) AIR 1917 Upp Bur 14 (14) 2 Upp Bur 105

4 (17) 26 Bom 597 (601, 602)

5 (19) 3 Ind Cas 995 (996) 33 Cal 799

Note 4

1 (26) AIR 1920 Cal 490 (494) 53 Cal 132 (Suit to enforce the right to a palis or worship.)

(34) AIR 1934 Mad 448 (451) (Cause of action for breach of trust survives against legal representative.)

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the right to sue will survive.)

(14) 27 Mad 112 (116) (Reference to arbitration about matters in respect of which the right to sue will survive — Rights in property survive.)

(116) AIR 1916 Mad 611 (612-613) 39 Mad 382 (Suit by a daughter to recover possession as her

**O. 22 R. 1**  
**Notes 4-5**

connected with the *individuality* of the deceased will not survive.<sup>2</sup> One aspect of this exception is expressed by the maxim *actio personalis moritur cum persona* — a personal right of action dies with the person.

The general rule and the exception abovementioned have also been recognized by the Legislature in the following enactments dealing with particular classes of cases and they may be usefully referred to as illustrating the principles applicable to the generality of cases.

(1) Section 37 of the Contract Act lays down that "promises bind the legal representatives of the promisor in case of the death of such promisor before performance *unless a contrary intention appears from the contract*" Such a contrary intention will be presumed when the contract is of a nature involving *special skill or personal confidence, etc.*

(2) Section 306 of the Succession Act of 1925 provides that 'all demands whatsoever and all rights, to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators except causes of action for defamation, assault, as defined in the Indian Penal Code, or other *personal injuries* not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

It is the *original party's* rights and disabilities that have to be considered and the mere fact that the legal representative could not, in his individual capacity, have brought a suit for the relief claimed does not cause abatement of the pending suit.<sup>3</sup>

**5. Right to sue in personal actions.** — In cases of *personal* actions that is in actions where the relief sought is *personal* to the deceased, the right to sue will not survive to his representatives.<sup>1</sup> Thus, a suit for damages for breach of a contract of betrothal (except to the extent of the actual expenses incurred when the betrothal was in force)<sup>2</sup> and a suit for dissolution of marriage together with the claim for damages against the co respondent<sup>3</sup> are suits involving claims of a personal nature which will not survive on the death of either party to his representative. A suit by a Hindu widow under the Dayabhaga Law for partition in lieu of her maintenance will not survive on her death,<sup>4</sup> but if, by an award or a compromise, a fixed sum has been awarded to her in lieu of her interest a suit to recover the sum will be a suit to recover *property* and will survive to her legal representatives.<sup>5</sup> Similarly, if what was once a personal claim has matured into a *decree*, the benefit of the decree will survive to the legal representatives.<sup>6</sup>

(35) AIR 1938 Nag 298 (299) 1 I L R (1939) Nag 526 (Suit for accounts of dissolved partnership — Death of plaintiff—Right to sue survives)

2 Holland's Jurisprudence 3rd Edn., page 271  
(39) AIR 1939 Lah 492 (494) (Right to get compensation for malicious prosecution)

3 (24) AIR 1924 Lah 45 (46) 4 Lah 12

**Note 5**

1. (08) 30 All 49 (51)

(35) AIR 1935 All 106 (107) (Suit by members of a Municipal Board to restrain the defendant from recording his vote in arbitration—The claim is personal one)

(01) 25 Bom 574 (579, 582)

(13) AIR 1919 Lah 18 (18) 1919 Pun Re No 67

(28) AIR 1928 Lah 119 (119) 9 Lah 306

(18) AIR 1918 Mad 379 (380) 41 Mad 412 (Suit for partition by minor—Claim by minor is personal to the minor)

2. (20) AIR 1920 Bom 225 (226) 44 Bom 416

3. (09) 1906 Pun Re No 60 page 221

4. (07) 5 Cal L Jour 410 (315)

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5 (01) 28 Cal 155 (162, 163)

6 (27) AIR 1927 All 763 (763)

(10, 5) Ind Cas 758 (759, 763) 33 Mad 162

(21) AIR 1921 Lah 52 (53) 2 Lah 169

(87) 9 All 131 (134) (FII)

(95) 19 Mad 345 (346, 347, 348) (After decree



6. Suit to establish right to personal office. — A right to a *personal office* does not survive on the death of the claimant and a suit to establish such a right abates on the death of the plaintiff<sup>1</sup> But if *emoluments* are attached to the office the right to sue will, on the principles mentioned in Note 1 above, survive and the suit will not abate<sup>2</sup>

O. 22 R. 1  
Notes 6-7

7. Right to sue in respect of torts. — The maxim *actio personalis moritur cum persona* is, as a general rule, applicable to actions in respect of torts and therefore on the death of either party to such action the right to sue will be extinguished<sup>3</sup> Thus, the maxim will apply to the following cases —

- (1) Suits for damages for injury to reputation such as defamation<sup>4</sup> malicious prosecution<sup>5</sup> malicious arrest<sup>6</sup> and malicious search<sup>7</sup>
- (2) Suits for damages for obstruction to plaintiff's right of way over defendant's land<sup>8</sup>
- (3) Suits for damages for illegal distrunt for cess<sup>9</sup>
- (4) Suits for damages for refusal to deliver the keys of a temple and to allow worship being performed<sup>10</sup>
- (5) Suit by A for recovery of custody of his minor daughter left in the defendant's custody<sup>11</sup>
- (6) Suit for an injunction restraining defendant from preventing the plaintiff standing at a particular place in a temple<sup>12</sup>

Where however the tort is one relating to or affecting the *estate* of the deceased the maxim does not apply and the right to sue will survive to his representatives<sup>13</sup> Thus it will survive where the tort committed has injured the estate of the deceased<sup>14</sup> or benefited the estate of the wrongdoer<sup>15</sup> But the injury or the benefit must be the *direct* result of the wrong<sup>16</sup> and the damage caused by the injury must be liquidated

for partition in minor's suit for partition right survives.)  
(39) AIR 1930 Lah 492 (494) (Person after

5 (18) AIR 1918 Mad 1100 (1101)  
6 (22) AIR 1922 Upp Bur 7 (7 8) 4 Upp Bur  
Rul 73  
7 (11) 12 Ind Cas 716 (717) 36 Bom 174  
(12) 17 Ind Cas 226 (227) (Mad)  
8 (98) 8 Mad L Jour 160 (181 182)  
9 (01) 25 Bom 574 (579 582)  
10 (10) 5 Ind Cas 937 (939) 34 Mad 76  
11 (1878) 4 C P D 40 (44 45 47) Twycross v  
Grant  
(21) AIR 1921 Mad 1 (9) 44 Mad 357  
12 See case in Foot Note (11) above  
13 (32) AIR 1932 Oudh 163 (166 167) 8

1 (95) 22 Cal 92 (99)  
(80) AIR 1930 Lah 708 (705) 12 Lah 1  
2 (26) AIR 1926 Cal 490 (494) 53 Cal 132

Note 6

Note 7

1 (1909) 1909 App Cas 383, United Collieries  
Limited v Simpson  
2 (15) AIR 1915 Lah 378 (378) 1915 Pun Re  
No 62  
3 (22) AIR 1922 Upp Bur 7 (7 8) 4 Upp Bur  
Rul 73

(1878) L R 5 H L 377 Peak v Gurney (Referred  
to in Bom 677 9 Bom 373 8 Cal 837 and  
21 All 290)

(22) AIR 1922 Upp Bur 7 (7 8) 4 Upp Bur  
Rul 73  
14 (1883) 24 Ch D 439 (454) Phillips v Ham  
frey  
(21) AIR 1921 Mad 1 (8) 44 Mad 307

Pat 841 and A I R 1926 All 610 ]  
4 (89) 13 Bom 677 (679 680)

22 R.1  
Notes 7-9

and certain<sup>12</sup>

**8. Right to sue on contracts.**—A right to sue in respect of a contract will on the general principles referred to in Note 4, survive to the representatives of the promisee. Thus in a suit on a bond or to enforce specific performance of a contract to sell or recover property, if the plaintiff dies, the right to sue will survive to his legal representatives<sup>1</sup>. The right to sue will survive against the promisor's representatives unless a contrary intention appears from the contract such as the contract being incapable of being performed by persons other than the deceased. See Section 37 of the Contract Act and the illustrations thereto.

**9. Right to sue for pre-emption.**—Rights of pre-emption are of two different kinds viz—

- (1) those incidental to the ownership of property and
- (2) those which are purely personal.

Rights of the former kind will survive while those of the latter kind will not. In deciding the question whether the right to sue in pre-emption suits survives or not it is necessary to see whether the right claimed is one incidental to the ownership of property or only a personal right. The answer to the question will in turn depend upon the origin of the right. It may be founded on Mahomedan law or on custom or it may have been given by statute.

**Pre-emption under Mahomedan law**—Under the law applicable to the *Sunnis* Mahomedans the right of pre-emption does not survive on the death of the pre-emptor before decree<sup>1</sup>. Under the law applicable to the *Shafis* the right would appear to survive to the heirs of the pre-emptor on his death before decree<sup>2</sup>. Under the law applicable to other sects of Mahomedans there is a conflict of authority between the Allahabad and Bombay High Courts. The Allahabad High Court<sup>3</sup> holds that the right in such cases is incidental to and arising out of ownership of land and that it therefore survives to the heirs of the pre-emptor though it cannot be transferred. The same view prevails in the Punjab<sup>4</sup>. But according to the Bombay High Court the right is a personal one and does not survive to the heirs or other legal representatives of the pre-emptor<sup>5</sup> except in so far as it falls within the provisions of Section 306 of the Indian Succession Act<sup>6</sup>. In Madras where the principle of an absolute transfer of all rights under a sale prevails, a right of pre-emption is not recognized<sup>7</sup> except as a matter of custom in some places such as Malabar<sup>8</sup>.

**Pre-emption under customary law**—Where the right claimed is one based on a custom the question of its survival will have to be decided on evidence as to the custom<sup>9</sup>. Generally speaking a right of pre-emption based on *uajib ul ar.* is an incident of proprietary possession and will survive unless such survival is expressly

All 209)

#### Note 8

1. (16) AIR 1916 All 159 (159) (On bond)
- (19) AIR 1919 All 189 (190) 41 All 515 (Specific performance)
- (26) AIR 1926 Bom 97 (100 102) 49 Bom 862 (Do)

#### Note 9

1. (See (97) 20 All 68 (89))
2. (See (12) 12 Ind Cas 720 (720) 36 Bom 144

- 8 (97) 20 Mad 305 (306 312) (Not a pre-emption before High Court)
- 9 (89) 35 Cal 554 592 593 594)
- (97) 20 Mad 305 (306 312)

excluded by local usage or other specific provisions<sup>11</sup> In Bombay however even a customary right of pre-emption has been held to be a personal one<sup>12</sup>

O. 22 R. 1  
Notes 10-15.

**Pre-emption under statute** — Where the right claimed is one conferred by statute, the question whether it survives or not will be governed by the provisions of the particular statute conferring the right Thus under the Oudh Laws Act (XVIII of 1876) the right of pre-emption survives to the pre-emptor's heirs<sup>13</sup> It can also be devised though not alienated to a stranger<sup>14</sup>

**9a. Right to sue for partition.** — In the case of a Hindu Mitakshara joint family, the filing of a suit for partition by one of the coparceners effects a severance of the joint status so far as he is concerned and if he dies during the pendency of the suit his legal representatives can be brought on the record and can continue the suit<sup>1</sup>

**10. Application for leave to sue in forma pauperis** — The right to apply for leave to sue in *forma pauperis* is purely a personal one depending upon the pauperism of the petitioner On his death therefore the right does not survive<sup>2</sup> Further, the legal representative may or may not be a pauper If he is he may file a fresh application in his own right<sup>3</sup> If he is not he has no right to sue in *forma pauperis*<sup>4</sup>

Where the leave is granted, the plaint gets registered as a suit and if the plaintiff dies thereafter, his legal representative can no doubt continue the suit if the right to sue survives He can further continue the suit as a pauper if he is himself a pauper<sup>5</sup> If he is not a pauper he should pay the court fee otherwise the suit will be struck off<sup>6</sup> This power to enquire into the pauperism of a legal representative is no doubt not contained in Order 22 but exists in a Court by virtue of its power to dispauper the original plaintiff himself at any stage of the suit<sup>7</sup> In making an order for or against the legal representative however the Court should first see whether he is a legal representative in the capacity of an heir entitled personally or beneficially to the estate of the deceased or whether he is only coming in in a representative capacity, having no personal or beneficial interest In the former case his own property can be taken into account<sup>8</sup> In the latter case only the estate of the deceased should be considered and not his individual property<sup>9</sup>

If a defendant in an application for leave to sue in *forma pauperis* dies there being no suit Order 22 does not apply Nor can Section 141 or Section 146 of the Code be invoked for imposing the penalties contained in Order 22 without express provision to

(AIR 1925 Mad 765 D distinguished—Since death after registration as suit)  
(11) 11 Ind Cas 724 (725) 36 Bom 279 (Death

1 11

1 1  
1 1

#### Note 9a

1 (36) AIR 1936 Mad 155 (156) 59 Mad 693  
(In this case it was held that the same principle will apply to a suit for partition filed by a tavazhi in a joint Marumakkattayam family)

#### Note 10

7 (11) 11 Ind Cas 724 (725) 36 Bom 279  
8 (31) AIR 1931 Mad 321 (324 325)

9

utor

**O. 22 R. 1** that effect. Consequently, the legal representatives of the deceased defendant can be  
**Notes 10-13** brought in at any time <sup>10</sup> *Vide also* Notes under Rules 3 and 4, *infra*

**11. Claim to guardianship.** — An application under the Guardians and Wards Act (VIII of 1890) or otherwise for the appointment of a guardian for the person or property or both of a minor, is not a proceeding *inter partes*. It is the Court's duty to look after the interests of the minor and the parties simply set the Court in motion. The policy of the law therefore is not to allow such applications to lapse by the death of parties <sup>1</sup>

Where guardianship, which was before the minor's father, was held to abate on the petitioner's death on the ground that the claim was a matter of personal preference and trust and would not therefore survive to the representatives of the petitioner <sup>3</sup>

**12. Right to letters of administration.** — A right to the grant of letters of administration is a *personal* right and does not survive <sup>1</sup>. The heir can, however, apply afresh <sup>2</sup>. Where pending an application by an executor for the probate of a will, the executor dies, his widow's administration instead <sup>3</sup> of his representative must be the same <sup>4</sup>

**13. Right to sue in representative actions.** — See Order 1 Rule 8, Note 24 for a full discussion. See also Order 30 Rule 4

**14. Suit under Section 92 of the Code.** — See Section 92, Note 30

**15. Suit by or against limited owners or reversioners.** — *Suit by or against limited owners* — A limited owner under the Hindu law is not a mere life estate holder <sup>1</sup> but represents the entire inheritance in certain circumstances <sup>2</sup>. A suit relating to the estate by or against such limited owner is, therefore, not one on any cause of action *personal* to herself and if she dies pending such suit, the right to sue will survive to the reversioners <sup>3</sup>. See also Note 63 to Section 11, and also Note 5 above

*Suit by or against reversioners* — A suit by or against a reversioner in respect of the estate of a Hindu widow is one brought or defended in a *representative capacity* and on behalf of all the reversioners <sup>4</sup>. Consequently, on the death, pending suit, of

{ 16) AIR 1918 Mad 362 (363, 364) 41 Mad 624

(Liquidator)

{ 94) 18 Bom 237 (241)

10 { 83) 7 Bom 373 (376)

{ 29) AIR 1929 Sind 136 (136)

#### Note 11

1. { 24) AIR 1924 Mad 484 (484) 47 Mad 459

{ 17) AIR 1917 Lah 385 (386)

2. { 28) AIR 1928 Lah 456 (457, 458)

3 { 99) 23 Bom 719 (720, 721, 722)

#### Note 12

1. { 19) AIR 1919 Cal 197 (197) 45 Cal 862

{ 09) 111 Cal 709 (801)

[See { 32) AIR 1932 Cal 206 (207) (Appeal from order refusing grant of probate — Where the judgment appealed against may operate as

2.

3.

Note 15

Mad 634

{See however { 31) AIR 1931 Lah 675 (676) (Suit by a Hindu widow for partition of her estate from co-sharers held to be a suit to enforce only her personal rights)}  
 4 See for full discussion Note 63a S 11  
 {See also { 16) AIR 1916 PC 117 (119) 32 Mad 634 43 Ind App 207 (PC)]

such reversioner, the next reversioner will be entitled to continue the suit or to defend it and there is no abatement.<sup>1</sup> Where, however, on the death of the reversioner, events happen, such as the death of the limited owner, which change the nature of the relief to be granted, there can be no continuation of the suit.<sup>2</sup>

O. 22 R. 1  
Notes 15-18

Under certain statutes or customary law prevailing in certain places, the right to control or question the alienation made by a collateral is given to the person who will become immediately interested on the death of such collateral. A suit based on such a right can, on the death of the plaintiff, be continued by the person who becomes so interested on such death.<sup>3</sup> But where the right to question an alienation is, by law, given only to the descendants of the alienor, a suit by a descendant cannot be continued by collaterals other than those who can show themselves to be descendants of the person whose acts are questioned.<sup>4</sup>

**16. Suit under Sections 14 and 18 of the Religious Endowments Act.** — A suit under Section 14 of the Religious Endowments Act (XX of 1863) is a representative suit and on the death of the plaintiff any one of the persons interested may get himself substituted and continue the suit without fresh leave.<sup>1</sup> But a suit under Section 14 of the Act against the defendant who is a sole surviving member of a committee for his removal for neglect of duty is purely a personal claim against the defendant and on the death of the latter the right to sue will not survive against his heir.<sup>2</sup>

**17. Partial abatement.** — An abatement may be total or partial. It may be partial either as regards the parties to the suit (Rules 3 and 4) or as regards the subject matter or reliefs.

The latter kind of partial abatement will arise where there are two or more reliefs claimed in the suit and on the death of a party the right to sue survives with respect to some of them but does not survive with respect to the others.

#### Illustrations

1. A files a suit against B a trustee under Section 92 of the Code for the removal of B and for the settlement of a scheme. Pending the suit B dies. The suit will abate as regards the former relief but may be continued as regards the latter.<sup>1</sup>

2. A files a suit against B a trustee under Section 92 of the Code for his removal and for setting aside an alienation of trust property by him to a stranger. Pending the suit B dies. The suit abates as regards the first relief but continues as regards the second.<sup>2</sup>

**18. Death of either party pending appeal.** — A right to sue which would have survived had the death of a party occurred during the pendency of a suit will survive on such death taking place during the pendency of an appeal from the decree in the suit (Vide Notes under Rule 4)

■ (19) 18 Ind Cas 329 (330-331) 1913 Pun Re  
No 65 p 247  
(86) 1 Agra 49 (49)

7 (35) 1905 Pun Re No 58 page 193  
(96) 21 Cal 997 (1004) 21 Ind App 163 (PC)  
8 AIR 1931 Lah 293 (294) 13 Lah 116

Note 16

1 (18) AIR 1918 Mad 560 (562) 41 Mad 237  
2 (12) 16 Ind Cas 908 (909) 40 Cal 323

Note 17

(14) AIR 1914 Mad 481 (482) 15 Ind Cas 213  
(213-214) 37 Mad 406

(12) 16 Ind Cas 839 (841-842) 36 Mad 500  
(Overruled in AIR 1919 Mad 911 (FB))

(12) 16 Ind Cas 865 (865) (Mad)

(04) 27 Mad 588 (591)

(12) 15 Ind Cas 461 (462-463) (Mad)

17

**O.22 R.1**  
**Notes 18-19**

In cases where it would not have so survived had the death occurred pending the suit, the question whether it survives or not if the death occurs pending appeal, will depend upon the *result* of the suit. If the suit has resulted in a *decree in favour of the plaintiff's claim*, then the claim will have become perfected by the decree and attached to the estate. Thereafter, it becomes a question of benefit to the estate of the plaintiff which his legal representatives are entitled to uphold, or a detriment to the estate of the defendant which his legal representatives are entitled to try and get rid of, consequently, the "right to sue" survives.<sup>1</sup> In such cases the fact that the lower Court's decree has already been executed will not affect the question, since the legal representative can get restitution if he succeeds.<sup>2</sup>

But if in the first Court the result was a *dismissal of the suit*, the plaintiff, in appealing against it is only seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit. The appeal, therefore, partakes of the character of the suit and the "right to sue" will not survive on the death of either party.<sup>3</sup> The appeal cannot be continued even in respect of costs or other reliefs which are merely incidental to the main relief.<sup>4</sup> (See also Order 22, General, Note 2.) If the first Court has decreed the suit in part, then an appeal by the plaintiff in respect of the part disallowed will partake of the nature of an appeal from a dismissal of the suit.<sup>5</sup>

If the "right to sue" in an appeal does not survive, then the memorandum of cross objections filed by the respondent cannot be heard and must also be dismissed.<sup>6</sup>

**19. Suit or appeal against a dead person.** — It has been seen in Note 2 to Order 22, General that this Order applies only to cases of death during the *pendency of the suit* and not to cases of death occurring *before the institution of the suit*.<sup>1</sup> A suit against a person who is dead at the time of the institution thereof is void and of no legal effect<sup>2</sup> and it is immaterial whether the death was *known at the time or not*.<sup>3</sup> Such a suit cannot be amended into one against his legal representatives.<sup>4</sup> But an appeal filed against Lahore, be amended to the Sind and Upper

respect of costs }  
 4 (10) 5 Ind Cr 997 (978 999) 84 Mad 76

62, p 273  
 6 (21) AIR 1921 Mad 405 (406) 44 Mad 673  
 (29) AIR 1929 Lah 807 (808) 11 Lah 1

**Note 19**

1. (33) AIR 1933 Mad 454 (455)  
 (98) 31 Mad 86 (89).  
 [See also (32) AIR 1932 Lah 592 (594)]  
 2. (08) 31 Mad 86 (86, 89)  
 3. (03) 31 Mad 86 (89)  
 (83) AIR 1933 Mad 454 (455)  
 (24) AIR 1924 Bom 109 (111)  
 (19) AIR 1919 Cal 257 (258)  
 4. (25) AIR 1925 Mad 1210 (1210) 49 Mad 15  
 (EB)  
 (32) AIR 1932 Lah 905 (906)

no jurisdiction to bring in the legal representative in such a case<sup>5</sup> although, if the legal representative is already on record in another capacity, the memorandum of appeal can be amended so as to describe him as the legal representative of the deceased<sup>6</sup>

O. 22 R. 1  
Notes 19-21

The principle of the rule that a suit against a dead person is a nullity does not apply to execution proceedings. Thus where an execution application is presented against a judgment debtor who is dead at the time of the presentation of the application the application can be amended by the substitution of the heirs of the deceased<sup>7</sup>

Where the legal representative of a party dying subsequent to decree is allowed to file an appeal against the decree without notice to the respondent the latter can at the hearing raise the objection that the appellant is not really the legal representative and the appeal will be dismissed if there is no application to bring the right legal representative on record<sup>8</sup>

**20 No abatement by reason of death after decree**—When a suit is decreed, the decree determines and settles the claims of the parties. The claim is perfected by the judgment<sup>1</sup> and the decree is properly capable of transfer devolution or inheritance like any other property<sup>2</sup>. Hence, there is no abatement by death subsequent to the decree<sup>3</sup>. But this principle does not apply to the case of death after a decree dismissing a suit on a personal claim *vide* Note 17

**21. Appeal and revision.**—An order refusing an application to add a person as a legal representative and directing abatement of the suit on the ground that the right to sue does not survive is appealable as a decree<sup>4</sup>

An order adding or refusing to add a person as a legal representative of a deceased party may be open to revision under Section 115 of the Code<sup>5</sup>

## R. 2. [S 362] Where there are more plaintiffs or defendants than one, and any of them dies, and

O. 22 R 2

Procedure where one of several plaintiffs or defendants dies and right to sue survives

where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants

[1877, S 362, 1859, S 100]

- |   |  |
|---|--|
| <p>3 (33) AIR 1933 Cal 684 (687)</p> <p>8 (23) AIR 1923 Mad 367 (368)</p> <p style="text-align: center;">Note 20</p> <p>1 (87) 9 All 131 (134) (FB)</p> <p>(02) 26 Bom 597 (607 608)</p> <p>(02) 26 Mad 499 (500)</p> <p>(04) 28 Bom 201 (208) (In a partition suit a decree granting partition effects a division in status and puts an end to survivorship so that on the death of the plaintiff his heirs get the property by inheritance and can come on record as his legal representatives)</p> | <p>(96) 19 Mad 845 (347 348)</p> <p>(24) AIR 1924 Mad 302 (310)</p> <p>2 (20) AIR 1920 Pat 609 (510)</p> <p>(34) AIR 1934 All 1029 (1030)</p> <p>3 (87) 9 All 131 (134)</p> <p>(02) 26 Bom 597 (605 607 608)</p> <p>(27) AIR 1927 Oudh 156 (157 158) ■ Luck 464</p> <p>(94) ■ Bom 224 (226) (No abatement by death during execution proceedings)</p> <p style="text-align: center;">Note 21</p> <p>1 (28) AIR 1928 Oudh 362 (364 365) 3 Luck 628 (618)</p> <p>(16) AIR 1916 Mad 1068 (1069)</p> <p>(19) AIR 1919 Mad 479 (480 481)</p> <p>2 (19) AIR 1919 All 189 (190) 41 All 515</p> <p>(16) AIR 1916 All 34 (36) 38 All 111</p> |
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## Synopsis

## 1. Scope.

- Right to sue surviving to surviving plaintiffs

## 3. Right to sue surviving against surviving defendants.

## 4. "Suit" includes appeal

## 1. Scope. — In order that this rule may apply, it is necessary that —

- (1) there should be *more than one* plaintiff or *more than one* defendant in the suit, and
- (2) on the death of one of the plaintiffs or one of the defendants the right to sue should survive to the surviving plaintiffs *alone* or against the surviving defendants *alone*, respectively, even though they might have been on the record in *another capacity* <sup>1</sup>

The word "survive" has not been used in any technical sense. It has been used in its ordinary sense of "outlive." This rule, therefore, applies to cases of every kind of devolution on death. It is not necessary that the survival should be by reason of any circumstance antecedent to the suit <sup>2</sup>

The word "alone" in the rule means "exclusively," i. e., to the exclusion of other persons <sup>3</sup>. It, however, does not mean that no one else should be entitled to sue or be liable to be sued. It only means that the survivor or survivors should be entitled to sue or be liable to be sued independently of others, i. e., without joining others <sup>4</sup>

No application is necessary for making the necessary entry under this rule. It is the duty of the Court to do so <sup>5</sup>

The following points of distinction between this rule and Rules 3 and 4 may be noted —

- (1) There can be no abatement if the facts come within the provisions of this rule, <sup>7</sup> whereas if the facts fall within the provisions of Rules 3 or 4 and the procedure laid down therein is not adopted, the suit will abate
- (2) If the conditions of this rule are satisfied, the suit can be proceeded with even if it had been filed against a dead person along with others who are his legal representatives, <sup>8</sup> whereas Rules 3 and 4 will not apply if the party was dead at the time of institution of the suit

## Order 22 Rule 2 — Note 1

1. (21) AIR 1921 Oudh 209 (213) 24 Oudh Cas 374  
(34) AIR 1934 Pat 427 (428)

(35) 30 All 49 (51). (Right to sue not surviving—  
Suit abates)

(31) AIR 1931 All 349 (349, 350) 53 All 521  
(But the rule does not apply if the survival is to one in the opposite array—Thus, one of several defendants preferred second appeal the other

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they were *pro forma* respondents in the second appeal, that the right to sue survived to them and that there was no abatement—*Held* that the co defendants were not appellants, that O 22 R 2 did not apply and that the appeal abated)

2. (29) AIR 1929 Sind 225 (226) 24 Sind L R 167

3. (66) 4 Cal L Jour 568 (571, 572)

(27) AIR 1927 Lah 501 (503) (If the right to sue survives against the surviving respondents, even

living defendant, it was *deus ex machina* not apply)

8 (29) AIR 1929 Lah 440 (440)



(iii) The application of this rule or of Rules 3 and 4 *infra* depends on whether the right to sue fully vests in the surviving plaintiffs or is fully available against the surviving defendants. Thus in all cases where the right to sue is fully represented by the surviving plaintiff or defendant already on record this rule will apply and when it would not be fully represented unless some person not already on record is added as a party, Rules 3 or 4 *infra* will apply.<sup>1</sup>

Suppose, there are several defendants to a suit. One of them dies. His legal representatives are already on the record as defendants in another capacity. Can it be said that in such cases the right to sue survives against the surviving defendants alone within the meaning of this rule so that it is not necessary to make an application to bring them on the record as legal representatives under Rule 4 *infra*? It has been held by the Bombay High Court<sup>10</sup> that where the interest of a defendant in the subject matter of the suit does not cease on his death and his legal representatives *as such* have an interest in the subject matter an application to bring them on the record is necessary. On this question, however, there is a conflict of decisions for which see Note 12 to Rule 4 *infra*.

**2. Right to sue surviving to surviving plaintiffs** — Where joint purchasers of property sue for possession and pending the suit one of them dies the right to sue will survive to the others if the purchase is joint and indivisible but not if it is of *distinct* though undivided shares.<sup>1</sup>

As to the survival of the right to sue on the death of a partner in suits by a firm see O 30 R 4 and as to the survival of such right on the death of plaintiff in a suit under Section 92 of the Code see Section 92 Note 30. See also the undermentioned cases.<sup>2</sup>

(33) AIR 1933 All 291 (291)

(32) 1932 Mad WN 491 (493) (Hindu joint

of all the legatees so that on the death of one of the legatees the other is entitled to continue the suit)

(33) AIR 1933 Lah 654 (655) (Suit by some landlords that certain tenancy had extinguished and for declaration that certain person has no occupancy right—Death of some plaintiffs pending suit — Legal representatives not brought on record — Suit is for benefit of all landlords and does not abate either wholly or in part)

(34) AIR 1934 Cal 328 (333) 61 Cal 80 (Suit by committee appointed by Government under S 7 of Act 24 of 1863 — Death of member of com-

(81) 1881 Pun Ro No 109 page 252

(34) AIR 1934 Pat 559 (561) (Suit for ejectment

subject matter would cease — The rule does not contemplate any defence being made by the legal representatives of a deceased defendant)

Note 2

1 (66) 3 All LJ Jour 30 (35 38)

Pat 250 D sungu shed)

(35) AIR 1935 Cal 413 (415) (In an appeal by the defendants against a decree in a representative

O.22 R.2  
Notes 3-4

**3 Right to sue surviving against surviving defendants** — Where the defendants are jointly and severally liable to the plaintiff and one of them dies his legal representatives need not be brought on record<sup>1</sup> Thus in the following cases no legal representatives of a deceased defendant need be brought on record —

(1) Suit against several joint tortfeasors<sup>2</sup>

(2) Suit on a mortgage executed by the members of a joint Hindu family<sup>3</sup>

The legal representatives of a defendant who has before his death assigned his rights to another defendant need not be brought on record<sup>4</sup>

As to the right to sue surviving against the surviving defendants in cases coming under O 1 R 8 see Note 24 to that rule

**4 "Suit" includes appeal** — The word suit includes an appeal (See Rule 11 *infra*) This rule will therefore apply also where the right to appeal survives to the surviving appellants alone or against the surviving respondents alone<sup>1</sup>

For cases where the right to appeal survives to surviving appellants alone see the undermentioned cases<sup>2</sup> and for cases where the right survives against the surviving respondents alone see the cases cited below<sup>3</sup>

suit by several plaintiffs instituted with the permission of the Court under O 1 R 8 C P O no substitution of a legal representative is necessary if one of plaintiffs respondents dies pending

4 (66) G Suth W R Ref 2 (3)  
(88) 1888 Bom P J 191

Note 4

his legal representatives not brought on record — Surviving respondent held solely entitled to prosecute appeal)

(39) AIR 1939 Oudh 106 (203) (A transferring his property to B—Then both A and B suing O for declaration — A dying during pendency of suit — As A has transferred all his rights in the subject matter of the suit to B he is not a necessary party to the suit and his death does not cause the suit to abate)

Note 3

1 (20) AIR 1920 Pat 801 (802)

(24) AIR 1924 Rang 127 (128) 1 Rang 618

[But see (22) AIR 1922 Cal 408 (409) 49 Cal

Annulment after eight months by son

2 (03) 05 All 27 (28) (Dissenting from 24 All 222)

(03) 27 Bom 284 (287)

— Ap-

2 (16) AIR 1916 Lah 133 (135) 1915 Pun Re No 106

(27) AIR 1927 Cal 182 (189) 53 Cal 992

**R. 3. [Ss. 363, 365, 366.] (1)** Where one of two or more

*Procedure in case of death  
of one of several plaintiffs  
or of sole plaintiff.*

plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone,<sup>5</sup> or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application<sup>7</sup> made in that behalf, shall cause the legal representative<sup>10</sup> of the deceased plaintiff to be made a party<sup>9</sup> and shall proceed with the suit.

(2) Where within the time limited<sup>8</sup> by law no application is made under sub-rule (1), the suit shall abate<sup>18</sup> so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs<sup>24</sup> which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

[1877, Ss. 363, 364, 365, 366; 1859, Ss. 101, 102.]

### *Synopsis*

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| <ol style="list-style-type: none"> <li>1. Legislative changes</li> <li>2. Scope and applicability of the Rule.</li> <li>3. Rule applies to appeals</li> <li>3a. Applicability of Rule to revision proceedings. See Order 22, General, Note 2</li> <li>4. Rule does not apply to execution proceedings. See Rule 12 and Notes thereto</li> <li>5. Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone.</li> <li>6. Death of a pauper applicant.</li> <li>7. "On an application made in that behalf"</li> <li>8. Limitation for application under this Rule.</li> <li>9. "Shall cause the legal representative of the deceased plaintiff to be made a party."</li> <li>10. Legal representative.</li> <li>11. Two or more legal representatives.</li> <li>12. Wrong person as legal representative</li> <li>13. Joint Hindu family and legal representatives</li> </ol> | <ol style="list-style-type: none"> <li>14. Legal representatives of deceased plaintiff or appellant already on record in another capacity.</li> <li>15. Determination of the question as to who is the legal representative.</li> <li>16. What pleas may be taken by a legal representative.</li> <li>17. Minor as legal representative.</li> <li>17a. Insolvent legal representative.</li> <li>18. "The suit shall abate so far as the deceased plaintiff is concerned"</li> <li>19. Death after preliminary and before final decree.</li> <li>20. Death after final decree. See Notes to Rule 12</li> <li>21. Suits under Section 92 of the Code. See Note 80 to Section 92</li> <li>22. Suits under O. 1 II 8 of the Code.</li> <li>23. Effect of abatement on the rights of parties.</li> <li>24. Award of costs</li> <li>25. Revision</li> <li>26. Appeal.</li> </ol> |
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### *Other Topics (miscellaneous)*

Application after time See Note 8

Death of pro forma plaintiffs See Note 2

Order of abatement if necessary See Note 18

Survival to defendant See Note 5

Who can apply See Notes 7 and 11

#### **1. Legislative changes. —**

1 Section 363 of the old Code dealing with the case of death of one of several plaintiffs provided that the Court "may cause the legal representative" of the

# **O. 22 R. 3** **Notes 1-3**

deceased plaintiff to be made a party, Section 365 which dealt with the death of a sole plaintiff provided that the legal representative may apply to be brought on the record and "the Court shall thereupon enter his name" Under the present rule the Court, in all cases, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party See Note 7, *infra*

2 The words "the Court may pass an order that the suit shall abate" which occurred in Section 366 of the old Code have been substituted by the words "the suit shall abate"

3 After the words "the suit shall abate" the words "so far as the deceased plaintiff is concerned" have been newly added in order to make it clear that the abatement shall, in the first instance, be only so far as the deceased plaintiff is concerned and not of the whole suit See Notes 18 and 23, *infra*

**2. Scope and applicability of the Rule.** — In order that this rule may apply the following conditions must be satisfied —

1 The death must occur *pending* the suit Thus the rule does not apply where a plaintiff dies *after decree*<sup>1</sup>

2 The right to sue must survive to a 'legal representative' as defined by Section 2, sub section (11)<sup>2</sup>

3 The right to sue must survive either to *other* persons jointly with the surviving plaintiffs or to those *other* persons exclusively

4 The deceased plaintiff must have been a *necessary party* to the suit Otherwise, or, if he has no interest in the suit, his legal representatives need not be made parties and the rule will not apply<sup>3</sup>

Where a plaintiff dies, the suit cannot be dismissed for default of appearance under Order 9 The provisions of Order 22 will apply to such cases<sup>4</sup> See Note 1 to O 9 R. 8, *ante*

The principle of the rule has been held to apply to proceedings in revision<sup>5</sup> and to cases before the Deputy Commissioner under the Chota Nagpur Tenancy Act<sup>6</sup> But it does not apply to proceedings in an application for probate<sup>7</sup> The rule applies to proceedings under the U P Encumbered Estates Act of 1934<sup>8</sup>

As to the applicability of the rule to appeals, see Note 3 below

**3. Rule applies to appeals.** — The provisions of this rule also apply to appeals (*vide* Rule 11, *infra*) Where an appellant dies during the pendency of the appeal and his right of appeal does not survive to the surviving appellant alone, his legal representatives can and should be brought on record and if no application

## **Order III Rule 3 — Note 2**

1 (81) 3 Mad 236 (238)

(27) AIR 1927 Oudh 156 (157) 2 Luck 464

(37) AIR 1937 Rang 199 (200)

See Note 5 *infra*

2 (96) AIR 1936 Pat 123 (124) 15 Pat 82  
{Assncc from a person is not his legal representative}

3 (21) AIR 1921 Lah 357 (358)

(32) AIR 1932 Lah 641 (643) 13 Lah 463  
{Partition suit between two branches of Hindu family — Son of plaintiff dying — Suit does not abate}

(14) AIR 1914 All 113 (113)

4 (35) AIR 1935 Nag 189 (190) 31 Nag L R 374  
{Where the suit is dismissed the dismissal

5 (13) 21 Ind Cas 407 (407) (Cal) (Note *Inter*  
is a conflict of decisions as to the applicability of  
Order 22 to revision proceedings — See Order 22  
General, Note 2)

6 (23) AIR 1923 Pat 29 (29) 2 Pat 243

7. (32) AIR 1932 Cal 206 (207) (Probate appeal  
by legatee — Legal representative of legatee can  
be substituted in appeal)

8 (39) AIR 1939 All 717 (717) (In such pro-  
ceedings the landlord is to be considered to be  
the plaintiff and the creditor who puts in his  
claim as the defendant)

therefor made within the prescribed time, the appeal will abate so far as the deceased appellant is concerned<sup>1 2</sup>

O. 22 R. 3  
Notes 3-6

Where two independent appeals were filed against the same decree, one by the plaintiff and the other by one of the defendants, and during the pendency of the appeals the plaintiff died and his legal representatives were impleaded in his appeal but not in the defendant's appeal, it was held by the High Court of Madras<sup>3</sup> that the latter appeal abated and that the impleading of the legal representative in the plaintiff's appeal would not enure for the benefit of the other appeal

In applying the rule to appeals the interpretation of the words 'right to sue' as given in Note 3 to Rule 1 should be remembered and it will follow that even in cases where the suit would have abated by reason of the right to sue not surviving on the death of the plaintiff, the right to appeal may survive<sup>4</sup> See Note 3 to Rule 1

**3a. Applicability of Rule to revision proceedings.** — See Order 22, General, Note 2

**4. Rule does not apply to execution proceedings.** — See Rule 12 *infra* and Notes thereto

**5. Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone.** — This rule will apply only where the right to sue does not survive, where there are several plaintiffs, to the surviving plaintiffs alone<sup>1</sup> but survives either to the surviving plaintiffs jointly with others<sup>2</sup> or exclusively to others. If the right to sue survives to the surviving plaintiff alone the case is not within this rule<sup>3</sup> but is governed by the provisions of Rule 2

Where the right to sue survives to a *contesting defendant*, the rule cannot apply inasmuch as he cannot continue the suit against himself<sup>4</sup> The case is, however, different if the defendant on whom the right to sue survives is only a *pro forma* defendant<sup>5</sup>

See also Notes to Rule 2 above

**6. Death of a pauper applicant.** — As already pointed out in Note 10 to Rule 1, the right to apply for permission to sue in *forma pauperis* is a purely personal right which does not survive at all. On the death therefore of the petitioner in such an application, this rule will not apply<sup>1</sup> But, it has been held that the legal representative is entitled to be brought on the record and to continue the suit on payment of court fee or he may file a fresh application for leave to sue as a pauper<sup>2</sup> See also O. 22 R. 1, Note 10

#### Note 3

1-2 (86) 1886 All W N 90 (90, 91)  
(85) AIR 1935 All 640 (641) (But where the

#### Note 5

1 (29) AIR 1929 All 347 (347)  
2 (1900) 22 All 222 (223 224)

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**O. 22 R. 3**  
**Notes 7-9**

**7. "On an application made in that behalf."** — The Court cannot, under this rule, add a legal representative *suo motu*. An application must be made for the purpose<sup>1</sup>. The application can be made even by a defendant or respondent interested in bringing the legal representative on the record<sup>2</sup>. Where there are several legal representatives it is not necessary that the application need be made by *all* of them<sup>3</sup>. Further, even an application made by a person who is ultimately found not to be a legal representative has been held to be sufficient compliance with the requirements of the rule, if it has been made *bona fide*<sup>4</sup>. But where *A* applies to be made a party as legal representative and the application states that *B* is not the legal representative *B* cannot seek to counteract his own failure to apply in time by relying on *A*'s application<sup>5</sup>.

Where a party dies after decree, his legal representative can file an appeal against the decree without making a separate application for impleading him as a party: the appeal itself may be regarded as an application for the purpose<sup>6</sup>.

**8. Limitation for application under this Rule.** — The period of limitation for filing an application to bring the legal representatives on record under this rule is ninety days from the date of the death of the plaintiff under Article 176 of the Limitation Act as amended by Act XXVI of 1920 and this is so even if the death had occurred before the amending Act was passed<sup>1</sup>.

The onus is on the applicant to prove that the application is within time<sup>2</sup>.

Where one of the legal representatives has applied in time to be made a party and the application has been granted, the other legal representatives may be brought on the record subsequently<sup>3</sup>.

**9. "Shall cause the legal representative of the deceased plaintiff to be made a party."** — The Court is bound to implead the legal representatives as parties on an application made in that behalf<sup>1</sup>, unless there is a dispute as to who is the legal representative, in which case, the question should be decided by it under Rule 5<sup>2</sup>.

Where an application to add a person as the legal representative of a deceased plaintiff is filed, but the Court, without expressly adding the petitioner as a party allows him to prosecute the suit or appeal, the petitioner will be deemed to have been brought on the record<sup>3</sup>. But the same result will not follow by the mere fact that a *wakalatnama* is filed by a pleader on behalf of the legal representative<sup>4</sup>.

Note 7

L.R. 21

6. (89) 1882 All W.N. 73 (73)

Note 8

one legal representative is sufficient for him to be made a party)

(86) 10 Bom 220 (223) (If an application has been made by one of the heirs of the deceased appellant in time the abatement is saved and the respondent is entitled to have the other heirs all

Note 9

1 (101) 96 Bom 317 (319)

is sufficient to save suit from abatement)

5. (19) AIR 1913 Nag 150 (151, 152) 15 Nag

It has been held that where on the death of the father who was a co plaintiff in a suit, his sons refuse to be substituted as his legal representatives and are joined as pro forma defendants the requirements of law are complied with and the suit does not abate.<sup>5</sup>

A Court to which a case has been sent on remand has jurisdiction to act under this rule.<sup>6</sup>

Where a suit is dismissed for default in ignorance of the plaintiff's death and subsequently an application is filed by his legal representative to be brought on the record the Court can set aside the order of dismissal and restore the suit to the file under Section 151 and substitute the legal representative's name for that of the deceased plaintiff.<sup>7</sup>

**10 Legal representative** — The expression legal representative was not defined under the old Code. Under the English law the primary meaning of the expression is executor or administrator though it may under special circumstances be controlled by the context.<sup>1</sup> The same strict meaning was given to the expression in some cases under the old Code while in other cases a wider meaning was given so as to cover all persons representing the estate of a deceased person.<sup>2</sup> The present definition in Section 2 clause (11) of the Code is very wide<sup>3</sup> and gives effect to the latter view. Under that definition the following persons are legal representatives —

1. A person who in law, represents the estate of a deceased person.<sup>4</sup>

2. A person who intermeddles with the estate of a deceased.<sup>5</sup>

3. Where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.<sup>7</sup>

The term next of kin is peculiar to the English law of inheritance and does not mean the same thing as the term legal representative under the Code.<sup>8</sup>

(1) *Person who in law represents the estate of a deceased person* — There are certain cases which are governed by the Succession Act 1925 in which the executor or administrator alone can represent the estate of a deceased person.<sup>9</sup> In such cases

5 (39) AIR 1939 Pat 225 (228)

6 (04) 7 Oudh Cas 17 (18)

7 (35) AIR 1935 Nag 189 (190) 31 Nag L R 374

Note 10

1 (1820) 6 Madd 159 Price v Strange

(04) 8 Cal W N 843 (851)

2 (See (95) 22 Cal 903 (908))

[See also (97) 20 Mad 51 (53) (Executor was brought on record as legal representative)]

3 (04) 8 Cal W N 843 (851)

(79) 4 Cal 697 (908-919) (It includes the heir)

4 (34) AIR 1934 Lah 1 (3)

(37) AIR 1937 Sind 318 (320) (Residuary legatees under the will of a Hindu residing in Sind is legal representative even before obtaining letters of administration)

[See also (12) 17 Ind Cas 101 (106) 11 Nag L R 113 (Term as used in O 22 has a wide significance)]

5 (19) AIR 1919 Mad 510 (513) 42 Mad 76 (He need not be necessarily the beneficial owner)

9 (38) AIR 1938 Bom 11 (9) 11 L R (1933) Bom 64 (Heir of a Parsi is not his legal representative—18 Bom 337 Relied on)

See S 211 of the Succession Act 1925

[See also (84) 11 Bom 241 (256) (Case under the Probate and Administration Act 1881 which has now been repealed by the Succession Act 1925)]

8 (16) AIR 1916 Mad 1022 (1024)

O.22 R.3  
Note 10

they alone are his legal representative.<sup>10</sup> In cases not governed by the Succession Act there may or may not be an executor or administrator. Where there is an executor or administrator he will be the legal representative of the deceased person where the will is with regard to *part* of the property of the testator, the executor cannot be his legal representative with regard to the properties of the deceased not dealt with by the will.<sup>11</sup> Where there are no executors or administrators, the heir or the legatee will be the legal representative of the deceased person in respect of the property respectively got by him.<sup>12</sup> In other words, the term 'legal representative', as defined in this Code only denotes those classes of persons on whom the status of a representative is fastened *by reason of the death* of a person whose estate they are held to represent.<sup>13</sup> But an assignee from the deceased of a certain property is not his legal representative, for, he does not get any estate of the deceased by reason of his death.<sup>14</sup> Similarly, the Crown getting by escheat the property of a person on his death is not a legal representative, as it does not get the estate as *representing* the deceased person but in its *paramount* right.<sup>15</sup> So also a zamindar who, on the death of a tenant gets under the village custom his interest by escheat, is not his legal representative.<sup>16</sup> Again, the Official Assignee or Receiver of an insolvent's estate is not a legal representative of the insolvent.<sup>17</sup>

(2) *Intermeddlers* — The term 'intermeddle' has been used to mean an intermeddling with the assets of a deceased person in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor or administrator.<sup>18</sup> In other words, it has been used to mean what is known as an executor *de son tort*.<sup>19</sup> It is therefore essential, in order to constitute a person an intermeddler, that there should be an *intention* on his part to act as a legal representative and to *represent the estate* of the deceased.<sup>20</sup> A trespasser or a person who claims a title in himself adversely to the estate of the deceased cannot, therefore be an intermeddler within the meaning of the definition.<sup>21</sup> He will, however be a legal representative if he intends to act as a legal representative and to represent the estate

10 (14) 8 Cal W N 843 (806)

[See also (97) 21 Bom 102 (100) (But an administrator however appointed under S 10 of Regulation VIII of 1827 without leave being granted to him to sue is not the legal representative nor is he entitled to continue an appeal)]

11 (29) AIR 1929 Lah 546 (546)

12 (14) 8 Cal W N 843 (806) (Heirs)

(93) 17 Bom 758 (700)

(36) AIR 1936 Oudh 7 (9) 12 Luck 1 (Universal legatee is legal representative)

(See (35) AIR 1935 All 390 (391) (In this case it was held that a person who would have got

10 (See (100) 21 Bom 102 (100))

16 (14) AIR 1914 Oudh 208 (200)

17 (35) AIR 1935 Mad 131 (152) 53 Mad 403

18 Halsbury Vol 14 page 147

(38) AIR 1938 Mad 694 (666) (A mere assignee from a legal representative is not a legal representative.)

19 Halsbury Vol 14 pp 147 to 151 See also meaning of executor *de son tort* in Wharton's

for which see Note 4 to Section 52 ante ]]

[See also (37) AIR 1937 Sind 318 (300)]

13 (29) AIR 1929 Oudh 353 (354)

14 (29) AIR 1929 All 444 (446) (His case comes under O 22 R 10)

21 (See (26) AIR 1926 Cal 825 (825) (Where taking away a portion of the property of the deceased does not make such person while there is a legal representative present, an executor *de son tort*)]



as such.<sup>22</sup> It depends, in each case, upon the particular facts of that case whether he intends to do so. An intermoddler is a legal representative only for the purposes of the procedure in instituting and defending suits and only to the extent of the property with which he had intermoddled.<sup>23</sup> It has been held in the undormentioned case<sup>24</sup> that an intermoddler cannot sue on behalf of the estate though a suit may be brought against him as representing the estate.

Where it is alleged on behalf of the plaintiff that the defendant is the legal representative of the deceased debtor in that he has intermoddled with the estate of the deceased, the burden is on the plaintiff to prove that the defendant has intermoddled with the property of the debtor at the time of his death.<sup>25</sup>

The definition in Section 2 clause (11) merely means that a person who intermoddles with the estate may be treated as the legal representative. It does not mean that such a person is to be preferred to a person who is found to be the true legal representative of the deceased.<sup>26</sup>

(3) *Representative suits* — In representative suits the legal representative must be a person on whom the estate devolves on the death of the party suing or sued.<sup>27</sup> Where, on the death of a trustee a new trustee is elected or appointed the latter is not the legal representative of the deceased trustee, inasmuch as the estate did not devolve on him on the death of the former trustee but by virtue of his appointment or election which has no retrospective operation.<sup>28</sup> In a suit by a *Hindu widow* for the benefit of the estate, the estate will devolve on the death of the plaintiff on the next reversioner who will therefore be the legal representative of the plaintiff.<sup>29</sup> In a suit by a *reversioner* in respect of an estate held by a Hindu female the reversioner plaintiff sues on behalf of the whole reversionary body. In other words all the reversioners are represented in the suit by the plaintiff reversioner, and on the latter's death other reversioners may be brought on the record for the purpose of continuing

22 (18) AIR 1918 Pat 216 (216)

[See also (79) 4 Cal 842 (345 346) (Party who takes possession of the estate of a deceased Hindu treated for some purposes as his representative)]

(38) 80 Cal 1044 (1057) (Do)

(24) AIR 1924 Cal 362 (362) (Person possessing judgment-debtor's property is his legal representative)

(17) AIR 1917 Mad 879 (880) (Person in possession of estate belonging to deceased can represent deceased defendant)]

23 (24) AIR 1924 All 717 (718) (But not for the purpose of succession to the property of the deceased)

24 (38) AIR 1938 Nag 299 (299) I L R (1939) Nag 526 (Decision proceeds on the ground that under the English law an executor *de son tort* is liable to all the trouble of an executorship without any of the profits or advantages and that he cannot bring an action himself in the right of the deceased but actions may be brought against him)

25 (34) AIR 1934 Rang 196 (197) (Proof of possession by defendant of property which deceased owned some time prior to his death is not enough)

26 (39) AIR 1939 Pat 117 (118)

27 (17) AIR 1917 Mad 578 (588) 40 Mad 177

28 (26) AIR 1926 Mad 540 (541)

(24) AIR 1924 Lah 251 (251)

(32) AIR 1932 Cal 783 (784) (Suit by mohunt on behalf of deity)

(22) AIR 1922 Mad 402 (403) 45 Mad 703

(21) AIR 1921 Mad 124 (124) (Where a trustee sued on behalf of a trust impleading his co

is inapplicable)

[See however (30) AIR 1930 All 348 (349) (Religious endowment — Successor in management is legal representative of previous manager)]

29 (98) 20 All 341 (343 344)

(16) AIR 1916 All 34 (35 36) 38 All 111

(10) 7 Ind Cas 97 (97) 33 All 111

(96) 23 Cal 636 (638)

(1900) 23 Mad 120 (133)

(16) AIR 1916 Mad 611 (612 613) 39 Mad 332

(93) 1893 Pun Re No 97 page 395

[See (12) 16 Ind Cas 461 (463) (Mad) (Where however the suit is in her personal capacity

(19) AIR 1919 Oudh 258 (259) 23 Oudh Cas 260 (A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to any

**O 22 R 3**  
**Notes 10-11**

the suit.<sup>30</sup> This however is not because the succeeding reversioners are legal representatives of the deceased reversioner (for there was no estate vested in him which devolved on his death to the succeeding reversioners) but under the provisions of O 1 Rules 8 and 10.<sup>31</sup> See Note 24 to O 1 R 8. It has been held that a *benamidar* in some sense a trustee for the real owner and his son who has some interest can succeed to the trusteeship and can be considered to be his legal representative within the meaning of Section 2 clause (11).<sup>3</sup>

When a person's name is entered on the record as representing the estate of a deceased person there is no determination of any question as to the *capacity* in which the name is entered. It may be afterwards shown that the person was substituted in a representative character for instance as representing the members of a joint Hindu family.<sup>33</sup>

The right to enforce a partnership contract does not vest in the surviving partner *alone*.<sup>34</sup> But though the rights of a deceased partner may devolve on his representative the right to sue survives to the surviving partners in the absence of any statutory authority to the contrary the latter may therefore continue the suit as legal representatives of the deceased partner.<sup>3</sup>

It is not necessary that the legal representative should be in actual possession of the assets of the deceased. It is sufficient if he is entitled to the possession thereof: e.g. if he is a person on whom the estate would devolve.<sup>35</sup>

If A allows his *benamidar* B to sue in his own name he cannot on the death of B claim to come in as B's legal representative.<sup>37</sup> A District Judge taking possession of the assets of a deceased person under Section 64 of the Administrator General's Act II of 1874 is not the legal representative of the deceased.<sup>38</sup>

If a legal representative dies his own legal representatives who have received assets of the previous deceased will represent him.<sup>39</sup>

**11 Two or more legal representatives** — The expression legal representative must where there are more legal representatives than one be read in the plural.<sup>40</sup>

3 Mad  
 (193 )  
 imp t e  
 reversioner for declaring alienation by widow  
 ineffectual as against reversioners — On his  
 death right to sue survives to next presumptive  
 legal representative.  
 310  
 r on  
 was

ted is not correct—See Note 24 to O 1 R 8 /  
 [See however (39) AIR 1939 All 672 (673)  
 ILR (19 9) All 713 (Brothers suing as re of

32

33

425 (The person entered merely to represent  
 the estate)

34 (97) 21 Bom 412 (421)

35 (87) 9 All 486 (490)

36 (31) AIR 1931 Nag 173 (175) 27 Nag LR 947  
 (Plea that he has no assets of the deceased is

31 (19) AIR 1919 Mad 49 (480)

See also the following analogous cases:

(19) 15 Ind Cas 329 (402) (Mad)

(29) AIR 1929 Mad 524 (525) (Where on refusal

of execution of decree against the deceased)

39 (1900) 22 All 367 (369 3 0)

**Note 11**

1 (94) 16 All 211 (212)

and if any of them refuses to join as plaintiff or appellant he must be made a defendant or a respondent.<sup>2</sup> Where, however, some of them are omitted to be brought on the record, there is a conflict of views as to whether the suit or appeal abates. According to the High Court of Allahabad<sup>3</sup> and the Judicial Commissioner's Court of Sind,<sup>4</sup> it does. According to the High Court of Calcutta the term "legal representative" means all the representatives of whom the representative applying *knew or ought to have known*. Where one or more of the legal representatives are unknown or are unwilling to join in the application, a *bona fide* application by all the representatives who are willing to join will be sufficient compliance with this rule.<sup>5</sup> The High Courts of Bombay,<sup>6</sup> Lahore<sup>7</sup> and Madras,<sup>8</sup> and the Judicial Commissioner's Courts of Nagpur<sup>9</sup> and Oudh<sup>10</sup> hold that a *bona fide* application by all those representatives who are willing to join is enough and will save the suit or appeal from abatement. In cases where the legal representatives are added after notice to the defendants or respondents and they do not raise any objection as to there being other legal representatives, even the Allahabad High Court agrees that it is not open to the defendants or respondents to subsequently contend that the suit or appeal has abated by reason of the fact that all the representatives were not brought on record.<sup>11</sup> Further, where the legal representatives of a deceased person constitute a joint Hindu family and the manager of the family is brought on the record as representing the family, it is not necessary to bring on record the other members of the family.<sup>12</sup>

See also Note 9 to Rule 4, *infra*

**12. Wrong person as legal representative.**—It is the duty of the defendant to enquire and ascertain who the legal representatives of the deceased plaintiff are.<sup>1</sup> Consequently an objection that any person is not the legal representative of a deceased

the omitted legal representatives omission to implead all will be fatal to the suit or appeal )  
( 39 ) AIR 1939 Lah 499 (444) ILR (1939) Lah

not legal representatives even though their contention may be found to be untrue that would not make the whole of the suit or any portion of the suit abate )

9 ( 23 ) AIR 1923 Nag 101 (102) 18 Nag L R 21

10 ( 17 ) AIR 1917 Oudh 34 (35) 20 Oudh Cas 67

(The legal representatives who are unwilling to be made co plaintiffs may be added as defendants even after period under Art 176, Limitation Act )

11 ( 28 ) AIR 1928 All 532 (533) 50 All 657

12 ( 36 ) AIR 1938 All 256 (258) 1 L R (1938) All 425

( 36 ) AIR 1936 Pat 3 (5) (Suit on mortgage—

*vide* believed that they alone were the legal representatives as the parties were governed by customary law and not by Mahomedan law the appeal does not abate )

[See also ( 27 ) AIR 1927 Lah 94 (95) (But where the interest involved in the suit or appeal cannot be sufficiently represented in the absence of

Note 12

1. ( 21 ) AIR 1921 Lah 60 (60)

( 03 ) 26 Mad 224 (228)

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Notes 11-12

O. 22 R. 3  
Notes 12-13

plaintiff must be taken by them at the earliest possible opportunity and if no such objection is so taken and a person has been impleaded as the legal representative of the deceased plaintiff, it is not open to the defendants to subsequently contend that the true legal representatives have not been brought on record and that therefore the suit must abate.<sup>2</sup> See also Note 7, *supra*

See Note 63b to Section 11 and Sections 50 and 52, and the undermentioned case<sup>3</sup>

See also Note 10 to Rule 4, *infra*

**13. Joint Hindu family and legal representatives.** — It has been held by the High Courts of Lahore<sup>1</sup> and Bombay<sup>2</sup> and the Chief Court of Oudh<sup>3</sup> that where a coparcener in a joint Hindu family dies, the survivors are not his legal representatives inasmuch as they take the estate by *survivorship* and not by *succession*. The High Court of Patna has, on the other hand, held that they are his legal representatives within the meaning of Section 2 (11) of the Code.<sup>4</sup> It has been held by the Allahabad High Court that the last portion of the definition of a 'legal representative' in Section 2 (11) is wide enough to cover the case of a coparcener who gets property by survivorship on the death of a coparcener who sues or is sued in a representative character.<sup>5</sup> But it has been held that by force of Section 53, where a son or other descendant of a Hindu has joint family property in his hands which is liable for the debts of the ancestor such son or other descendant is a "legal representative" of the ancestor.<sup>6</sup>

Where, however, the deceased coparcener was the *managing member* of the family representing the family, the succeeding managing member is, according to the High Courts of Bombay<sup>7</sup> and Madras,<sup>8</sup> a "person who, in law, represents the estate of a deceased person" and is therefore his legal representative. The Oudh Judicial Commissioner's Court also has held that where a suit is brought by the manager of a joint Hindu family and the plaintiff dies pending the suit, the substitution of the persons who become the managing members of the family after him is sufficient to save the suit from abatement and it is not necessary to bring on record all the members of the family.<sup>9</sup>

In the case of a *separated Hindu*<sup>10</sup> or in a suit by a member of a joint Hindu family on a *personal contract* made with him his *heirs* will be his legal

2 (1903) 27 Bom 162 (182 186 187)

(1921) AIR 1921 Lah 60 (60)

(1903) 26 Mad 224 (228)

3. (1933) AIR 1933 Mad 43 (48) (Decree against wrong legal representative does not bind the real representative)

**Note 13**

1 (1921) AIR 1921 Lah 34 (35) 2 Lah 114

2 (1918) AIR 1918 Bom 165 (166) 42 Bom 504

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person

[See also (1935) AIR 1935 All 390 (391)]

6 (1936) AIR 1936 Bom 456 (458 459)

(1937) AIR 1937 Mad 780 (785) (Creditor can file administration suit against undivided son of Hindu debtor)

7. (1931) AIR 1931 Bom 484 (489) 55 Bom 700

8 (1925) AIR 1925 Mad 456 (457)

[See also (1932) 1932 Mad W N 431 (432 433)]

9. (1917) AIR 1917 Oudh 34 (35) 20 Oudh Cas 67

10.

refused to allow them to continue the suit

10. (1904) 27 Mad 106 (109)

representatives<sup>11</sup> The institution of a suit for partition by an adult coparcener effects a division in status In the case of a minor's suit for partition, the division in status would be effected from the date of the suit conditional on the Court being able to find that the suit when filed was for the benefit of the minor. Where the minor plaintiff dies after the institution of the suit for partition and before the Court has found that the partition is for his benefit, according to the High Court of Madras, the suit does not abate but it is open to his legal representative to proceed with the trial and obtain a decree on his showing that the suit when instituted was for the benefit of the minor<sup>12</sup> But the High Court of Bombay has taken a contrary view that the heirs of the minor are not entitled to continue the suit<sup>13</sup> After a preliminary decree for partition even the minor plaintiff becomes a divided member, and on his death, his heirs will be his legal representatives<sup>14</sup>

See also the undermentioned case<sup>15</sup>

**14. Legal representatives of deceased plaintiff or appellant already on record in another capacity.**—Where the legal representatives of a deceased plaintiff or appellant are already on the record, though in another capacity, an application to bring them in as legal representatives is unnecessary<sup>1</sup> As to whether such an application is necessary in the case of the death of a defendant or respondent see Note 12 to Rule 4, *infra*

**15. Determination of the question as to who is the legal representative.**—Where a dispute arises as to who is the legal representative, the Court should under Rule 5 determine the question<sup>2</sup> The effect of such a determination is however only limited for the purposes of the suit and is not to be conclusive of his rights<sup>3</sup>

**16. What pleas may be taken by a legal representative**—When a party dies his legal representative is appointed merely in order that the suit might proceed and a decision arrived at It is the rights and disabilities of the *original parties* that have to be considered and not those of the legal representatives themselves<sup>4</sup> All that the representative can therefore do is to take up the suit at the stage at which it was left when the original plaintiff died and to continue it<sup>5</sup> He must rely on the same cause of action and on the same title as the deceased plaintiff<sup>6</sup> It is not open to him to assert his own *individual* or *hostile* title in the suit<sup>6</sup> Likewise the defendant is not

11 (19) AIR 1919 All 189 (190) 41 All 515  
(38) AIR 1938 Bom 451 (453) (Pro note in favour of manager of Hindu joint family—If holder dies a succession certificate may be

fact that his representatives were on the record

**Note 15**

- 1 (94) 17 Mad 209 (211)
- 2 (23) AIR 1923 Nag 209 (209)

**Note 16**

**Note 14**

to Court informing of party's death and the

**O. 22 R. 3** entitled to raise against the legal representative any defence other than those which he  
**Notes 16-18** could have raised against the deceased plaintiff <sup>5</sup>

**17. Minor as legal representative.** — A minor is not disentitled to be made a party as the legal representative of a deceased plaintiff, but he must be represented by a next friend <sup>1</sup>

**17a. Insolvent legal representative.** — See the undermentioned case <sup>1</sup>

**18. "The suit shall abate so far as the deceased plaintiff is concerned"**  
 — If on the death of a plaintiff or appellant, no application to implead his legal representatives is filed within the prescribed time, the suit or appeal will abate <sup>1</sup> But if such application has been made but rejected, the suit or appeal will not abate <sup>2</sup> It is immaterial that the application was made by a wrong person, if it was made *bona fide* <sup>3</sup>

The impleading of the legal representative in an interlocutory matter in the suit will be enough to save the suit from abatement <sup>4</sup> But the impleading of a legal representative in a *cross appeal* will not save the *appeal* from abatement <sup>5</sup>

Under the old Section the Court had to pass an order that the suit or appeal abated Under the present rule, however, the abatement takes place automatically and no separate order to that effect is necessary, <sup>6</sup> so that, any decree passed in the suit in disregard or in ignorance of an abatement will, to that extent, be set aside on appeal <sup>7</sup>

An abatement under this rule will be only so far as the deceased plaintiff is concerned If it is a case of death of a sole plaintiff the abatement will be of the entire suit <sup>8</sup> If, on the other hand, it is a case of death of one of two or more plaintiffs the abatement will, in the first instance, be only so far as he is concerned <sup>9</sup> The effect of such abatement on the whole suit or on the rights of the other parties will depend upon the nature of the suit and of the reliefs claimed (*vide* Note 23, *infra*) Apart

■ (96) 19 Mad 345 (347).

Note 17

1 (24) AIR 1924 Mad 313 (314)

Note 17a

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(AIR 1922 All 209, Overruled—AIR 1922

property vests in him and his subsequent withdrawal <sup>6</sup>  
 does not re-vest the property in the insolvent )

Note 18

1 (69) 11 Suth W R 543 (543)

(33) AIR 1933 Rang 234 (234)

(17) AIR 1917 Low Bur 132 (133)

(96) 1826 All W N 91 (91 92)

[See also (30) AIR 1930 Oadh 3 (5) 5 Luck  
 241 (If a portion of the plaintiff's claim is  
 admitted by the defendant that portion does  
 not abate)]

2 (21) AIR 1921 Nag 23 (24) 17 Nag L R 45

3 (10) 5 Ind Cas 514 (515) (Mad)

4 (25) AIR 1925 Pat 145 (145)

[See also (34) AIR 1934 Mad 448 (450) (Death  
 of one appellant who was also impleaded in

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from any such effect the abatement will be limited to the extent that the deceased plaintiff is concerned.<sup>10</sup>

**19. Death after preliminary and before final decree.** — In suits requiring a preliminary and a final decree can there be an abatement on the ground that no application was filed in time to implead legal representatives on the death of a plaintiff or of a defendant after the preliminary, but before a final decree? It was held in the undermentioned cases<sup>1</sup> by the High Court of Allahabad, that the suit would abate, the reason being that a suit is 'pending' till a final decree is passed. The said Court did not accept the position that the principle laid down by the Privy Council in *Lachmi Naram v Balmakund*, A I R 1921 Privy Council 198 was applicable to such cases. In order to avoid this difficulty, O 22 R 13 has now been amended by that Court so as to make Rules 3, 4 and 5 inapplicable to proceedings after the preliminary decree.<sup>2</sup>

The view of the other High Courts is that the rule does not apply to such cases and that there can be no abatement of a suit on account of the death of a party after a preliminary and before a final decree.<sup>3</sup>

But, as no decree can be passed against a dead person, where after a preliminary decree, the defendant dies and the Court passes a final decree against him without bringing his legal representatives on the record, the final decree is a

10. (98) 22 Bom 718 (721)

(28) AIR 1928 Lah 737 (737, 738)

(01) M Mad 426 (428)

[See also (21) AIR 1921 All 84 (86)]

#### Note 19

1 (31) AIR 1931 All 490 (497) 54 All 70 (FB)

(31) AIR 1931 All 154 (155) 58 All 374

(17) AIR 1917 All 429 (429) 39 All 551

(22) AIR 1922 All 896 (896, 897)

(27) AIR 1927 All 272 (272) 49 All 310

(30) AIR 1930 All 779 (782, 783) 52 All 910

(30) 1930 All L Jour 999 (1002)

(15) AIR 1915 All 88 (88) 37 All 226

2 (34) AIR 1934 All 465 (468)

[See also (35) AIR 1935 All 180 (181) (The Allahabad amendment of Rule 12 *infra* is not, however retrospective)]

3 (28) AIR 1938 Rang 318 (319, 320) 11 Rang 446

(29) AIR 1929 Cal 430 (430) 57 Cal 285 (AIR 1927 Cal 531 and AIR 1926 Cal 308 held not to be good law)

(03) 30 Cal 607 (612)

(30) AIR 1930 Lah 329 (330)

(28) AIR 1928 Mad 914 (918) 51 Mad 701 (FB)

(AIR 1923 Mad 237 and AIR 1924 Mad 786 Overruled)

(23) AIR 1923 Nag 142 (144) 27 Nag L R 119 (FB)

(29) AIR 1929 Nag 206 (207)

(27) AIR 1927 Oudh 561 (561)

(27) AIR 1927 Oudh 156 (157, 158) 2 Luck 464

(31) AIR 1931 Pat 57 (57) (Authority of AIR 1919 Pat 430 (FB) doubted)

(33) AIR 1933 Pat 27 (28)

(36) AIR 1936 Cal 540 (541) (Death of some

plaintiffs after preliminary decree for ascertainment of mesne profits — Suit does not abate by reason of non substitution of deceased plaintiffs legal representatives within time)

(35) AIR 1935 Lah 712 (714) (Obiter)

(37) AIR 1937 Lah 164 (166) 17 Lah 817

(37) AIR 1937 Lah 615 (616) (Order 22 R 3, 4 and 5 do not apply to a case of defendant dying after passing of preliminary decree)

(37) AIR 1937 Sind 208 (209) 30 Sind L R 423 (But where pending an appeal from the preliminary decree one of the respondents dies and no application is made within time to bring on record his legal representatives the appeal will abate)

[See (29) AIR 1929 Cal 648 (649) (Death of one of several mortgagors after preliminary decree and before final decree — Legal representatives not brought on record — Suit does not abate with respect to mortgagors on record)]

(25) AIR 1925 P O 117 (117) 4 Pat 507 59 Ind App 188 (PC) (Under the Code of 1882 proceeding for ascertainment of mesne profits was a proceeding in execution and O 22 R 12 applied — Hence substitution not necessary)

[See also (23) AIR 1923 Cal 626 (628, 629) 50 Cal 650 (Compromise decree in mortgage suit — No abatement on death after such decree)]

(09) 3 Ind Cas 999 (1000) (Cal)

(23) AIR 1923 Oudh 156 (157)

(21) AIR 1921 Pat 185 (186) (Proceeding for





will not cause the appeal to fail.<sup>4</sup> But if the nature of the appeal is such that it cannot be heard in the absence of any of the appellants the provisions of Order 11, Rule 4 cannot be invoked and the whole appeal will fail.<sup>5</sup> One test of determining whether the failure to bring in the legal representative of a deceased appellant will cause the entire appeal to fail is—can the appeal be decided without bringing the legal representatives of the deceased party on the record without bringing into existence two decrees contrary to each other?<sup>6</sup>

Where an appeal has abated the respondent cannot claim its being heard even though he might have filed a memorandum of cross objections. He must file a separate appeal.<sup>7</sup>

As pointed in Note 18 *supra* a judgment given in ignorance of an abatement is null and void.<sup>8</sup> The remedy of the legal representative in such cases is not to sue again on the same cause of action but to have the suit revived.<sup>9</sup>

See also Notes to Rule 9 *infra*

**24. Award of costs.**—The provision for the award of costs contained in this rule should not be taken in a restricted sense. The power to award costs in proper cases exists in Courts and this power is not restricted by this rule.<sup>1</sup> The rule only extends or recognizes the power in cases of abatement under the rule.

The power can also be exercised by an Appellate Court.<sup>2</sup> See also Note 16 to Section 35 *ante*

**25 Revision**—A applied to be added as the legal representative of a deceased plaintiff. It was found that A was not the legal representative. The Court thereupon on that application itself impleaded as legal representative another person who did not seek and was not sought to be impleaded. It was held that the order was liable to revision.<sup>1</sup>

A applied to be added as the legal representative of a deceased plaintiff. He was directed to file a separate suit to establish his claim as such. Such a suit was not filed. The Court thereupon ordered the first suit to abate. It was held that the order of abatement was made without jurisdiction and could be set aside in revision.<sup>2</sup>

(88) 146 Ind Cas 915 (946) (Lah) (Shares of parties ascertainable—No total abatement)

56 Cal 692 ]  
6 (35) AIR 1935 Pat 4 (5) (If the result of hearing and deciding the appeal would be to bring each

(14) AIR 1914 Lah 382 (383) 1914 Pun Re No 89  
(18) AIR 1918 Lah 227 (228) 1918 Pun Re No 84

[See (25) AIR 1935 All 640 (641)]

[See also (26) AIR 1926 Lah 431 (432)]

[But see (34) AIR 1934 Lah 206 (207, 208) 15 Lah 667]

■ (78) AIR 1928 Cal 184 (184, 185)

(09) 4 Ind Cas 380 (386) (All)

(19) AIR 1919 Cal 410 (411)

(28) AIR 1928 Cal 824 (824)

(30) AIR 1930 Lah 174 (175)

# Note 25

1 (19) AIR 1919 Nag 150 (152) 15 Nag L.R. 21  
2 (83) 1883 Bom P J 6 (7)

O. 22 R. 3  
Note 26

**26. Appeal.** — An order on an application under this rule allowing<sup>1</sup> or refusing to allow<sup>2</sup> a person to be brought on the record as the legal representative of a deceased party is not appealable. The reason is that such an order does not adjudicate upon the rights of parties on any point or points in controversy in the suit and is therefore not a decree,<sup>3</sup> nor is such an order an appealable one under the provisions of Section 104 and O 43 R 1. Under the old Code, an order under this rule whether a person should be brought on record as a legal representative of the deceased party was sometimes held to be one under Section 367 of the old Code (corresponding to Rule 5 of this Order) and was therefore held to be appealable under Section 588, clause 18 of that Code.<sup>4</sup> Under the present Code there is no appeal from an order under Rule 5 and the said cases would, therefore, be no longer law. An order bringing on record the legal representative of a deceased appellant is not a "judgment" within the meaning of Clause 15 of the Letters Patent.<sup>5</sup>

In *Nirajan Nath v Afzal Hussain*,<sup>6</sup> a Full Bench of the Lahore High Court observed as follows: "When the order of the Court merely recognizes an abatement, which has already taken place on account of the death of a plaintiff not followed by an application within six months [the period of limitation now is ninety days under Article 176 of the Limitation Act] to implead his legal representative, and does not determine any matter in controversy between the parties, it cannot be regarded as a decree. If, on the other hand, the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy, and is not passed upon an application for the revival of the suit made under O 22 R 9 [an order under O 22 R 9 refusing to set aside the abatement of a suit is an appealable order under O 43 R 1 clause (k) and hence cannot be a decree vide Section 2,

sue did not survive after the death of the plaintiff. It was also pointed out that where the Court holds that the result of the abatement of a suit with regard to one of the plaintiffs owing to his limitation to be brought to the other plaintiffs also and the order would be an abatement

<sup>1</sup> (19) AIR 1915 All 158 (159) 37 All 272  
(Order under O 22 R 5)

(11) 3 All 844 (845)

(12) AIR 1920 Mad 586 (591) 49 Mad 450 (FB)  
(Order under O 22 R 5 — AIR 1920 Mad 424, Overruled.)

(16) AIR 1916 Mad 523 (524) 39 Mad 489

(24) AIR 1924 Mad 622 (623) (Applications by

3. (32) AIR 1932 All 466 (466)

(130) AIR 1920 Lah 8 (9) 1 Lah 403

(24) AIR 1924 Mad 813 (814)

4. (195) 18 Mad 496 (497)

(17) 10 Oudh Cas 121 (125)

5. (33) AIR 1933 Mad 417 (417) 56 Mad 559

6. (16) AIR 1916 Lah 245 (247) 1916 Pun Jc

No 128 (FB)

declared to have abated, open to appeal.<sup>9</sup> It has been held in the undermentioned case<sup>9</sup> that an order of rejection of a petition for substitution under this rule does not *ipso facto* cause the suit to abate.

O. 22 R. 3  
Note 28

A decree dismissing the suit will be appealable by a party thereto<sup>10</sup>

Where a suit automatically abates in the absence of an application under this rule within time, it has been held by the Lahore High Court<sup>11</sup> that an application thereafter for substitution must be deemed to be made under Rule 9 *infra*, and that an order on such application would be appealable under the provisions of Order 43

See also Note 21 to Rule 1, *ante*

**R. 4. [S. 368.]** (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone,<sup>5</sup> or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf,<sup>6</sup> shall cause the legal representative of the deceased defendant to be made a party<sup>8</sup> and shall proceed with the suit.

O. 22 R. 4

Procedure in case of death of one of several defendants or of sole defendant.

(2) Any person so made a party may make any defence<sup>15</sup> appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited<sup>7</sup> by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.<sup>17</sup>

[1877, S. 368; 1859, S. 104.]

#### Local Amendments

##### CALCUTTA

(1) At the end of sub rule (3) delete the period and add the words "except as hereinafter provided"

(2) Insert the following as sub rule (4)

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing, and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place"

##### MADRAS

(1) Remove the period at the end of sub rule (3) and add the following "except as hereinafter provided"

[See also (95) 17 All 172 (174)]

8. ('95) 17 All 286 (288)

9. ('21) AIR 1921 Nag 23 (24) 17 Nag L R 45

10 ('95) 18 Mad 496 (498)

[See also (20) AIR 1920 Lah 8 (9) 1 Lah 493]

11. ('24) AIR 1924 Lah 424 (424)

O. 22 R. 4  
Notes 1-2

(2) Insert the following as new sub rule (4)

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared *ex parte* or who has failed to file his written statement or who, having filed it has failed to appear and contest at the hearing, and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place"

### Synopsis

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| 7 Limitation to implead legal representative  | 23. When suit or appeal abates against all, as a whole.                        |
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#### 1. Legislative changes. —

1 Under Section 368 of the old Code, the plaintiff had to make an application specifying the person whom he alleges to be the legal representative of the deceased defendant. It was, however open to the person to object that he was not the legal representative. The real legal representative could also make the application to have himself impleaded. The present provision is more general in the matter of the application and lays down that "the Court shall, on an application made in that behalf, cause the legal representative of the deceased defendant to be made a party." See Note 16 *infra*

2 The words "as against the deceased defendant" in sub-rule (3) are new.

2. Scope and applicability of the Rule. — This rule deals with the death of a defendant in a pending suit. It will be interesting to note the position of this rule in relation to Rule 2 on the one hand, and in relation to Rule 10 on the other. If a case falls within Rule 2, this rule is excluded,<sup>1</sup> and if a case falls within this rule, Rule 10 will be excluded.<sup>2</sup>

For the application of this rule the following conditions are necessary, viz —

O. 22 R. 4  
Notes 2-3

(1) There must be a *suit* (or an appeal). Thus, the rule has been held to be inapplicable to an investigation into an application for permission to sue in *forma pauperis*,<sup>2</sup> and to proceedings by contributories under Section 214 of the Companies Act, 1882.<sup>4</sup> But it has been held to apply to proceedings under Section 21A of the Punjab Alienation of Land Act.<sup>5</sup>

(2) The death of the defendant must be *pending the suit*. Thus, the rule will not apply if such death was either before the institution of the suit<sup>6</sup> or after decree in suit.<sup>7</sup> In the former case, if the deceased was the sole defendant, the suit will have to be dismissed as being against law.<sup>8</sup> If he was one of two or more defendants, his name will have to be removed from the record and the suit proceeded with against the other defendants, if need be, after an order under O. 1 R. 10.<sup>9</sup> The suit or appeal must be pending in a Court having *jurisdiction* to entertain it. Otherwise, there can be no question of abatement of the suit or appeal.<sup>10</sup>

(3) The right to sue should survive but not against the surviving defendants *alone*. Thus, if the right to sue does not survive at all the rule will not apply.<sup>11</sup> And if it survives against the surviving defendants *alone*, Rule 2, and not this rule, will apply.<sup>12</sup>

**3. Rule applies to appeals.** — This rule applies also to the case of the death of a respondent in a pending appeal.<sup>1</sup> The words "right to sue" in this rule should be taken to mean "right to appeal" in cases where a party dies after decree in the suit, but pending appeal.<sup>2</sup> But where the appeal has been filed in a Court not having *jurisdiction* to entertain it, there can be no abatement.<sup>3</sup>

Under the old Code it was held by the Allahabad High Court in a number of cases that the provisions of Section 368 were limited to the case of the death of a respondent, who was a defendant in the lower Court,<sup>4</sup> and held that a defendant-appellant need not apply under the Section for impleading the legal representatives of

(27) AIR 1927 All 272 (272) 49 All 310 (Right to sue includes the right to continue the suit)

(92) 16 Bom 27 (28)

3. ('88) 7 Bom 378 (376)

4. ('98) 18 All 156 (158)

5. ('85) AIR 1935 Lah 443 (444)

6. ('08) 31 Mad 86 (88)

(37) AIR 1937 Lah 794 (795) (Suit originally instituted in wrong Court and on return of plaint plaintiff presented in proper Court—Death of some of the defendants in the interval — No question of abatement arises)

7. ('05) 29 Mad 361 (362) (Where a defendant dies after an *ex parte* decree against him, his legal representatives cannot apply to set it aside unless plaintiff has clearly brought them on record as legal representatives under § 234 (S. 50))

8. ('14) AIR 1914 Cal 895 (896)

(19) AIR 1919 Cal 237 (238)

(16) AIR 1916 Mad 440 (441)

(28) 1928 Mad W N 240 (241)

(20) AIR 1920 Sind 82 (83)

[See ('93) 16 Mad 319 (320)]

9. ('26) AIR 1926 Lah 153 (153, 154)

(28) AIR 1928 Lah 359 (360) 9 Lah 536

10. ('35) AIR 1935 All 92 (93)

11. ('21) AIR 1921 Lah 390 (391)

(35) AIR 1935 All 106 (107)

(23) AIR 1933 Cal 61 (63) 36 Cal W N 1007 (1009, 1010)

12. ('06) 4 Cal L Jour 563 (570 571)

<sup>1</sup> estate — Suit against such father and son — Father dying — Right to sue survives against son)

#### Note 3

1. ('60) 4 Bom 654 (655)

(98) 22 Bom 718 (721)

(04) 31 Cal 457 (494) 31 Ind App 71 (PC)

(80) 1880 Pun Re No 30 p 67

2. ('34) AIR 1934 All 1029 (1030)

3. ('35) AIR 1935 All 92 (93)

4. ('87) 9 All 118 (119)

(85) 7 All 734 (738)

**O 22 R. 4**  
**Notes 3-4b**

a deceased plaintiff respondent<sup>5</sup> It is now, however well settled that the rule applies to the case of the death of a respondent whether he was a plaintiff or a defendant in the original suit<sup>6</sup> The question whether the abatement is partial or total will in the case of a suit depend on the nature of the right claimed but in an appeal it will have to be decided with reference to the nature of the decree appealed against<sup>7</sup> As to this see Notes 22 and 23, *infra*

The provisions of sub rule(4) framed by the High Court of Madras are applicable to appeals also Thus where on the death of one of the respondents the appellant fails to bring on record his legal representative the Appellate Court has jurisdiction to exempt his being brought on record and the appellate decree has the same force and effect as if it had been passed before he died<sup>8</sup>

**3a Applicability of Rule to revision proceedings** — See Order 2<sup>o</sup> General Note 2

**4 Rule does not apply to execution proceedings.** — This rule does not apply to execution proceedings<sup>1</sup> Rule 13 contains a specific declaration to this effect For fuller discussion see Notes to O 22 R 12.

**4a Suit against municipality** — A certain Municipality was superseded by the Government and a Special Officer was appointed A suit was brought against the Municipality represented by the Special Officer and was decreed The defendant appealed against the decree making the Special Officer as representing the Municipality respondent to the appeal The administration of the Municipality was then restored to the Commissioners It was held by the Patna High Court in the undermentioned case<sup>1</sup> that it was not necessary to bring the Commissioners on the record as the legal representatives of the Special Officer as the appeal was against the Municipality which was a Corporation and the Commissioners were not the representatives of the Special Officer The decision proceeds on the ground that the Municipality continues to be a Corporation notwithstanding the appointment of a Special Officer But this decision is inconsistent with the decision in the undermentioned case of the Lahore High Court<sup>2</sup> In that case a suit was filed against a Municipality and then the Municipality was superseded and an Administrator was appointed It was held that a decree passed against the Municipality in such a suit without bringing on record the Administrator or other person as the legal representative of the Municipality was a nullity

**4b Suit against devasthanam** — See the undermentioned case<sup>1</sup>

5 (30) 7 All 693 (697 693 700 01) (Pat

Mahmood J *Contra*)

6 (1900) 22 All 400 (433)

(Oo) 23 Mad 499 (499)

7 (30) AIR 1930 Lah 651 (653)

[See also (33) 141 Ind Cas 239 (240) (Pat)]

8 (33) AIR 1935 Mad 236 (238) 53 Mad 752

(This power is discretionary and will rarely be exercised in the case of a single respondent)

**Note 4**

1 (31) AIR 1931 Bom 495 (42) (The proper procedure in execution is regulated by O 21 R 16 in case of a deceased decree-holder and O 21 R 27 and S 30 in case of deceased judgment-debtor)

(33) AIR 1923 Lah 560 (563) [Appeal from order in execution proceedings—O 22 R 11 not

applicable]

(11) 10 Ind Cas (405) (406) (Lah)

(39) AIR 1939 Sind 234 (235) I L R (1939) has

no

sure to  
cancel  
make

**Note 4a**

1 (3) AIR 1937 Pat 553 (55)

2 (33) AIR 1933 Lah 63 (64)

**Note 4b**

1 (37) 1937 Mad W N 465 (4) (Suit against devasthanam—Defendant represented by trustee—Trust ceasing to be such subsequently—Objection to bring on record another trustee does not cause abatement)

**5. Where right to sue survives against persons other than the surviving defendant or defendants.** — The rule does not apply if the right to sue survives against the surviving defendants alone. In other words, it is necessary that the right to sue should either survive to other persons alone or to other persons along with the surviving defendants. For some illustrative cases, see the cases cited below.<sup>1</sup> See also Notes to Rule 2 and Note 5 to Rule 3, *ante*.

O. 22 R. 4  
Notes 8-7

**6. "On an application made in that behalf."** — Under the old Code it was for the plaintiff to bring the proper legal representatives of a deceased defendant on record and he was to choose the representative at his own risk.<sup>1</sup> Even the last paragraph in Section 369 was only subsequently added to the Section. Before that addition, it was held that the Court could not, except on the application of the plaintiff or the appellant, place on record the representative of a deceased sole defendant or respondent and that the representative of the deceased defendant or respondent could not apply under that Section.<sup>2</sup> Under the present rule it is open to any person interested to apply for the addition of the proper representative.<sup>3</sup> But even under the present rule, in the absence of a proper application by anybody else the duty of applying for bringing in the proper legal representatives on record ultimately rests on the plaintiff<sup>4</sup> as the consequence of not applying in time will be the abatement of the suit. Such an application is not obviated by the mere fact that a legal representative has been impleaded in another independent proceeding.<sup>5</sup>

Even under the old Code where the Court was to simply enter the name of the person nominated by the plaintiff it was held that it had in some cases power to add other persons jointly with those nominated by the plaintiff.<sup>6</sup> Under the present Code the Court has power to determine who is the legal representative.

**7. Limitation to implead legal representative.** — Under the Limitation Act of 1877 there was a sharp conflict of opinion on the question as to the period within which an application to implead the legal representatives of a deceased respondent in an appeal had to be filed.<sup>1</sup> Under the present Code such applications

**Note ■**

- 1 (1900) 22 All 430 (433) (Suit for joint possession decreed — Appeal — One respondent died — Legal representative not brought on record — Held right to appeal does not survive against surviving respondents alone.)  
(04) 81 Cal 487 (494) 31 Ind App 71 (PC) (Suit for taking accounts and winding up the affairs of a partnership — Right to sue does not survive against surviving partners alone — If legal representative is not added, suit cannot proceed)

- (90) 1890 Pua Re No 5 p 12  
2 (85) 9 Bom 56 (58)

- (See however (25) AIR 1925 Mad 777 (777) But order that is made bringing the legal representative of the deceased respondent on the record in the memorandum of objections will ensure for the whole of the proceedings including the appeal.)  
(19) AIR 1919 Mad 1026 (1027) (Appeal and memorandum of objections are not independent proceedings.)  
6 (85) 11 Mad 300 (303)

**Note 7**

- 1 In the following cases Article 178 was held applicable

made nearly two years later — Held that the appeal abated inasmuch as the right to sue did not survive only against the two defendants on the record.)

**Note 6**

- 1 (13) 21 Ind Cas 397 (400) (Cal)

**O.22 R. 4**  
**Notes 7-9**

whether in a suit or in an appeal, to implead legal representatives are governed by Article 177 of the Limitation Act (IX of 1908)<sup>2</sup>

Has the Court power to excuse delay and accept an application made after the period of limitation? It has been held that Section 5 of the Limitation Act does not apply to an application under this rule<sup>3</sup> But an abatement can be set aside for *sufficient cause under Rule 9, infra*, so that in such cases the strict procedure would be to declare the suit or appeal to have abated and to allow the plaintiff or appellant as the case may be, to apply under Rule 9<sup>4</sup> As to what is sufficient cause, See Rule 9

8. "Shall cause the legal representative of the deceased defendant to be made a party." — On the death of a defendant in a suit the Court should bring the legal representative on the record before proceeding further with it The suit may be described to be in a state of suspension till then, and no orders excepting formal, or processual can be passed<sup>1</sup> If the suit is disposed of without impleading the legal representatives of a deceased party, retrial will be ordered<sup>2</sup>

Where the Court makes an order for the substitution of the names of the heirs of a deceased defendant or respondent, it is no part of the duty of the plaintiff or appellant to see that the record of the Court is corrected in terms of the order This is a ministerial function which the Court's establishment is charged to perform<sup>3</sup>

If it is necessary in any case that some person who is not an heir or concessor of a deceased defendant should be substituted instead, it is not enough that the name of the person is substituted or added in the cause title But it is necessary that the plaint should also be amended making the necessary allegations on which the liability of the added person is based<sup>4</sup>

### 9. Two or more legal representatives. — Supposing that a defendant dies

(88) 10 All 260 (262, 263)

(88) 10 All 284 (287, 269) (FB)

(88) 10 All 270 (271) (FB)

(86) 11 Mad 1 (3, 4, 5) (FB) (Karnan, J., dissenting)

(1906) 29 Mad 529 (580) (28 Mad 498 Overruled)

[See (10) 5 Ind Cas 420 (421) 34 Mad 292

(86) 10 Bom 663 (665) (Art 171 B, Limitation Act (1877) not applied)

(1885) 11 Cal 694 (695, 696) (Art 171B applied)]

In the following cases Article 175C was held applicable

(59) 11 All 408 (413 415)

(07) 29 All 535 (536)

(07) 34 Cal 1020 (1023)

2. ('24) AIR 1924 Lah 816 (818) (But an application for bringing legal representative of a deceased person who was not a defendant or respondent on date of his death is governed by Art 181 and not by Art 177)

(33) AIR 1933 Lah 356 (358) 14 Lah 543 (If no application is made in time suit abates automatically)

3. ('14) AIR 1914 All 94 (95) 36 All 235

(22) AIR 1922 Lah 131 (131).

4. (29) AIR 1929 Lah 129 (130) 10 Lah 816 (Application specifically under Rr 4 and 9—Certain circumstances adduced as sufficient cause to excuse delay—Prayer that application be admitted and delay excused under S 5 of the Limitation Act—Held, application was in sub-

stance to set aside abatement)

[See (33) AIR 1933 Sind 86 (87) 70 Sind L R 81]

#### Note 8

1. (31) AIR 1931 Lah 73 (74) (The state of suspension by lapse of time under Art 177 merges

(10) 43 Bala 14 100 (100)  
(24) AIR 1924 Lah 33 (34) (It is illegal for two Court to continue to hear a suit against a dead

not insist on having a re hearing of the case because it turns out that at the time of hearing the respondent was dead when the representatives of the deceased themselves do not want it) [See also (27) AIR 1927 Lah 200 (215) 9 Lah 54 (Refusal to bring in legal representative is a denial of natural justice which will make foreign judgment unenforceable.)]

3. (37) AIR 1937 Bom 401 (406) 1 L R (1937) Bom 602 (If it is not performed or neglected, the fault will not lie with the appellant)

4. (33) AIR 1933 Cal 314 (315)



leaving two or more legal representatives, the question arises whether all of them should be impleaded and what is the effect of a failure to do so. On this question the Allahabad,<sup>1</sup> Bombay,<sup>2</sup> Madras,<sup>3</sup> Patna,<sup>4</sup> Lahore<sup>5</sup> and Peshawar<sup>6</sup> Courts have held that even if one of them alone is impleaded, he sufficiently represents the estate and the suit does not abate. Further, according to the Lahore High Court,<sup>7</sup> a *bona fide* application to bring in all those representatives who can be ascertained by the exercise of due care and industry will save abatement. According to the Rangoon High Court<sup>8</sup> if the person impleaded as a matter of fact represented the estate and no objection as to the want of proper representation is taken at the time, there will be no abatement and the decree will bind the estate. According to the Nagpur view the plaintiff can get relief against the legal representative impleaded, though it will not bind the other representatives.<sup>9</sup> The Sind Court<sup>10</sup> has held that all the legal representatives should be brought on record in time, otherwise the suit will abate. But even in that Court an objection that all the representatives have not been brought on record should be taken at the proper time, otherwise the defendants will be estopped from taking it at any subsequent stage.<sup>11</sup> In any event if some of the legal representatives are specifically dispensed with the suit cannot proceed as against them and if the suit cannot proceed in their absence, the whole suit will abate.<sup>12</sup>

It has been held by the Madras High Court<sup>13</sup> that where all the legal representatives are brought on the record but, subsequently, one of them dies and his legal representatives are not brought on the record, the proceedings are not vitiated.

See also Note 11 to Rule 3 *ante*.

**10 Wrong person as legal representative.** — An application to implead somebody other than the proper legal representative of a deceased defendant is not valid and a decree obtained against such person will *ordinarily* be not binding on the true representative or on the estate of the deceased defendant.<sup>1</sup> But such a decree will be binding in the following circumstances, *viz* —

(1) where the plaintiff acted *bona fide*

#### Note 9

1 (25) AIR 1928 All 532 (533) 50 All 657

2 (24) AIR 1924 Bom 420 (421)

(35) AIR 1935 Bom 287 (290)

3 (02) 26 Mad 230 (234)

time there is no abatement and an effective decree can be passed against the estate of the deceased especially where the others are later on also added as parties though after the prescribed time.)

[See (12) 13 Ind Cas 313 (313) (Mad) (Where some of the legal representatives of a deceased respondent are brought on the record in time there is no bar to bringing the other representatives on the record subsequently.)]

(See also (36) AIR 1936 Mad 336 (337) 59 Mad

8 (23) AIR 1923 Rang 114 (116) 4 Upp Bur Rul 150

9 (23) AIR 1923 Nag 101 (102) 18 Nag L 21

10 (25) AIR 1925 Sind 2 (3, 4)

(26) AIR 1926 Sind 20 (21)

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deceased defendant held barred by failure to take the objection earlier.)]

12 (17) AIR 1917 Cal 98 (93)

13 (36) AIR 1936 Mad 336 (338) 59 Mad 660

(In this case there was the additional factor that the plaintiff did not know about the death of one of the legal representatives.)

#### Note 10

1. (20) AIR 1920 All 323 (323) 42 All 497 (504)

**O. 22 R. 4**  
**Notes 10-12**

- (11) where the decree obtained is free from fraud or collusion,
- (12) where the person wrongly impleaded was so impleaded in a representative capacity and the decree was passed against him as representing the estate of the deceased,
- (13) where the plaintiff was not aware of any fact which displaced the apparent title of the person, and
- (14) where the real legal representative had not intervened during the pendency of the suit.<sup>3</sup>

Thus, a decree obtained after impleading a person having a *prima facie* claim to be considered the legal representative of a deceased defendant<sup>3</sup> or after impleading a person who, but for some other facts of which the plaintiff is not aware, would be such legal representative,<sup>4</sup> will be binding on the estate. In such cases, however, conditions (11) and (12) must be satisfied, that is, the true representatives must not have intervened or applied to be made parties pending the suit<sup>5</sup> and the plaintiff must not, during such pendency, have been otherwise made aware that the person whom he has impleaded is not the true legal representative. Where the plaintiff was in a position to know who the real heirs were on making inquiries which he failed to make, it has been held that his application to substitute a wrong person as the heir of the deceased cannot save the suit from abatement.<sup>6</sup> Where a wrong person has been impleaded as the legal representative the Court can, on being apprised of the fact of the existence of the legal representative, strike out the former's name and substitute the latter's name on the record.<sup>7</sup>

See also Section 11 Note 63b, Section 50 Note 14, Section 52 Notes 4 to 6 and Order 22 Rule 3 Note 12

**11. Joint Hindu family and legal representative.** — When the deceased defendant is a member of a joint Hindu family it must be shown, before the other members can be impleaded as legal representatives, that *prima facie* the deceased had an estate which survived to the other members.<sup>1</sup> See also the undermentioned decision<sup>2</sup>.

**12. Legal r . . . . .**  
It may be taken as

3 L R 89  
 does not

part but there is nothing to show that

) 33 Mad

6 (Principle applied to execution proceedings)]  
 [See however (33) AIR 1933 Mad 43 (48) (Decree against wrong legal representative not in possession of estate is bad though not fraud)]

3 (91) 14 Mad 454 (457)  
 (23) AIR 1925 Oudh 330 (334) 28 Oudh Cas 177.

[See also (32) AIR 1932 Lah 426 (427) 14 Lah 76]

7. (83) 12 Cal L Rep 45 (46) (Court refused to substitute suo motu)  
 (15) AIR 1915 Lah 144 (144)

Note 11

1. (30) AIR 1930 Mad 575 (576)

2. (39) AIR 1939 AIR 66 (636) (Defendant in suit dying during pendency of suit leaving father, brothers widow and daughter — His father brought on record in his place and not his widow — Representation is defective — Even if it is assumed that the defendant was sued as manager

defendant are already on the record in the suit, though in another capacity, no application is necessary under this rule to implead them as legal representatives, and the suit will not abate by reason of the absence of such an application<sup>1</sup>. It is enough if the plaintiff, at some time or other during the hearing of the suit, states the fact and gets it noted on the record<sup>2</sup>. Where, however, only *some* of the legal representatives are on the record but not all, it has been held by the Patna and Lahore High Courts that an application is necessary under this rule and that in its absence the suit will abate<sup>3</sup>. In the undermentioned case<sup>4</sup> it was held by the Bombay High Court that even where the only heir of a deceased defendant is already on the record in another capacity, an application under this rule is necessary. According to the High Court of Madras, where the legal representative already on the record sufficiently represents the estate, the suit will not abate by reason of the absence of an application under this rule and the decree passed in the suit will bind the estate<sup>5</sup>.

See also Note 11 to Rule 3

**13. Succession Act and legal representative.** — Where the deceased is governed by the Succession Act, his legal representatives are his executors or administrators and not his heirs<sup>1</sup>. Even though no representation is taken out for his estate, the plaintiff cannot on that ground add his heirs as legal representatives<sup>2</sup>. The only course open to the plaintiff will be to move the Court to have an administrator appointed<sup>3</sup>. On the death of an executor, the estate of the testator devolves on the residuary legatee and hence a suit or appeal filed against the executor will abate if upon his death an application for bringing on record the residuary legatee is not made within the period of limitation<sup>4</sup>. See also Note 10 to Rule 3

**14. Pro forma defendant or respondent** — Where the deceased defendant or respondent *had no interest* in the litigation the rule does not apply and the failure to bring his legal representatives on the record within time will not cause the suit or appeal to abate<sup>1</sup>. Thus there will be no abatement for failure to bring in the legal

of joint family if father is not the manager his impleadment is not sufficient)

#### Note 12

{ 21 } AIR 1901 Oudh 209 (218) : 24 Oudh Cas

Letter written within time to the Deputy Registrar mentioning his death and informing the Court that the legal representatives were already on the record may be treated as sufficiently complying with the necessity for

- 3 (25) AIR 1925 Pat 123 (124) 3 Pat 859  
(39) AIR 1933 Lah 356 (359) 14 Lah 543  
(28) AIR 1928 Pat 270 (255, 253) 7 Pat 285  
4 (38) AIR 1933 Bom 6 (6) I L II (1938)  
Bom 64  
5 (30) AIR 1980 Mad 69 (71, 72)

#### Note 13

and son if father dies appeal does not abate as

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1 reg 46

#### Note 14

- 1 (23) AIR 1973 Cal 382 (394)

**O 22 R. 4** representative of a deceased defendant or respondent, who was only a *pro forma*  
**Notes 14-16** defendant or respondent<sup>2</sup> or who was not a proper or necessary party to the suit  
 or appeal<sup>3</sup>

**15. What pleas may be taken by a legal representative.** — A legal representative must continue the litigation on the *cause of action* sued upon and cannot set up a new or individual right<sup>1</sup> He cannot set up a plea open to him personally<sup>2</sup> But he can take up any plea which may be appropriate to his character as legal representative<sup>3</sup> Thus, he can rely on any one of the alternative defences of the deceased<sup>4</sup> even though it may not have been raised by him specifically<sup>5</sup> But he cannot take up a new and inconsistent plea<sup>6</sup> or a plea contrary to the one taken up by the deceased<sup>7</sup> See also Note 16 to Rule 3 and Note 7 to Section 50

**16 Effect of decree against legal representative of deceased defendant**  
 — A decree obtained against the legal representative of a deceased defendant is binding on the estate If the person against whom the decree has been obtained is a limited owner, such as a Hindu widow, the question whether the decree is or is not binding on the reversioner will depend upon the question whether the suit was one which affects the *whole inheritance* or only on a cause of action *personal* to the widow<sup>1</sup> In the latter case the decree is not binding on the reversioners<sup>2</sup> Whereas in the former case it is when the decree has been fairly and properly obtained against the widow in her representative capacity it whom the decree has been ob has been held by the Bombay rightly entitled to the estate even though the plaintiff acted under a *bona fide* mistake and was not aware of the existence of the true legal representative<sup>4</sup> However this may

(83) AIR 1933 Lah 406 (407)

(26) AIR 1926 Cal 247 (248)

(26) AIR 1926 Cal 512 (513)

(14) AIR 1914 Mad 708 (709) 38 Mad 1064  
 (The test to decide whether a right survives is whether the result of the adjudication will affect the deceased party)

(26) AIR 1926 Lah 189 (189) (The only point in dispute in the case did not affect the deceased defendant)

(35) AIR 1938 Cal 541 (543) (No abatement as a whole)

(35) AIR 1935 Cal 202 (203)

[See (38) AIR 1939 Cal 639 (640) (Where the legal representative of a *pro forma* respondent who is dead is not brought on record the appeal does not abate in toto)]

[See (32) AIR 1932 Lah 641 (642) 13 Lah 433]  
 Note 15

1 (27) AIR 1927 Nag 162 (163)

(35) AIR 1935 Mad 52 (54)

2 (25) AIR 1925 Mad 59 (59)

(97) 19 All 480 (482)

(99) 21 All 277 (279)

(99) 21 All 356 (358)

[See also (18) AIR 1918 Cal 151 (157) (Let after a widow's death the reversioner was clothed with the full rights of a proprietor as the heir of a last male owner and could reopen the matters settled against the widow)]

3 (30) AIR 1930 All 348 (349) (Legal representative a manager of mutt—Preliminary decree on a mortgage by deceased defendant manager allowed to be challenged)

4 (13) 19 Ind Cas 401 (403) (Dom)

5 (16) AIR 1916 Mad 1130 (1139)

6 (21) AIR 1921 Cal 343 (344)

7 (24) AIR 1924 Mad 245 (246)

Note 16

1 (81) 7 Cal 357 (366)

2 (99) 26 Cal 235 (299 300)

3 (98) 20 All 341 (343 344)

(81) 6 Cal 479 (482)

(85) 11 Cal 45 (51 52)

(86) 13 Cal 283 (291)

(96) 23 Cal 636 (638)

(04) 8 Cal W N 813 (851)

(09) 1 Ind Cas 62 (64) (Cal)

4 (27) AIR 1927 Bom 63 (66, 67) 50 Bom 60

3 (33) AIR 1933 Lah 406 (407)

(27) AIR 1927 Lah 444 (444) (Appeal filed to de-

bo, where the legal representative stands by and allows a stranger to enter into possession of the property, a decree obtained *bona fide* against the latter will be binding on the former.<sup>5</sup> Moreover, if the Court has decided that a person is the proper legal representative and passes a decree against him, it is binding on the estate even though it may subsequently turn out that he is not the proper legal representative.<sup>6</sup> See also Notes 63 and 63b to Section 11, Note 14 to Section 50 and Notes 5 and 6 to Section 52.

O 21 R. 4  
Notes 16-18

17. "The suit shall abate as against the deceased defendant." — If a sole defendant dies and no application is made within the period of limitation, for bringing on record his legal representatives, the suit abates.<sup>1</sup> But if one of several defendants or respondents dies and no application is made within the period of limitation for bringing on record his legal representatives, the suit or appeal will, in the first instance, abate not in its entirety but only so far as the deceased defendant or respondent is concerned.<sup>2</sup> But such abatement may under certain circumstances result in the whole suit or appeal failing.<sup>3</sup> On this subject, see Note 22 below. Under the old Code a specific order of abatement was necessary and it was held that such an order ought not to be passed without notice to the plaintiff.<sup>4</sup> Under the present Code, however, the abatement takes place automatically and no separate order therefor is necessary.<sup>5</sup>

Where a suit abates it is, so to speak "dead or at an end"<sup>6</sup> and a decree passed in the face of such abatement is a nullity so far as the legal representative is concerned.<sup>7</sup>

18. Death after preliminary and before final decree. — See Note 19 to Rule 3

5. (78) 3 Cal L Rep 157 (158)

3 (27) 26 Bom 203 (206)

6 (31) 111 Bom 337 (347) 27 Ind App 216 (PC)

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#### Note 17

1. (22) AIR 1922 Cal 408 (409) 49 Cal 524  
(24) AIR 1924 Lah 316 (317, 318) (And no failure by the persons concerned to object to action taken on an application presented after expiry of such time would alter the fact of abatement)  
(36) AIR 1936 Pat 110 (110) (One of the defen

(28) AIR 1923 Lah 746 (747)  
(37) AIR 1937 Bom 401 (406) ILR (1937) Bom 602

(37) AIR 1937 Nag 69 (69) (Suit abates automatically if no application is filed within limitation — Application to set aside abatement within sixty days of abatement is proper and not premature even if made before order of Court that suit has abated)

(34) AIR 1934 Lah 442 (443) 15 Lah 679  
6 (28) AIR 1928 Cal 234 (235) (Attachment before judgment — Death of defendant before decree — Heirs not impleaded — Abatement — Application to implead heirs and restore suit ordered — Effect — Attachment not revived)

2 (96) 22 Bom 718 (721)

(33) AIR 1933 Lah 682 (684)

(33) AIR 1933 Lah 805 (805, 806) (Suit or appeal

is dead, the application abates under O 22,  
P 4 (a)

have been passed *qua* his share in the land in

O. 22 R. 4  
Note 19

**19. Decree against a dead person.** — See also Note 8 to Section 52. A decree passed *against a dead person* without impleading his legal representatives is a nullity<sup>1</sup>. This does not mean that a party who was heard and against whom a decree has been passed on the merits can take advantage of the death of another party and claim a re-hearing on the merits<sup>2</sup>. In an Allahabad case<sup>3</sup> the plaintiff obtained an *ex parte* decree against a defendant who had been dead before the decree, but of whose death plaintiff had no knowledge. It was held that on the decree being held inexecutable the plaintiff might apply to have the case re-opened after impleading the legal representatives.

Where a suit is filed against several defendants one of whom is dead, it cannot be said in such a case that there is no valid plaint and the Court has power, under O 1 R 10 *ante*, to implead, if necessary, the legal representatives of the deceased person<sup>4</sup>. Where some of several defendants had been dead when the decree was passed, the others may object to the execution on the ground that the decree is a nullity<sup>5</sup>.

A decree passed by the Privy Council is an order of the Sovereign, and even if passed against a deceased respondent without impleading his legal representatives, it is not a nullity<sup>6</sup>.

dispute—Therefore he or his heir need not have been impleaded as respondents to the second appeal.)

(122) AIR 1922 Lah 78 (78)

## Note 19

1 (90) 128 Ind Cas 444 (445) (77th) (Annullity of decree)

whether the whole decree is a nullity depends on the question whether the failure on the part of

is a nullity automatically brought on record — Appeal automatically abates—Appellant must apply under R 9 — If owing to ignorance of death appeal is heard and accepted application by legal representatives for review becomes necessary—Accepting of such application has not the effect of setting aside

(09) 4 Ind Cas 187 (198) (Bom) (Death taking place after close of evidence but before arguments)

(83) 1883 Bom P J 5

(11) 11 Ind Cas 782 (782) (Low Bur)

(17) AIR 1917 Low Bur 132 (183)

(78) 8 Cal L Rep 192 (193)

is a nullity automatically brought on record — Appeal automatically abates—Appellant must apply under R 9 — If owing to ignorance of death appeal is heard and accepted application by legal representatives for review becomes necessary—Accepting of such application has not the effect of setting aside

[See however (23) AIR 1923 Cal 676 (676) (Order of remand passed in ignorance of death of one of the respondents — Held order not a nullity)]

(12) 15 Ind Cas 832 (833) 5 Sind L R 260

(68) 10 Suth W R 455 (456)

(70) 14 Suth W R 337 (338)

(76) 25 Suth W R 103 (108)

(23) AIR 1923 All 141 (144) 45 All 198 (But a decree passed against A as the legal representa

5 (23) AIR 1923 Cal 676 (676) (Order of remand passed in ignorance of death of one of the respondents — Held order not a nullity)

(39) 5 Cutt L Tim 15 (16) (But the question followed) 6. (32) AIR 1932 Pat 261 (262, 263) 11 Pat 415

See also the undermentioned decision<sup>7</sup> See also Note 19 to Rule 3 *ante*

**20 Order 41 Rule 20 and abatement** — Rule 20 of Order 41 does not override the provisions of Order 23 and will not prevent an abatement<sup>1</sup>

**21 Order 1 Rule 8 and abatement** — See Note 24 to Order 1 Rule 8

**22 Where suit or appeal abates against deceased defendant or respondent only** — As under Rule 3 an abatement under this rule will in the first instance be only so far as the deceased defendant or respondent is concerned<sup>1</sup> If the deceased was the sole defendant or respondent the abatement puts an end to the suit or appeal But if he is one of many defendants or respondents the effect of the partial abatement on the whole suit or appeal will depend upon the nature of the suit or appeal If on account of the partial abatement it becomes for any reason impossible to proceed with the suit or appeal to its final conclusion the entire suit or appeal will fail<sup>2</sup> But if the suit or appeal can proceed to a final adjudication in the absence of the legal representatives of the deceased defendant or respondent the partial abatement will not affect the rest of the suit or appeal<sup>3</sup> Such a final adjudication is possible in cases where the interest of the deceased defendant or respondent can be separated from those of the others In such cases a decree can be given against the latter without affecting the rights of the legal representatives of the former<sup>4</sup> The abatement therefore will not result in a total failure of the suit or appeal Thus in the following cases

<sup>7</sup> (23) AIR 1923 All 141 (144) 45 All 198 (In this case it was held that a final decree which was

against one of defendants abates & does not abate as a whole)

(66) 38 Cal 580 (592) (Liability joint and several—Whole suit does not abate)

(23) AIR 1923 Lah 252 (252)

(17) AIR 1917 Lah 450 (451)

#### Note 20

1 (26) AIR 1926 Cal 335 (336)

(31) AIR 1931 Nag 164 (166) 27 Nag L R 220

#### Note 22

1 (12) 14 Ind Cas 535 (536) (Lah)

(15) 26 Ind Cas 523 (524) (Oudh)

(20) AIR 1920 Cal 264 (266)

suit—Person in possession of property being only proper but not necessary party impleaded—Death

<sup>4</sup> (25) AIR 1925 All 108 (114) 47 All 100

(33) AIR 1933 Lah 556 (557) (Two respondents in appeal being co-owners each entitled to half share in property—Death of one of them and failure of appellant to implead legal representative with time Appeal does not abate wholly) (33) AIR 1933 Lah 1001 (1001 1002) (Appeal by mortgagee—Death of one of puisne mortgagees respondents and legal representative not brought on record—Appeal does not abate in its entirety)

**O. 22 R. 4** abatement as regards the deceased was held not to affect the rest of the suit or  
**Notes 22-23** appeal—

(1) Where the suit is for the recovery of a specific sum of money from the deceased defendant and for a specific sum from each of the other defendants<sup>1</sup>

(2) Where the suit relates to distinct plots of land in the hands of the several defendants including the deceased defendant,<sup>2</sup> or where it relates to specified shares or to shares which are ascertained or ascertainable<sup>3</sup>

(3) Where the liability sought to be enforced against the defendants is joint and several<sup>4</sup> Thus, the liability of co promisors is joint and several<sup>10</sup> as also the liability of a surety<sup>11</sup> In the case of suits to enforce such liability the suit does not abate *in toto* on the death of one of the promisors or the surety as the case may be The liability of joint wrongdoers or tortfeasors is joint and several and the suit or appeal will abate only so far as the deceased defendant is concerned<sup>12</sup> On the same principle, a suit for ejectment of trespassers will abate only so far as the deceased defendant is concerned and may be proceeded with against the rest<sup>13</sup> The same principle applies to suits for rent against fixed rate tenants<sup>14</sup> or joint holders of a holding,<sup>15</sup> as their liability is likewise joint and several

In short, their

or only in part is to

and prosecuted with

are maintainable against the defendants severally, then the abatement will be only in part in spite of the other defendants having been impleaded in the same suit<sup>17</sup>

(24) AIR 1924 Lah 93 (94)

(25) AIR 1925 Lah 381 (384 385) 6 Lah 238

(30) AIR 1930 Lah 709 (710) (Death of one tortfeasor—Suit does not abate)

(25) AIR 1925 Nag 299 (301) 21 Nag L R 33

(25) AIR 1925 Nag 239 (240) (One of the decree-holders respondents dying—Presumption is that both decree-holders were equally interested to recover the amount—Extent of interest thus being

8. ('27) AIR 1927 Lah 783 (784)

('28) AIR 1928 Lah 572 (575 576) 10 Lah 7 (FB)

('30) AIR 1930 Lah 126 (127)

9. (06) 33 Cal 580 (582)

10. (22) AIR 1922 Lah 182 (183)

('25) AIR 1925 Pat 434 (434, 435) 4 Pat 187

11. ('03) 23 All 206 (208)

12. ('24) AIR 1924 Lah 348 (349) 6 Lah 54

('34) AIR 1934 Lah 941 (942) 155 Ind Cas 509

(39) AIR 1939 All 626 (636)

(35) AIR 1935 Lah 893 (854) 16 Lah 747

14. ('12) 17 Ind Cas 89 (83, 90) 34 All 604

(26) AIR 1926 Lah 264 (266) 7 Lah 376

(30) AIR 1930 Lah 33 (34)

(31) AIR 1931 Lah 466 (467) 12 Lah 318

(36) AIR 1936 Pat 548 (550) 15 Pat 326

(35) AIR 1935 Lah 322 (324)

record—As against the other decree can be executed as a money decree but not as a rent decree }

16. ('24) AIR 1924 Nag 123 (123)

(33) AIR 1933 Sind 834 (835)

17. ('27) AIR 1927 Lah 851 (852)



to proceed with the suit or appeal as against the rest, the suit or appeal will fail *in toto*.<sup>1</sup> Such impossibility may arise from the suit or appeal becoming imperfectly constituted for want of necessary or essential parties,<sup>2</sup> or from the undesirable possibility of having two inconsistent or contradictory decrees in one and the same suit,<sup>3</sup> or from the futility of proceeding further in a matter in which the decree, if given, cannot be effectually executed by reason of the outstanding right of the legal representative of the deceased.<sup>4</sup>

O. 22 R. 4  
Note 23

Note 23

1. ('31) AIR 1931 Nag 184 (186) 27 Nag L.R. 220
- (26) AIR 1926 Cal 893 (894, 895) 83 Cal 752
- (1900) 22 All 430 (433)
- (04) 31 Cal 437 (494) 31 Ind App 71 (P C)

ment—But if representation is incomplete appeal abates as a whole.)

(See also ('25) AIR 1925 Mad 237 (238) ]

3. ('25) AIR 1925 All 141 (141)
- (26) AIR 1926 All 128 (129, 190) 48 All 81
- (26) 96 Ind Cas 932 (932) (Lah)
- (47) AIR 1927 All 531 (532)
- (27) AIR 1927 All 776 (777)
- (20) AIR 1920 Cal 264 (267)

- (31) AIR 1931 Bom 200 (200) (Appeal from preliminary decree—Respondent who is necessary party dying pending appeal—Appeal abates in its entirety)
- (35) AIR 1935 Oudh 829 (880, 881) 11 Luck 5

brought on record—Appeal abates as a whole )

- (88) AIR 1938 Bom 11 (9) 1 L R (1938) Bom 64
- (Suit by some partners of a firm for dissolution and for accounts—Nature of suit is such that if one defendant dies and his legal representative is not brought on the record suit abates as a whole)
- (89) AIR 1939 All 608 (699)
- 2 ('28) AIR 1928 Lah 572 (575, 576, 582) 10 Lah 7 (F II)
- (84) 147 Ind Cas 1187 (1188) (Lah) (Death of co-sharer whose representative not brought on record

dants pending appeal and his legal representative not brought on record—Appeal abates as a whole)

- (35) AIR 1935 Pat 430 (430) (Appeal—Death of one of several respondents—Right capable of being exercised only collectively—Legal representative not impleaded—Appeal abates as a whole)

(36) AIR 1936 Oudh 209 (211) (Where a joint decree has been given in favour of the respondents the entire appeal abates if the appellant fails to bring the legal representatives of a deceased respondent on the record, as otherwise the decision may result in two conflicting deci

- (18) AIR 1918 Cal 286 (287)
- (20) AIR 1920 Cal 264 (267)
- (22) AIR 1922 Lah 101 (102)
- (26) AIR 1926 Lah 216 (216, 217)
- (26) AIR 1926 Lah 332 (333)
- (26) AIR 1926 Lah 474 (476)
- (11) 9 Ind Cas 940 (940) (Mad)
- (12) 16 Ind Cas 688 (688) (Mad)
- (26) AIR 1926 Mad 379 (380)
- (32) AIR 1932 Mad 212 (213)
- (31) AIR 1931 Pat 17 (18) 9 Pat 693
- (16) AIR 1916 Lah 360 (368)
- (05) 3 Low Bur Rul 168 (169)
- (23) AIR 1923 Rang 258 (259, 260) 1 Rang 189
- (14) AIR 1914 Lah 123 (125) 1915 PunRanNo 41
- (35) AIR 1935 Pat 241 (242) (Appeal—Death of one of respondents not making representation of the interests involved, incomplete—No abate

record—Appeal abates as a whole as such heirs are necessary parties—But if receiver is on record appeal does not abate)

- (See also ('26) AIR 1926 Cal 667 (668) ]
- 4 ('29) AIR 1929 P C 58 (60) 56 Ind App 80

**0.22 H 4**  
**Note 23**

On the above principles the non impleading of the legal representatives of a deceased defendant will result in total failure of the suit or appeal in the following cases—

(1) Where the interests of the defendants in the suit are *joint and indivisible* so that the interest of the deceased defendant cannot be separated from those of the rest,<sup>6</sup> such as the interests in a pre-emption suit<sup>7</sup> but not the rights arising from a sale in distinct shares.<sup>7</sup>

(2) Where a decree appealed from is joint and indivisible.<sup>8</sup> But a decree cannot be said to be joint and indivisible merely because it is on one sheet of paper.<sup>9</sup> The interest awarded in the decree must in *substance* be joint and indivisible.<sup>10</sup>

In this connexion the following distinction between a suit and an appeal should be noted. In a suit the nature of the abatement will depend upon the relief involved.<sup>11</sup> If the plaintiff sets up a joint and indivisible right and the defendants set up a separate or separable right, the point should be decided before deciding the nature of the

[See also (25) AIR 1925 Cal 411 (412)]

(21) AIR 1921 Lah 160 (161)  
(25) AIR 1925 Lah 494 (494) 6 Lah 313

(26) AIR 1926 Lah 187 (188)

(26) AIR 1926 Lah 87 (88 89)

(27) AIR 1927 Lah 860 (860)

(17) AIR 1917 Mad 308 (309)

(32) AIR 1932 Mad 212 (213)

(29) AIR 1929 Nag 358 (360)

(25) AIR 1925 Pat 517 (518)

(25) AIR 1925 Pat 590 (591)

(11) 12 Ind Cas 871 (871) 1911 Pun Re No 60

(13) 18 Ind Cas 256 (256) (Lah)

(17) AIR 1917 Lah 321 (322)

(19) AIR 1919 Lah 890 (891)

(36) AIR 1936 Oudh 209 (211) (Where a point

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62  
pre-emption suit—Death of one of joint vendees—respondents—Legal representatives not brought

7 (31) 132 Ind Cas 895 (896) (Lah)

8 (24) AIR 1924 All 95 (96)

(39) AIR 1933 Lah 356 (359) 14 Lah 543 (Suit against defendants not as partners dismissed—One respondent dying during appeal—Appeal abating against him—Joint decree—Abatement of whole appeal must be decided by reference to decree)

(83) AIR 1933 Pat 646 (647) (Declaratory decree obtained by three members of joint Hindu family

(30) AIR 1930 Cal 100 (101) (Plots jointly

abated in toto)  
(See also (15) AIR 1915 Cal 750 (756))

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11 100

One of several tenants can institute a suit under

(20) AIR 1920 Lah 174 (174 175)

(20) AIR 1920 Lah 67 (68) 1 Lah 225

(20) AIR 1920 Lah 72 (73)

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(23) AIR 1923 Cal 299 (253)

abatement<sup>12</sup> In an appeal, however, the nature of the abatement will have to be decided not upon the nature of the relief involved in the suit but upon the nature of the relief awarded by the decree appealed against<sup>13</sup> Thus, if the decree awarded joint possession the abatement will affect the whole appeal even though the plaintiff had asked for separate possession in the plaint<sup>14</sup> Even in cases where the plaintiff could choose to ask for a joint relief and on appeal will abate *in toto* on the death of legal representatives are not brought on the

O. 22 R. 4  
Notes 23-26

record in time<sup>15</sup>

**24. Inherent power to add legal representative after abatement.** — Even after a suit or appeal has abated, the Court has inherent power to add the legal representatives of the deceased defendant or appellant in proper cases<sup>1</sup> The proper procedure in such cases would be to just declare that the suit had abated, then to set the abatement aside for valid reasons and then add the legal representatives and proceed with the suit or appeal<sup>2</sup> It should, however, be noted that such a course will not be adopted unless very strong grounds are made therefor<sup>3</sup>

**25. Appellate Court and abatement.** — The Court to appoint the legal representative of a deceased defendant or respondent will be the Court in which the suit or appeal was pending when the death took place<sup>1</sup> Similarly, the Court to declare an abatement will be the Court in which the suit or appeal was pending when the abatement took place<sup>2</sup> Where, however, such Court proceeds to a decision on the merits in spite of an abatement that has taken place, the Appellate or second Appellate Court, as the case may be, may set aside the decision and either declare the abatement<sup>3</sup> or remand the matter for disposal according to law<sup>4</sup>

**26. Award of costs.** — If a suit abates on the ground that the legal representatives of a deceased defendant are not impleaded within time, there is no

into his appeal only against some of the wrong doers at his choice)

(26) 94 Ind Cas 253 (253) (Lah)

(17) AIR 1917 Cal 647 (647) (Where a suit brought against several joint promisors is dismissed the plaintiff cannot appeal against some only releasing his claim against the others)  
[See also (26) AIR 1926 Cal 667 (668)]

Note 24

1 (11) 11 Ind Cas 559 (560) 35 Bom 303 (Case

impleaded and abatement set aside even without an application by him for setting aside abatement)]

Note 25

[See also (25) AIR 1928 Lah 784 (785, 737) (Decree was passed before time for bringing legal representatives on record had expired)  
(01) 1901 All W N 157 (157) (Do)]

is not open to the plaintiff appellant to prose

**O. 22 R. 4** provision in the rule entitling the legal representatives to come to Court and ask for  
**Notes 26-29** costs<sup>1</sup>

**27. Re-hearing of suit or appeal.** — Where a decree is passed against a deceased respondent without impleading his legal representatives, it is competent for the Court to entertain an application for impleading the legal representatives and to re open and re hear the suit or appeal<sup>1</sup>

**28. Revision.** — No revision lies from an order that a deceased plaintiff's legal representatives are not necessary parties to an application to set aside an *ex parte* decree<sup>1</sup>

**29. Appeal.** — Under the old Code an order of abatement was appealable, not as a decree but as an order under Section 588 (18)<sup>1</sup> Under the present Code, where the facts fall within the four corners of the rule, an order of abatement thereunder is not open to appeal. The only remedy is that provided by Rule 9. But when the suit is dismissed as having abated and the propriety of the dismissal on that ground is questioned, an appeal will lie as if from a decree<sup>2</sup> Thus, where on abatement of a suit so far as the deceased is concerned, the Court dismissed the whole suit an appeal would lie<sup>3</sup> No appeal lies from an order bringing in certain persons as legal representatives of a deceased defendant<sup>4</sup> Such an order is also not a 'judgment' within the meaning of the Letters Patent (Clause 10 of the Letters Patent of the Allahabad High Court) and no appeal lies from it under the Letters Patent<sup>5</sup>

See also Note 26 to Rule 3 *supra*

**O. 22 R. 5**

**Determination of question as to legal representative.**

**R. 5. [S. 367.]** Where a question arises as to whether any person is or is not the legal representative<sup>3</sup> of a deceased plaintiff or a deceased defendant, such question shall be determined<sup>4</sup> by the Court

[1877, S. 367; 1859, S. 103.]

#### Local Amendment

**MADRAS**

Add the following as a proviso —

"Provided that an appellate Court before determining it, may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in

#### Note 27

1. (27) AIR 1927 Oudh 221 (221) 2 Luck 592  
 {Plaintiff was ignorant of respondent's death—  
 Application for substitution treated as under  
 Order 22 Rule 9}

#### Note 28

1. (26) AIR 1926 Pat 29 (30).  
 (35) AIR 1935 Pat 121 (121)

#### Note 29

1. (33) 25 All 206 (207)

(AIR 1916 Lah 245, relied on)

4. (25) AIR 1925 All 431 (432) 47 All 741  
 5. (37) AIR 1937 All 192 (194) 1 L R (1937)  
 All 381  
 (33) AIR 1939 Nag 39 (40) (Dismissal of cross  
 objections as having abated a decree)

## Synopsis

O. 22 R. 3  
Notes 1-4

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule</li> <li>3. Legal representative. See Note 10 to Rule 3</li> <li>4. "Shall be determined."</li> <li>5. "By the Court"</li> <li>6. Objection as to the representative character.</li> </ol> | <ol style="list-style-type: none"> <li>7. Effect of order under this Rule.</li> <li>8. Power of Court to correct its own order.</li> <li>9. Suit to establish title as legal representative.</li> <li>10. Appeal.</li> <li>11. Revision.</li> </ol> |
|---|---|

*Other Topics (miscellaneous)*

Determination obligatory See Notes 1, 4 and 6

Wrong order — Remedies against See Notes 6, 8 and 11

**1. Legislative changes. —**

1 Under Section 367 of the old Code the Court had the *option* of either determining who is the legal representative of a deceased party or of staying the suit until the question has been determined in a separate suit<sup>1</sup> Under the present rule the Court *shall* determine the question and has no option in the matter

2 The words "at or before the hearing" which occurred in the old Section have been omitted

3 The provisions of the old Section, in terms, applied only to the case of the death of a *plaintiff*<sup>2</sup> But the present rule will apply to the case of the death of a *plaintiff* as well as to the case of the death of a *defendant*

2 **Scope of the Rule.** — As has been observed in Note 1 above, where a dispute as to who is the legal representative arises it is the duty of the Court under this rule to decide it<sup>1</sup> The decision, however should be limited for the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property<sup>2</sup>

The rule applies to appeals<sup>3</sup> but not to execution proceedings<sup>4</sup> Nor does it apply to a case where a party dies after the preliminary decree but before the final decree in the suit<sup>5</sup> See also Note 19 to Rule 3 *ante*

**3. Legal representative. —** See Note 10 to Rule 3

4. "Shall be determined." — See Notes 1 and 2 above For the purpose of determining as to who is the legal representative, the Court must, when necessary, hold an enquiry in which evidence may be adduced<sup>1</sup> and must come to a conclusion as to who is the legal representative according to the rights of the parties<sup>2</sup> It cannot

**Order 22 Rule 3 — Note 1**

1. (85) 1885 All W N 7 (7) (22) 4 Lah L Jour 314 (316)

(09) 2 Ind Cas 479 (479) (Mad) (39) AIR 1939 Pat 117 (118)

(57) 9 All 447 (450) ,

(94) 1694 Pun Re No 66 page 218 (Old Code) :

■ 368)

(88) 1889 Pun Re No 29 page 78 (Do)

2. (13) 21 Ind Cas 397 (400) (Cal)

[See also (88) 10 All 223 (232) (FB)]

**Note 2**

1 (18) AIR 1918 Bom 175 (177) 42 Bom 535

(18) AIR 1918 Bom 100 (101) 43 Bom 168

(Even though it might have primarily passed

an order bringing some person on record as legal

representative)

(19) AIR 1919 Mad 971 (971)

(21) AIR 1921 Nag 23 (25) 17 Nag L R 45

**Note 4**

**O. 22 R. 5**  
**Notes 4-7**

simply make all the claimants parties without making any such enquiry<sup>3</sup> A lengthy or elaborate enquiry is, however, unnecessary for the purpose<sup>4</sup> and where there is no dispute as to his being the legal representative, the mere fact that no steps were taken to have him declared as such, does not vitiate the decision in the case<sup>5</sup>

**5. "By the Court."** — The "Court" here means the Court before which the question as to who is the legal representative arises. It will be the trial Court, when the question arises in the suit, or the Appellate Court, if the question arises in appeal. An Appellate Court cannot delegate its powers to the trial Court. All that it can do is to direct the trial Court to take evidence on the question and remit the same. The decision must be by the Appellate Court<sup>1</sup> This principle has, in Madras, been embodied in a rule framed by the High Court as a proviso to this rule.

**6. Objection as to the representative character.** — The procedure laid down in this rule should be followed not only when two or more persons claim in opposition to each other but also when the representative character of a person who alone claims is denied by the other side<sup>2</sup>

The objection should, however, be taken at the earliest possible moment<sup>3</sup> But when the legal representative is appointed without notice to the other side, the latter can at the hearing raise objection to the representative character of the person so appointed<sup>4</sup>

**7. Effect of order under this Rule.** — An order under this rule will enable the person to represent the estate in the suit and will make an adjudication therein binding on the estate<sup>1</sup> To this extent and in this sense it is final<sup>2</sup> The mere admission of a person as legal representative for the purpose of further prosecution of the suit will not, however, conclusively establish his right to do so if his legal position on one of the main or vital issues in the suit itself<sup>3</sup> Further, as has been seen in Note 2 above, an order appointing a person as a legal representative for the suit will not have the effect of deciding that he is the heir of the deceased party<sup>4</sup>

{

3.

- (91) 15 Bom 145 (147) (Do)  
4. (22) AIR 1922 Lah 175 (176)  
(89) 1888 Pun Re No. 29, page 78  
5 (22) AIR 1922 All 223 (226) 44 All 407

**Note 5**

- 1 (22) AIR 1922 Pat 197 (197)  
(18) AIR 1918 Mad 1103 (1107)

**Note 6**

1

Iad 581

**Note 7**

1. (23) AIR 1923 Rang 114 (116) 4 Upp Bur  
Rul 150  
(22) AIR 1922 Mad 477 (477) 46 Mad 190 (FB)  
(Where a person who is not the legal representa

able to him)

- 2 (20) AIR 1922 All 532 (533) 50 All 657

deceased respondent)

[See (39) AIR 1939 Nag 147 (149) ILR (1939)  
Nag 165 (A decision under O 22 R 5 as to  
whether a person is not a legal representative  
though not *res judicata*, is final so far as the suit  
in which it is made is concerned, not on the  
ground of *res judicata*, but because of S 47)]

3. (23) AIR 1923 Nag 209 (209)

(66) 23 All 109 (111)

(93) 27 Bom 162 (163)

4. (10) 8 Ind Cas 999 (1037) 1910 Pun Re No. 17

(23) AIR 1923 Rang 114 (116) 4 Upp Bur Rul  
150

**8. Power of Court to correct its own order.** — As already pointed out in Note 6 above, where a person has been appointed legal representative without notice to the other side, the latter can afterwards object to the representative character of that person and the Court can after enquiry correct the order already passed

O. 22 R. 8  
Notes 8-11

**9. Suit to establish title as legal representative** — As to whether a decision under this rule can be re adjudicated upon in a separate suit see Note 13 to Section 11 *ante*, and the undermentioned cases<sup>1</sup>

**10. Appeal.** — See also Note 26 to Rule 3 *ante*. An order under Section 367 of the old Code (corresponding to this rule) was appealable as an order under Section 588, clause (18) of that Code<sup>1</sup>. Under the present Code no appeal lies from such an order either as a decree or as an appealable order<sup>2</sup>. Nor is such an order a 'judgment within the meaning of the Letters Patent (Clause 10 of the Letters Patent of the Allahabad High Court)<sup>3</sup>

But as to whether an objection to an order under this rule can under Section 105 of the Code, be a valid ground of attack in an appeal from the decree see Note 6 to Section 105

**11. Revision** — A decision under this rule amounts to the decision of a case within the meaning of Section 115 and is open to revision<sup>1</sup>. Thus, if a Court simply adds a legal representative without holding an enquiry into the dispute and deciding it it acts with material irregularity in the exercise of its jurisdiction and a revision will lie<sup>2</sup>

## R. 6. [New] Notwithstanding anything contained in the

O. 22 R. 6

No abatement by reason  
of death after hearing

foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place

[R S C, O. 17 R 1, last portion]

### Note 8

party not *res judicata*)<sup>1</sup>

### Note 10

1 { 90 } 12 All 200 (202)

{ 07 } 10 Oudh Cas 121 (125)

{ See also { 00 } 9 Oudh Cas 304 (356) }

2 { 12 } 13 Ind Cas 70 (70 71) (Cal)

{ 33 } AIR 1938 Bom 396 (397) 67 Bom 611

3 { 37 } AIR 1937 All 192 (194) ILR (1937) All 331

### Note 11

1 { 35 } AIR 1935 Lah 934 (934)

2 { 25 } AIR 1925 Mad 456 (456)

{ 24 } AIR 1924 Mad 813 (813)

O 22 R. 6  
Notes 1-2

## Synopsis

### 1 Scope and applicability of the Rule

#### 2 No abatement by reason of death after hearing

**1. Scope and applicability of the Rule** — This rule is new and embodies an exception to the principle that the Court has no jurisdiction to pass a decree for or against a dead man<sup>1</sup> It is based on the principle that a judgment pronounced at any time after the conclusion of the hearing shall be construed to be operative as if it had been delivered on the day on which the hearing was closed<sup>2</sup>

Even under the old Code it had been generally held that the death of a party after the hearing but before pronouncement of the judgment will not make the judgment invalid<sup>3</sup> The Chief Court of the Punjab, however, took a different view<sup>4</sup> This rule gives effect to the former class of decisions

For the application of the rule, it is immaterial whether the death is or is not brought to the notice of the Court<sup>5</sup>

Where, however, the legal representative brought on the record is under a legal disability and no guardian or next friend is appointed to act for him, the decree is a nullity as against him and the rule cannot be invoked to validate the same<sup>6</sup>

The principle of the rule will apply to proceedings in arbitration<sup>7</sup>

Where an *ex parte* decree was passed against two plaintiffs and an order was made for the setting aside of the decree on condition that the defendant deposited a certain sum of money in Court within a stated time, it was held that the fact that one of the plaintiffs died in the interval between the conditional order and the final order setting aside the *ex parte* decree on the required amount being deposited within the time allowed, did not affect the validity of the latter order and that the principle of this rule applied<sup>8</sup>

**2. No abatement by reason of death after hearing.** — The principle of the rule will not apply unless the hearing had been *concluded* before the death<sup>1</sup> Thus the rule will not apply where the party died on the day fixed for the hearing but before the hearing<sup>2</sup>

The 'hearing' contemplated by the rule is such a hearing as is provided for by Order 18 and includes arguments and where anything remains to be done or furnished by either party as a basis of consideration which is to end in the judgment and decree capable of execution the hearing cannot be said to have been concluded under the

#### Order 22 Rule 6 — Note 1

1 (12) 15 Ind Cas 532 (833) 5 Sind L R 260  
(39) AIR 1939 Pat 534 (535)

(07) 11 Cal L Jour 547 (555)

(03) 9 C 104 101 (109)

(03) 26 Mad 101 (102)  
(27) AIR 1927 Oudh 561 (561)  
(16) AIR 1916 Lah 133 (135) 1915 Pun Re  
No 100

3 (27) 21 All 314 (315) 316]  
(25) 19 Bom 507 (509)  
(97) 21 Bom 314 (319)  
(84) 19 Cal 513 (538) 19 Ind App 108 (P C)

Code judgment without legal representative  
death after hearing and before judgment is not  
void but may be irregular

5 (18) AIR 1918 Upp Bur 9 (10) 3 Lpp Bur

#### Note 2

1 (09) 4 Ind Cas 137 (137) (Bom)  
2 (20) AIR 1920 Oudh 57 (58)



rule<sup>3</sup> Thus, the rule will not apply if the party died before the completion of arguments<sup>4</sup> It has been held that where during the interval between the last hearing of a suit and the date on which the judgment is pronounced, the Court makes a local inspection of the site in suit and makes a reference to it in the judgment, the hearing of the suit cannot be said to have "concluded" on that day of hearing<sup>5</sup>

O. 22 R. 5  
Note 2

Where a defendant dies after the conclusion of the hearing and before delivery of judgment in the suit, and the plaintiff appeals against the decree, there can be no abatement of the appeal and the plaintiff can make the legal representative of the defendant a party to the appeal. It is not necessary that he should make an application for bringing on record the legal representative of the defendant<sup>6</sup>

## R. 7. [S. 369.] (1) The marriage of a female plaintiff or

O. 22 R. 7

*Suit not abated by marriage of female party.* defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

**1. Scope of the Rule.** — A died pending suit and his wife was brought on the record as his legal representative. The suit was decreed against her. Pending appeal, she married again. The lower Court's decree was confirmed in appeal and the decree was sought to be executed against the second husband. It was held that this was not a case where the husband was liable for the debts of the wife and that the decree could not be executed against the second husband<sup>1</sup>

## R. 8. [S. 370.] (1) The insolvency of a plaintiff in any

O. 22 R. 8

*When plaintiff's insolvency bars suit.* suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court

(19) AIR 1919 Mad 685 (689) (Where a party to

(FB)

[See also ('30) AIR 1930 Sind 259 (260) 25  
Sind L R 107]

4. (02) 26 Bom 317 (319)

5

Order 22 Rule 7 — Note 1  
1. (68) 9 Suth W R 442 (443)

O. 22 R. 8  
Notes 4-11

the Insolvency Court can step in and get the fruits of the execution handed over to him<sup>1</sup>  
An insolvent is entitled to make an application for execution of a decree obtained by him before an order for his adjudication was passed<sup>2</sup>

See also Notes to Rule 12 *infra*

5. "Insolvency" must be existing. — The rule does not, as has been seen in Note 2 above, apply unless an adjudication has *actually* taken place<sup>1</sup> Where a suit is instituted or continued by the receiver and pending that suit the adjudication is annulled, the receiver can nevertheless continue the suit unless the property is diverted from him and re vested in the quondam insolvent<sup>2</sup>

6. Plaintiff's insolvency. — See Note 2 above.

7. Defendant's insolvency. — See Note 2 above

8. Insolvency of pauper applicant. — The rule does not apply to the adjudication of a petitioner pending his application for permission to sue *in forma pauperis* Such an application cannot be dismissed on the ground of the adjudication<sup>1</sup> If the petitioner is adjudicated after he obtains leave to sue *in forma pauperis*, the receiver can come in and continue the suit in the same way as the insolvent could have done<sup>2</sup>

9. Suit instituted after adjudication. — After adjudication the insolvent has

has he got the right to appeal against a decree in the suit? According to the Bombay High Court, he can appeal<sup>3</sup> The High Court of Madras<sup>4</sup> has, on the other hand, held that he cannot appeal

9a. "Which the assignee or receiver might maintain for the benefit of his creditors." — In the undermentioned case<sup>1</sup> where the trial Court had passed against an insolvent a decree for maintenance, and the insolvent appealed from the decree, it was doubted whether the appeal was one "which the assignee or receiver might maintain for the benefit of the creditors" of the insolvent although the appeal, if successful, might incidentally benefit them.

10. Limitation. — There is no limitation for the receiver to appear and apply on the adjudication of the plaintiff for being allowed to continue the suit<sup>1</sup>

11. Costs payable by plaintiff prior to insolvency. — If a receiver elects to continue the suit he must give security only for the costs already incurred up to the time of his electing to continue the suit and not for *subsequent cost* as to which he will be personally liable<sup>1</sup> The order for furnishing the security must be passed at the time

#### Note 4

1. (24) AIR 1924 Lah 615 (616)
- (30) AIR 1930 Lah 205 (205, 206)
2. (39) AIR 1939 Mad 196 (198)

#### Note 5

1. (29) AIR 1929 Bom 202 (204)
- (1900) 27 Cal 217 (219)
2. (07) 32 Bom 321 (333, 336)

#### Note 8

1. (25) AIR 1925 Mad 791 (791)
2. (16) AIR 1918 All 177 (177)

#### Note 9

1. (14) AIR 1914 Mad 395 (395)
- (39) AIR 1939 Mad 196 (197)
2. (29) AIR 1929 Bom 202 (204)
3. (26) AIR 1926 Mad 556 (556, 557) 49 Mad 461 (L B)
- (26) AIR 1926 Mad 1214 (1214)
- [But see (21) AIR 1921 Mad 402 (403)]

#### Note 9a

1. (37) AIR 1937 Mad 915 (917)

#### Note 10

1. (22) AIR 1922 All 361 (362) 43 All 621

#### Note 11

1. (26) AIR 1926 Lom 533 (534)

of the receiver electing to continue the suit and not afterwards<sup>2</sup> In order that the receiver need not furnish security is not appealable<sup>3</sup>

O. 22 R. 8  
Notes 11-14

**12. Costs of successful defendant.**—In England the executors and trustees in bankruptcy continuing a suit filed by the bankrupt will be personally liable for all costs from the beginning of the suit<sup>1</sup> In India, however, such personal liability extends only for the costs incurred after the receiver comes on the record<sup>2</sup>

**13. Cause of action arising after insolvency.**—Where the suit is filed in respect of a cause of action arising after adjudication the insolvency is by itself no ground for demanding security for costs<sup>1</sup>

**14. Appeal.**—In order under this rule is not appealable<sup>1</sup>

**R. 9. [Ss. 371, 372A.]** (1) Where a suit abates or is dismissed under this Order,<sup>3</sup> no fresh suit shall be brought on the same cause of action.

O. 22 R. 9

Effect of abatement or dismissal.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply<sup>5</sup> for an order to set aside the abatement<sup>4</sup> or dismissal; and if it is proved that he was prevented by any sufficient cause<sup>8</sup> from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act,<sup>7</sup> shall apply to applications under sub-rule (2).

[1877, S 371.]

### Synopsis

1. Legislative changes
2. Scope and applicability of the Rule.
3. No fresh suit shall be brought on the same cause of action.
4. Setting aside abatement.
  - Who may apply under this Rule
6. Minor abatement.
7. Limitation.
- 8 "Sufficient cause."

9. Formal order of abatement, if necessary before setting aside abatement
10. Cause of action in the revived suit.
11. Substitution without setting aside abatement.
- Remand.
13. Appeal.
14. Letters Patent Appeal
- Revision

2. (27) AIR 1927 Mad 511 (511 512)
  3. (31) AIR 1931 Rang 286 (286) 9 Rang 478
- Note 12

- W B 536—Do }  
Daniel's Chancery Practice, page 1175 6th Ed
2. (26) AIR 1926 Bom 533 (534)

Note 13

- 1 (19) AIR 1919 Cal 719 (720) 46 Cal 156

Note 14

- (1884) 28 Ch D 53 (55) Borneman v Wilson  
(Referred in 20 Bom 167 )  
(1882) 20 Ch D 780 (785) Watson v Hollday  
(Affirmed in (1883) 48 LT 545 52 LJ Ch 543 31

1. (36) AIR 1936 Lah 53 (31 32) (If the lower Appellate Court entertains an appeal it will be exercising a jurisdiction not vested in it by law and revision will lie )

# **O. 22 R. 9** **Notes 1-3**

## **1. Legislative changes. —**

This rule embodies the provisions of Sections 371 and 372A of the old Code — sub rules (1) and (2) correspond to Section 371 and sub rule (3) corresponds to Section 372A

The following changes between the present rule and the above Sections of the old Code may be noted —

1 The words 'The plaintiff or person claiming to be the legal representative of a deceased plaintiff or the assignee or receiver in the case of an insolvent plaintiff' have been substituted for the words "but the person claiming to be the legal representative of the deceased or bankrupt or insolvent plaintiff"

3 The words "applicable to appeals" which occurred in Section 372A have been omitted

**2. Scope and applicability of the Rule. —** The rule is a disabling one and should therefore be strictly construed<sup>1</sup> Its application is limited to abatement or dismissal under one or other of the rules of this Order and does not extend to abatement on account of some other cause<sup>2</sup> Thus, an application under sub rule (2) cannot be made when the abatement is by reason of the fact that the right to sue does not survive<sup>3</sup>

This rule does not apply to proceedings before the High Court on reference under Section 66 (2) of the Income Tax Act<sup>4</sup>

**3. No fresh suit shall be brought on the same cause of action. —** An abatement under Rule 3 or Rule 4 bars a fresh suit on the same cause of action<sup>1</sup> If the fresh suit is, however, on a different cause of action<sup>2</sup> or if the plaintiff in the latter suit does not claim under a devolution of interest from the plaintiff in the former suit,<sup>3</sup> the suit is not barred by this rule Where the legal representatives of a deceased plaintiff applied to be brought on record, but on the objection of the defendant the Court disallowed the application and dismissed the suit and the legal representatives thereupon filed a fresh suit on the same cause of action, it was held that it was not

## **Order 22 Rule 9 — Note 2**

dying pending suit — No legal representative brought on record — Fresh suit by owner — Abatement of previous suit is bar to fresh suit on same cause of action

2. ( 29) AIR 1929 All 806 (807, 808)  
( 83) AIR 1933 Lah 109 (110) 14 Lah 880 (Suit by mortgagor for redemption — Vendee from mortgagor made a pro forma party — Vendee died and his legal representatives not brought on record — Subsequent suit by mortgagor against vendee for unpaid purchase money — not barred)

( 37) AIR 1937 Oudh 248 (249) 13 Luck 193 (Cause of action for ejectment of tenant — different from cause of action for recovery of rent)  
3 ( 31) AIR 1931 Lah 79 (80) 12 Lah 275 (Where a reversioner sued challenging an alienation and he having died the suit abated and subsequently another reversioner sued on the same cause of action held, that the later suit was not barred)

( 16) AIR 1916 Bom 278 (279) 40 Bom 248 (A member of a joint Hindu family, sues B for redemption of a mortgage of ancestral property, but not in a representative capacity — A dies — A's heirs are not brought on the record and the suit

## **Note 3**

1 ( 03) ■ Ind Cas 789 (740) 33 Mad 187 (The legal representative of a plaintiff after whose death a suit is dismissed cannot sue on the same

suit be brought on the ground that in the former suit the Court acted under some other

So new suit was not barred)

( 37) AIR 1937 Mad 101 (103) (Suit to recover possession by tenant for owner — Benamidar

open to the defendants to object to the suit on the ground that it was barred under this rule<sup>4</sup>

The dismissal of a suit for failure to deposit the costs of service of summons on the proposed legal representatives will not bar a fresh suit<sup>5</sup>

It has been held by the High Court of Bombay<sup>6</sup> that the bar under this rule has not got the same effect as *res judicata* and that it does not extinguish the right. The High Court of Madras<sup>7</sup> has held, distinguishing the Bombay decision, that an order of abatement operates as a judgment in favour of the defendant and that if it is not vacated by an application under this rule, it is conclusive of the defendant's rights to the property. The High Court of Lahore<sup>8</sup> also takes the same view as that of the Madras High Court.

**4. Setting aside abatement.** — The Court can set aside the abatement of a suit if it is moved by an application under sub rule (3).<sup>1</sup> The remedy provided for in sub rule (2) applies where the suit has abated under Rule 3 or Rule 4<sup>2</sup> or where it has been dismissed under Rule 8<sup>3</sup>

An order setting aside an abatement should be passed only after notice to the other side. If it is passed without notice, the other side can raise their objections to the order at the hearing of the suit or appeal.<sup>4</sup>

See also the undermentioned case<sup>5</sup>

**5. Who may apply under this Rule.** — If the abatement was under Rule 3, the application under this rule may be made by the legal representatives of the plaintiff. But a legal representative cannot apply under this rule if he had already applied to be brought on record within time and his application had been dismissed.<sup>1</sup> If the abatement is under Rule 4 the plaintiff may make the application. If the suit has been dismissed under Rule 8 the receiver or assignee in insolvency may apply.

Where there are more plaintiffs or appellants than one each one of them can make the application.<sup>2</sup>

The reversioners or any one of them can apply to set aside an abatement caused by the death of the widow plaintiff.<sup>3</sup>

The legal representative of a respondent wishing to bring himself on the record need not apply to set aside the abatement of the appeal.<sup>4</sup>

**6. Minor and abatement.** — Where an application made on behalf of A, a minor, to be brought on the record in the place of B, the deceased plaintiff, is

abated—Subsequently A's son and grandsons institute another suit for redemption of the same mortgage.—The second suit is not barred.)  
(39) AIR 1939 Lah 580 (581) (Suit by reversioner to set aside alienation by widow.—Its abatement does not bar fresh suit by another reversioner for same relief.)

4 (19) AIR 1919 Mad 512 (573)

5 (83) 9 Cal 163 (165)

6 (04) 11 Bom L R 638 (639)

7 (20) AIR 1920 Mad 580 (581)

8 (39) AIR 1933 Lah 752 (753)

vent but the proceedings in insolvency are subsequently annulled and he is not declared an insolvent is not an insolvent so as to make R 8 applicable and to treat a dismissal for default as an order under R 8.—In such a case the

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**Notes 6-8**

dismissed and *A* thereafter makes a second application, it can, in proper cases, be treated as an application under this rule for setting aside the abatement<sup>1</sup>

**7. Limitation.** — Under Article 171 of the Limitation Act, 1908, an application to set aside abatement should be filed within sixty days from the date of the abatement<sup>1</sup> If the petitioner was prevented by any sufficient cause from making the application within the said period the delay in filing the application may be excused under Section 5 of the Limitation Act<sup>2</sup> If no application is made within sixty days or within the extended time under Section 5 of the Limitation Act, the abatement becomes final and conclusive<sup>3</sup>

**8. "Sufficient cause."** — An applicant for setting aside an abatement must show that he had sufficient cause for not taking timely steps to continue the suit<sup>1</sup> As a matter of practice such cause must be alleged in the petition It is, however, not legally necessary to do so all that is necessary is that he should satisfy the Court that there was sufficient cause<sup>2</sup> The question as to what is sufficient cause depends upon the facts and circumstances of each case<sup>3</sup> The test to be adopted in determining it is to see whether the mistake or carelessness was real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise or whether the negligence was culpable or the applicant had acted *malu fide* or irreparable injury would result to the other side by the granting of the application in the former case the application must be granted,<sup>4</sup> in the latter case, it must be dismissed<sup>5</sup>

1. (24) AIR 1924 Bom 416 (417)  
 Note 6  
 Note 7

Bom 118 ]

N. S. C.

representative of one of parties not brought on record — Provisions of C. P. C. apply and the

In the following instances the abatement was set aside under this rule on the ground of sufficient cause —

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(1) Where, by virtue of an order of the Court, the petitioner *bona fide* believed that no separate application was necessary to implead the legal representatives<sup>6</sup>

(2) Where the legal representatives of a deceased appellant *bona fide* believed that the co-appellants were prosecuting the appeal and challenging the entire decree<sup>7</sup>

(3) Where the petitioner was a Government servant and had sent the necessary papers to the vakil but the papers were received by the latter on the last day of limitation after the rising of the Court<sup>8</sup>

For other instances see the undermentioned cases<sup>9</sup>

Can ignorance of law be pleaded as a sufficient cause for the purposes of this rule? On this question it has been held that while mere ignorance of law without anything more, will not constitute "sufficient cause" for the purposes of this rule,<sup>10</sup> it cannot be laid down as an inflexible rule that it can never be a sufficient cause for excusing the delay<sup>11</sup> Thus, where the original period of limitation prescribed had been shortened by an amending Act and, in ignorance thereof the application was made after the expiry of the shorter period, it was held that there was sufficient cause<sup>12</sup>

On the question whether the fact that the applicant under this rule was ignorant of the *death of the party* whose legal representatives had to be brought on the record, would constitute a sufficient cause for setting aside an abatement it has been held that if the ignorance is due to carelessness or want of diligence on the part of the petitioner it will not constitute a sufficient cause<sup>13</sup> Where, on the other hand it is not

6 (19) AIR 1919 Lah 147 (148) 1919 Pun Re No 20 (Court had made an order allowing the parties on record to represent all the persons

(14) AIR 1914 Lah 123 (124) 1915 Pun Re No 41

(16) AIR 1916 Lah 366 (367 368) 1916 Pun Re No 3

(15) AIR 1915 Lah 334 (336) (A careless mistake of law held to be no sufficient cause)

(29) AIR 1929 Nag 74 (75)

(1900) 3 Oudh Cas 13 (17)

9. ('36) AIR 1936 Lah 710 (711) (Delay in ap

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704 (Ignorance of law of a Native State or foreign place (where deceased was domiciled) according to the law of which the legal representatives have to be brought on record may be sufficient cause)

12 ('23) AIR 1923 Bom 40 (40)

('23) AIR 1923 Lah 475 (475)

('21) AIR 1921 Mad 650 (651)

13 ('24) AIR 1924 Lah 461 (461, 462)

(33) AIR 1933 Lah 356 (358) 14 Lah 543

(33) AIR 1933 Lah 556 (557) (Death of respondent in appeal—Appellant, municipal committee not impleading legal representative within time—Time cannot be extended under S 5 in absence of good ground)

(26) AIR 1926 Lah 137 (138)

('14) AIR 1914 Oudh 411 (411)

(22) AIR 1922 Lah 61 (61)

(22) AIR 1922 Cal 335 (336 337) 49 Cal 62

(18) AIR 1918 Oudh 304 (305) 21 Oudh Cas 63

(25) AIR 1925 Oudh 306 (307)

(24) AIR 1924 Pat 126 (127)

Limitation Act to be liberally construed—Death of opponent in Native State or foreign place—Difficulties in tracing legal representatives—Reasonable delay should be condoned Per B J Wadia J)

11 (89) 11 All 408 (414 415)

(33) AIR 1933 Lah 356 (358) 14 Lah 543 (Mere ignorance of law that an application is necessary)

(34) 147 Ind Cis 1187 (1188) (Lah)

(20) AIR 1920 Lah 174 (174)

(85) 1885 Pun Re No 39 page 79

('12) 15 Ind Cas 708 (709) (Lah)

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**Note 8**

due to any want of reasonable diligence on his part or it is due to events beyond his control, it will constitute sufficient cause.<sup>14</sup> Thus where the ignorance was due to the fact that the applicant was herself a pardanashin lady,<sup>15</sup> or that the deceased was a pardanashin lady,<sup>16</sup> or that the applicant lived far away from the place where the deceased was, the abatement was set aside. It was held in the undermentioned cases<sup>17</sup> that

the respondent is sufficient cause without inquiry as to whether the respondent is dead or alive from day to day as to whether the respondent is dead or alive

The negligence of the applicant is not a sufficient ground for setting aside the abatement.<sup>20</sup> Where the applicant gave instructions in time to her vakil to bring on record the legal representatives but owing to a mistake of the vakil in failing to notice the change effected in the period prescribed for such an application the application was not filed in time, it was held that the delay should be excused.<sup>21</sup>

The fact that succession to the estate of the deceased is in doubt or is in dispute will not be a sufficient cause for not filing an application in time.<sup>22</sup>

Where an application to add legal representatives is filed after the period of limitation has expired the Court may either first set aside the abatement by getting an application filed for the purpose and then substitute the legal representatives<sup>23</sup> or it

(1) In case of death of the deceased — Time was extended.]

- (15) (32) AIR 1932 Lah 148 (149)  
(16) (34) AIR 1934 Lah 998 (999)  
(17) AIR 1917 Lah 10 (11) 1916 Pun Re No 118  
(18) AIR 1930 All 779 (783) 32 All 910  
(19) AIR 1979 Lah 132 (133) (No reason shown death—)

- (20) (23) AIR 1925 Pat 162 (164)  
(21) AIR 1924 Pat 819 (820)  
(22) (23) AIR 1923 Lah 546 (547)  
(23) AIR 1983 Lah 224 (225) (And where means of communication were scarce)  
(24) AIR 1924 Lah 429 (429) 5 Lah 70  
(25) 91 Ind Cas 500 (561) (Oudh)  
(26) 1907 Pun Re No 118 page 522  
(27) AIR 1918 Lah 314 (314)  
(28) AIR 1929 Lah 634 (635)

[See also (39) AIR 1939 Pat 628 (624) (Conduct of appeal in hands of agent who was neither living in the village nor had any touch with the village where the deceased respondent lived — Abatement set aside)]

- (18) (39) AIR 1939 Pat 325 (126) 17 Pat 64  
(19) (10) 7 Ind Cas 391 (392) (Cal)  
(20) (37) AIR 1937 Nag 57 (98) 1 L R (1937) Nag 507 (Negligence of plaintiff is no ground for condoning delay though plaintiff was minor and next friend was a pardanashin lady)]

- (21) AIR 1919 Cal 156 (157)  
(22) (21) AIR 1921 Mad 650 (651)  
(23) (16) AIR 1916 Cal 285 (286)  
(24) AIR 1916 Mad 869 (871)

[But see (24) AIR 1924 Oudh 83 (84) 20 Oudh Cas 244 (But the fact that the legal representatives were minors who would not have obtained execution without obtaining a succession certificate is sufficient reason to excuse the delay)]

- (25) (33) AIR 1933 Cal 285 (286) 23 Cal W N 369 (370)  
(26) (33) AIR 1933 Cal 285 (286) 23 Cal W N 369 (370)  
(27) (33) AIR 1933 Cal 285 (286) 23 Cal W N 369 (370)

able—There is sufficient cause for setting aside the abatement.]

- (83) AIR 1933 Mad 218 (218) 1 L R (1933) Mad 275  
(See also (57) 1887 Pun Re No 42, p 92  
(33) AIR 1933 Cal 285 (286) (Application to bring on record legal representative filed four days beyond limitation — Applicant not know



exceptional cases, even treat the application as one to set aside the abatement and pass necessary orders thereon.<sup>21</sup> Where such an application is allowed without objection, the time will be deemed to have been extended and the legal representatives to have been properly brought on the record.<sup>22</sup> Where the lower Court has considered all the circumstances and has decided that there is no sufficient cause<sup>23</sup> or has extended the time for substitution,<sup>24</sup> the Appellate Court will not interfere with the decision.

Where an application has been made under this rule within time, a *bona fide* mistake therein can be corrected after the limitation period.<sup>25</sup>

**9. Formal order of abatement, if necessary before setting aside abatement.** — In cases under the old Code it was held that when a formal order of abatement had not been passed, the proper procedure on an application to revive the suit was to pass first an order of abatement and then an order setting aside the abatement.<sup>1</sup>

Under the present Code an abatement takes place automatically without any order and such abatement can be set aside on application under this rule even where no formal order declaring the abatement has been passed.<sup>2</sup> See Note 11.

**10. Cause of action in the revived suit.** — When a suit is revived under this rule it must be continued on the *same cause of action*; no new cause of action can be introduced into it.<sup>3</sup>

**11. Substitution without setting aside abatement.** — Strictly speaking, where an abatement has taken place, it should first be set aside before a substitution of the legal representative is ordered.<sup>4</sup> This rule is strictly applied in the Patna High Court.<sup>5</sup> In Bombay<sup>6</sup> and Allahabad<sup>7</sup> a more liberal interpretation is adopted and the substitution of the legal representatives without first setting aside the abatement has been held to be a mere irregularity which does not vitiate the decision. In a Calcutta case<sup>8</sup> where such substitution was ordered without objection by the other side, it was

(27) AIR 1927 Lah 865 (865) (One of the defen-

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Appellate Court will interfere only when discretion not exercised judicially or is exercised arbitrarily.)

27. (24) AIR 1924 Lah 339 (342)

(35) AIR 1935 Lah 712 (718) (Discretion is open to interference by Appellate Court only if it has been exercised in a perverse or an unjust manner.)

(39) AIR 1938 Bom 408 (410) I L R (1938) Bom 704

28. (27) AIR 1927 Oudh 170 (172)

Note 9

(Dissented.)

(24) AIR 1924 Bom 416 (417) (If no formal order application for substitution may, in suitable cases, be taken as one to set aside abatement.)

abatement of the suit — *Held*, that though that portion of the order which decided that the suit had abated in toto may be a decree, the order declaring the partial abatement was one which could be set aside on an application under O 22 R 9.)

(39) AIR 1939 Lah 572 (577)

(37) AIR 1937 Bom 401 (406) I L R (1937) Bom 602

[But see ('22) AIR 1922 All 209 (210) 44 All 459]

Note 10

1. ('94) 21 Cal 997 (1004, 1005) 21 Ind App

163 (PC)

('95) 22 Cal 92 (98)

Note 11

1. ('16) AIR 1916 Cal 630 (690)

2. (23) AIR 1923 Pat 417 (418) 2 Pat 168

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**Notes 11-14**

held that the decision could not, in an appeal from the final order, be objected to on that ground

An application for substitution may, in substance, be treated as an application to set aside the abatement.<sup>6</sup> This, however, should not be done when the merits of the case are against the petitioner.

**12 Remand.** — Where an Appellate Court finds that there was an abatement in the lower Court it should not proceed to set aside the abatement but should remand the case for disposal under this rule.<sup>1</sup>

Where an Appellate Court finds that the lower Court's refusal to set aside abatement is wrong and remands the application for re-hearing the remand is not a final order.<sup>2</sup>

**13 Appeal.** — No appeal lies from an order *setting aside* an abatement.<sup>1</sup> Is to whether an order setting aside abatement affects the decision on the merits within the meaning of Section 105 see Note 6 to Section 105 *ante*. Under the Code of 1877 no appeal was allowed even from an order *refusing to set aside* an abatement. But under the Code of 1882 as well as the present Code an appeal is allowed from such an order.<sup>2</sup> But no such appeal will lie when there has been no application to the Court to set aside the abatement.<sup>3</sup> It has been held by the Calcutta High Court<sup>4</sup> that an order refusing to set aside an abatement of an appeal cannot be appealed against. But the contrary view has been held by the Patna High Court.<sup>5</sup> See also Note 14.

**14. Letters Patent Appeal.** — The Allahabad<sup>1</sup> and Calcutta<sup>2</sup> High Courts have held that an order of a *single Judge* declining to set aside or setting aside an abatement in an appeal is a "judgment" within the meaning of Clause 10 of the Letters Patent (Allahabad) and Clause 15 of the Letters Patent (Calcutta) and that therefore a Letters Patent appeal is competent from such an order. But the Bombay High Court<sup>3</sup> has held that an order setting aside an abatement under this rule is not a "judgment" within the meaning of Clause 15 of the Letters Patent and that no appeal lies from such an order.

An order setting aside an abatement passed by a *Division Bench* of the High Court cannot according to the Madras High Court be set aside by another Bench of the High Court. The remedy is by way of review.<sup>4</sup>

- 6 (20) AIR 1920 All 284 (285) 42 All 540  
(24) AIR 1924 Lah 424 (424)  
(28) AIR 1928 Lah 746 (747)  
(37) AIR 1937 Lah 455 (457)  
7 (24) AIR 1924 Mad 713 (714)  
(30) AIR 1930 Cal 423 (424) 57 Cal 148

**Note 12**

- 1 (25) AIR 1925 Bom 290 (291)  
2 (25) AIR 1925 All 263 (263) 264) 47 All 335

**Note 13**

- 1 (17) AIR 1917 All 434 (435)  
(25) AIR 1925 Cal 473 (474) 52 Cal 472 (An

not be

setting  
aside is

- to revision)  
(38) AIR 1934 Bom 403 (409) I L R (1938) Bom  
704  
2 (34) AIR 1934 Lah 315 (315) (Application  
to bring on record legal representative of deceased  
party after expiry of time is application to set  
aside abatement—Order refusing to set aside

- 95  
4 (29) AIR 1929 Cal 532 (533)  
5 (38) AIR 1938 Pat 125 (126) 17 Pat 54 (AIR  
1925 Pat 162 Followed)  
(39) AIR 1939 Pat 623 (624)  
Bom 704  
4 (16) AIR 1916 Mad 130 (181)

11 (190)

**15. Revision** — Generally speaking no revision lies from an order under this rule<sup>1</sup> But where the order is passed without jurisdiction<sup>2</sup> or without adverting to the bar of limitation involved<sup>3</sup> a revision will lie

**D 22 R. 9  
Note 15**

**R. 10. [S 372] (1)** In other cases of an assignment,<sup>4</sup>

**O, 22 R. 10**

Procedure in case of assignment before final order in suit

creation<sup>5</sup> or devolution<sup>6</sup> of any interest<sup>7</sup> during the pendency of a suit,<sup>13</sup> the suit may, by leave of the Court,<sup>18</sup> be continued by or against the person to or upon whom such interest has come or devolved

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)

[1877, S 372 See S 146]

### Synopsis

- |   |   |
|---|---|
| 1 Legislative changes   | 13 During the pendency of a suit "                    |
| 2 Scope and applicability of the Rule                                       | 14 Application under this Rule when to be made        |
| 3 Other cases of assignment creation or devolution of interest pending suit | 15 Execution proceedings                              |
| 4 Assignment of interest  | 15a Sub rule (2) See Note 5a                          |
| 5 Interest  | 16 Laches   |
| 5a Attachment of decree "   | 17 No new suit  |
| 6 Trial Court can bring assignee on record pending an appeal                | 18 By leave of the Court                              |
| 7 Transfer of decree  | 19 Effect of adding new parties under this Rule       |
| 8 Creation of interest  | 19a Suit against municipality " See Note 4a to Rule 4 |
| 9 Devolution of interest  | 20 Appeal   |
| 10 Insolvency of defendant  | 21 Letters Patent Appeal                              |
| 11 Representative suits See Note 9  | 22 Limitation   |
| 12 Annulment of order of adjudication                                       |   |

### Other Topics (miscellaneous)

No application — Effect of See Notes 2, 9 and 14

Sub rule (2) See Note 8

Personal actions See Notes 9 and 10

### 1 Legislative changes —

- The words given either with the consent of all parties or after service of notice in writing upon them and hearing their objections if any which occurred in the old Section have been omitted
- The words or devolved in the present sub rule (1) are new
- The words either in addition to or in substitution for the person from whom it has passed as the case may be which occurred in the old Section have been omitted
- Sub rule (2) is new

**2 Scope and applicability of the Rule** — The rule is an enabling one<sup>1</sup> It is based on the principle that the trial of a suit cannot be arrested merely by reason of a

### Note III

- (14) AIR 1914 Mad 116 (116)
- (33) AIR 1933 Nag 85 (87) 29 Nag L R 113
- (21) 63 Ind Cas 230 (30) (All)
- (38) AIR 1933 Pat 27 (25)

2 (74) AIR 1924 Mad 713 (715)

3 (26) AIR 1926 Cal 444 (445)

### Order 22 Rule 10 — Note 2

1 (05) 98 Mad 157 (160)

(35) AIR 1935 Pat 488 (489) 15 Pat 64

O. 22 R. 10  
Note 2

devolution of the interest of a party in the subject matter of the suit that the person acquiring the interest may continue the suit with the leave of the Court but that if he does not choose to do so the suit may be continued with the original party and the person acquiring the interest will be bound by, or can have the benefit of, the decree as the case may be<sup>2</sup>

The rule applies to appeals in cases where the devolution takes place pending appeal<sup>3</sup> Similarly, the rule also applies to second appeals<sup>4</sup> It applies equally to cases of devolution of the interest of the *plaintiff* or of the *defendant*<sup>5</sup> and to the case of appellants as well as to that of respondents<sup>6</sup>

In order that this rule may apply

(1) There must be an *assignment, creation or devolution* of an interest in the subject matter of the suit<sup>7</sup>

(2) Such assignment, creation or devolution of interest must be by, or from, a *party* to the suit and not a stranger<sup>8</sup> Thus, an assignee from the *heir* of a deceased plaintiff who was himself not brought on the record, cannot apply under this rule<sup>9</sup>

(3) The person to whom the assignment, creation or devolution of interest takes place must be arrayed on the same side in the suit as the person from whom it has passed<sup>10</sup>

The rule is a residuary one governing cases *which are not provided for by the previous rules of the Order*,<sup>11</sup> so that if any of these other rules apply to the facts of a particular case, the effect of that rule cannot be got rid of by a resort to this rule<sup>12</sup> Where, however, there are two devolutions, *viz.*, one by the death of a party (coming under Rules 3 and 4) and the other by a transfer of his interest (prior to his death), the transferee has the right to be impleaded under this rule and the death of the plaintiff cannot take away the right<sup>13</sup>

instituted the suit)

(25) AIR 1925 Mad 487 (488)

(See (36) AIR 1936 Lah 632 (656) ILR (1937) Lah 525]

Q. (34) AIR 1934 Mad 1167 (1176)

Rule 10

is only a permissive rule and does not impose a

disability upon a person already on the record—

Appeal by original party is competent)

(21) AIR 1921 Cal 422 (423)

pendency of suit—Appellate Court has no jurisdiction to implead assignee as party under this rule)

(1900) 22 All 231 (232 233)

(85) 9 Bom 151 (156 157)

4. (38) AIR 1933 Mad 757 (758)

5. (15) AIR 1915 Cal 771 (772)

6 (90) 18 All 285 (287)

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(34) AIR 1934 Lah 190 (190) (Transfer of defendant during pendency of suit to plaintiff's knowledge — Transferee not made defendant—Appeal against defendant abating for not bringing his legal representative on record—Transferee cannot be brought on record at that stage) [See also (33) AIR 1933 Sind 371 (373) (Devolution of interest by death — Rule has no application)]

12 (203) AIR 1925 Cal 467 (463) (The two de-

(A widow of the deceased testator cannot apply to be brought on record as the 'legal representative' on the death of the executors who

It should be noted that there is no abatement under this rule<sup>14</sup> The rule contemplates the *substitution* of a new party, and not the *addition* of a new party<sup>15</sup> See also the undermentioned case<sup>16</sup>

O. 22 R. 10  
Notes 2-3

**3. Other cases of assignment, creation or devolution of interest pending suit.** — As has already been seen in Note 2, this rule provides for all cases not falling within the scope of the previous rules of the Order, such as Rules 2, 3, 4, 7 and 8<sup>1</sup> The words "other cases," etc mean cases other than those specifically provided for in the preceding rules<sup>2</sup> Those words were in the undermentioned case<sup>3</sup> held to indicate that the rule did not apply to a case of death But such a restricted interpretation does not appear to be warranted by the rule It would seem to apply even to cases of death if such cases do not fall within the provisions of Rules 3 or 4 *ante*<sup>4</sup>

As illustrations of "other cases of assignment, creation or devolution of interest" falling within this rule may be mentioned cases of transfer *inter vivos*<sup>5</sup> or cases where a mortgagee party in a suit releases the property to the mortgagor<sup>6</sup> Where a suit is instituted against a widow for recovery of debt due by her husband and, pending the suit she gives birth to a posthumous son, the son can be brought on the record under the principle of this rule<sup>7</sup> Where a suit was instituted against the G I P Railway and pending the suit the line was taken over by the Government, it was held that the Government should be made a party under this rule<sup>8</sup> But there is no "assignment creation or devolution of interest" by a company going into liquidation<sup>9</sup>

In *Manindra Chandra Nandy v. Ram Kumar*<sup>10</sup> the defendant in a suit for possession granted a lease of the suit property to another during the pendency of the suit The suit was decreed and it was sought to make the lessee a party to the proceedings for the ascertainment of mesne profits The lessee had surrendered the lease and did not claim to remain in occupation of the land The allegation against the lessee was that he had removed mica from the land and was liable for damages It was held by the Privy Council in the above circumstances that the lessee could not be proceeded against in the same suit and be made a party to the proceedings for the ascertainment of mesne profits The reason given was that there was no assignment, creation or devolution of interest within the meaning of this rule Their Lordships observed as follows in the course of their judgment The order (Order 22) contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else The more ordinary cases are death, marriage, insolvency, and then come the general provisions of Rule 10 for all other cases But they are all cases of devolution There is, it should be noted in this rule, a significant change of language from that used in the earlier Code, where it is stated in Section 372 as follows "In other cases of assignment, creation or devolution of any interest pending

14. (29) AIR 1929 All 444 (446)

15. (38) 42 Cal W N 1189 (1185) (Application to add a party—This rule does not apply)

16. (38) 42 Cal W N 1183 (1185) (The language of O 22 R 10 is wholly inapplicable to a case where some one is seeking to come into the proceedings in order to put forward a claim adverse to that of the original parties in the proceedings)

**Note 3**

1. (06) 20 Bom 250 (258)  
2. (05) 9 Cal W N 171 (173)  
(36) AIR 1936 Lah 83 (84)  
3. (92) 16 Bom 27 (28)

4. (05) 9 Cal W N 171 (173)

5. (21) AIR 1921 Mad 599 (603) 44 Mad 919 (FB)

(27) AIR 1927 Lah 501 (501) (Where owing to an arrangement in the form of a sale or partition the interest of the deceased respondent vested in the surviving respondent the appeal may by leave of Court continue against the surviving respondent)

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7.

8.

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10.

It— — — — —

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Notes 3-5

the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require' The words 'in addition to' in the earlier Code have disappeared. But the matter does not rest upon this change. The liability, if any, of the appellant (the lessee) to pay damages for the removal of the mica is not a liability which has devolved to him from the defendant Raja. They were both liable, if liable at all, as trespassers and a case, if any, against the appellant (lessee) must rest upon his action and the direct relation established thereby between him and the plaintiffs."

So, it was held in *Rameshwar v Mt Ganpati*<sup>11</sup> that the "interest" referred to in Rule 10 is the interest of a person who was a *party* to the suit, and it is the transfer of the interest of such a person to the applicant that entitles him to continue the suit under this rule. Hence, it was held that where a suit had been brought by the next reversioner challenging an alienation by a Hindu widow and the plaintiff died pending the suit, the sister of the suit under this rule <sup>12</sup> had been transferred to her by the above Act

The words "has come or devolved" connote an interest in present. A person who has a merely contingent interest cannot come in under this rule.<sup>13</sup>

See also Note 2 above

**4. Assignment of interest.** — As pointed in Note 3 above, a transfer *inter vivos*, such as a sale,<sup>1</sup> or any other kind of transfer will come within the rule. It is also not necessary that such transfer should be direct.<sup>2</sup>

**5. "Interest."** — A right to maintain a suit,<sup>1</sup> the right to recover *mesne profits* given by a decree<sup>2</sup> and the rights and interests of a *patnidar*<sup>3</sup> are "interests" within the meaning of the rule. But the interest must be an interest in the *subject-matter* of the suit<sup>4</sup> or one which is vitally affected by the suit.<sup>5</sup> For instances where the rule was

11. (36) AIR 1936 Lah 652 (656) I L R (1937) Lah 525

12. (37) AIR 1937 Mad 200 (207)

**Note 4**

1. (24) AIR 1924 Mad 649 (648)

(192) 5 Oudh Cas 91 (92)

(34) 8 Bom 323 (334, 335) (A mortgagee whose security was created prior to the suit and who made a further advance on the same security after the institution of the suit and agreed to buy the property after the termination of the suit was allowed to continue the defence when the mortgagor expressed his intention of abandoning it)

**Note 5**

1. (28) AIR 1928 Mad 246 (246)

2. (16) AIR 1916 Pat 10 (11) 1 Pat L Jour 427

3. (36) AIR 1936 Pat 100 (100)

4.

951, Followed)

(37) AIR 1937 Mad 200 (207) ("Interest" means interest in the subject-matter of the litigation)

to continue the pending suit for pre-emption creates an assignment within the meaning of the rule)

decree on the posthumous son)  
5. (16) AIR 1916 Pat 606 (606) (Addition of parties is in the discretion of the Court)

held not to apply on this ground, see the undermentioned cases <sup>6</sup> The word "interest" includes also a portion of the interest <sup>7</sup>

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Notes 5-8

A, the plaintiff in a suit, transferred his rights in the subject-matter of the suit by means of a sale deed in favour of B, whereupon B was added as a co plaintiff to the suit Then, B executed a deed in favour of C, his father, alleging that the sale deed by A was executed in his name only because for his father and that even assuming that he had any rights under it, he relinquished them in favour of his father It was held that the latter deed did not constitute any assignment, creation or devolution of any interest within the meaning of this rule <sup>8</sup>

**5a. Attachment of decree.** — The mere attachment of a decree does not, except as provided for by sub rule (2) amount to assignment, creation or devolution of any such interest as is mentioned in sub-rule (1) of this rule <sup>1</sup>

Sub rule (2) provides that the attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub rule (1) The benefit indicated in sub rule (2) is the right to oppose or support the pending appeal <sup>2</sup>

See also Note III below

**6. Trial Court can bring assignee on record pending an appeal.** — Where the suit is pending, the mere fact that an appeal is filed from an interlocutory order made in the suit will not deprive the Court of first instance of its jurisdiction to implead parties under this rule <sup>1</sup>

**7. Transfer of decree.**—This rule does not apply to the transfer of a decree <sup>1</sup>  
See also the undermentioned case <sup>2</sup>

**8. Creation of interest.** — Under the old Code an attaching creditor of the decree pending appeal therefrom could not claim to be impleaded in the appeal <sup>1</sup> But in view of the present sub rule (2) he can However, even under the present rule, a person who has attached property has been held not entitled to be impleaded, in a mortgage suit regarding the attached properties <sup>2</sup>

6. (33) 80 Cal 961 (364) (Where after a decree for money against it a company has assigned all its properties with liabilities the assignee cannot be proceeded against as no property in suit has been assigned to him)

(95) 22 Cal 259 (265) (In a suit on mere money claim the insolvency of defendant creates no assignment of interest within the meaning of this rule)

(25) AIR 1925 Nag 423 (426) (Suit by widow for partition of widow's estate — The widow dying, no devolution of interest in the suit on the adopted son)

7. (21) AIR 1921 Mad 599 (600, 603, 605) 44 Mad 919 (FD)

(33) AIR 1933 Mad 411 (413) 56 Mad 459 (Mortgagee of deceased plaintiff's share is entitled to continue appeal)

[But see (34) AIR 1934 Mad 484 (488) (Rule will apply to assignment of fractional share but will not apply to transfer of fractional interest such as in the case of a mortgagee)]

8. (36) AIR 1936 Oudh 224 (225)

**Note 5a**

1 (86) AIR 1936 All 857 (859)

2 (88) AIR 1938 Mad 757 (758)

**Note 6**

1 (23) AIR 1929 Bom 303 (309)

**Note 7**

can apply for execution under O 21 R 16)

2. (96) 18 All 86 (87) (Decree transferred to another before appeal — Appellant only making original decree holder respondent and not the assignee — In spite of notice of assignment, no steps taken to make assignee of decree respondent for a long time — Application then to substitute him as respondent was refused)

**Note 8**

1 (93) 20 All 33 (39)

2. (26) AIR 1926 Nag 67 (60)

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Notes 8-9

An adoption does not create an interest within the meaning of this rule<sup>3</sup>

It has been held that this rule will apply to a person acquiring the rights of a mortgagee on the principle of subrogation<sup>4</sup>

**9. Devolution of interest.** — Where a suit is brought by or against a person in a representative character and a devolution of the representative interest takes place, the rule that is applicable is not Rule 3 or Rule 4 but Rule 10, whether such devolution is by virtue of the death of the person or for any other cause<sup>1</sup>. Thus, it will apply to a public trust which is represented at different stages of a suit by different representatives<sup>2</sup>. When a trustee dies or retires<sup>3</sup> or is removed from office<sup>4</sup> and another is appointed in his place the estate "devolves" on the new trustee within the meaning of this rule. The fact that the original trustee was wrongly appointed as trustee will not make any inference<sup>5</sup>.

The following are illustrations of other cases of such devolution of interest —

- 1 One of four *uralans* of a Malabar *devaswam* sued for redemption of a *kanom*. The other *uralans* had been made party defendants. One of three latter died pending suit. It was held it was a case of devolution under this rule<sup>6</sup>.
- 2 The manager of an undivided Mitakshara family files a suit as manager of the family and dies pending suit. The succeeding manager can come in under this rule<sup>7</sup>.
- 3 The manager of an encumbered estate under the Chota Nagpur Encumbered Estates Act (VI of 1876) files a suit on behalf of the estate. Pending the suit the estate is released and restored to the owner. The owner can come in under this rule<sup>8</sup>.
- 4 A receiver appointed in a suit files a suit on behalf of the estate. Pending suit he is discharged and another receiver is appointed in his place. The latter can come in under this rule<sup>9</sup>.
- 5 A suit was instituted claiming a right of pre-emption and for possession of property as against the vendor. Pending the suit the vendor's rights devolved on another person under another decree. The latter person can be impleaded as defendant under this rule<sup>10</sup>.
- 6 When the Court of Wards assumes the management of the estate of a party to a suit during the pendency of the suit, there is a devolution of interest within the meaning of this rule<sup>11</sup>.

In cases of devolution other than by death, it should be noted that if the person on whom the estate devolves does not bring himself on record, the decree passed in the suit will be binding on him<sup>12</sup>.

3 (16) AIR 1918 Nag 1 (6). 15 Nag L R 24.  
4 (39) AIR 1939 Nag 215 (216). (Where a mortgage is split up each part should be treated as an

8 (01) 28 Cal 171 (175).

9. [See (21) AIR 1921 Cal 422 (423)].

10. (87) 1887 Pun Re No 29, p 62.

[See also (30) AIR 1930 Oudh 51 (52). (Suit for rent by person claiming to be zamindar — in his name found to be zamindar under

#### Note 9

1. (32) AIR 1932 Cal 783 (784).  
2. (22) AIR 1922 Mad 402 (403). 45 Mad 703.  
(33) AIR 1933 Cal 329 (332). 60 Cal 794.  
3. (26) AIR 1926 Mad 540 (541).  
4.  
5.  
6.  
7. (19) AIR 1929 Mad 1000 (1001).

#### 11

[See (19) AIR 1929 Mad 1000 (1001).  
17 Pat 1. 32 Sind L R 240 (P C) (In this case the Privy Council observed that it was not material whether Rule 10 will apply to such a case but did not express any definite opinion on the point)].

12. (21) AIR 1921 Cal 422 (423).  
(28) AIR 1928 Mad 246 (248).



Where the cause of action is purely a *personal* one there can be no devolution of interest<sup>11</sup> An adoption creates no devolution of interest within the meaning of this rule<sup>12</sup>

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Notes 9-13

**10. Insolvency of defendant.** — The rule applies also to the devolution of interest by operation of law. The insolvency of a defendant will cause a devolution of his estate on the Official Receiver or the Official Assignee as the case may be. But the question whether, on the adjudication of a defendant pending suit the receiver in insolvency can come in under this rule will depend upon the "interest" involved in the suit<sup>1</sup>. If it is a suit *in personam*, such as for instance a mere money suit, no interest devolves on the receiver or assignee and he cannot come in under this rule<sup>2</sup>. But if it is a suit relating to the "estate," such as a suit to enforce a mortgage, the receiver or assignee is entitled to come in and should be impleaded<sup>3</sup>. If in such cases the receiver or assignee refuses to defend the suit, the insolvent cannot on that ground defend it<sup>4</sup>. If, however, the suit is of such a nature that it can go on without the insolvent defendant, the receiver need not be made a party<sup>5</sup>.

A person was adjudicated an insolvent during the pendency of a suit for maintenance against him. A decree was passed in the suit declaring the maintenance as a charge on the property of the defendant. It was held that as this rule was only permissive and did not impose any disability on a person already on the record, the insolvent could file an appeal against the decree<sup>6</sup>.

See also Note 14 to Order 34 Rule 1

**11. Representative suits.** — See Note 9 above

**12. Annulment of order of adjudication.** — Where, pending a suit instituted by the Official Assignee, the adjudication is annulled under any condition, the *quondam* insolvent is entitled to be substituted as plaintiff under this rule<sup>1</sup>.

**13. "During the pendency of a suit."** — The rule does not apply unless the assignment, creation or devolution of interest takes place *during the pendency of the suit*. Thus, it does not apply if the assignment, creation or devolution of interest takes place *before the suit is instituted*<sup>1</sup>. Where, however, the suit has been instituted, it is pending so long as the final decree has not been passed in it, the rule is thus applicable to cases of assignment, creation or devolution of interest, after the

13. (84) AIR 1984 Pesh 89 (90) (Official Assignee's suit for avoidance of transfer by insolvent—Pending suit composition scheme accepted and insolvent's properties transferred to a trustee—Official Assignee's right of suit is personal and cannot devolve on the insolvent or on the trustee)

(14) 16 Ind Cas 908 (909) 40 Cal 323 (Smt

[See also (91) 18 Cal 43 (44) (As to the interpretation of this decision see 25 Mad 406)]

3 (27) AIR 1927 P O 108 (109) 54 Cal 595 54 Ind App 190 (P C)

(85) AIR 1935 Lah 316 (317 318)

4 (15) AIR 1915 Bom 293 (299) 39 Bom 568

5. (30) AIR 1930 Cal 388 (390)

6 (37) AIR 1937 Mad 915 (917)

Note 12

1. (08) 32 Bom 321 (331)

Note 13

1 (28) AIR 1928 All 120 (123)

(10) 7 Ind Cas 481 (482) (Cal)

(24) AIR 1924 Mad 648 (649) (Court auction held before suit—Sale confirmed pending suit—Held sale dates back — So no transfer pending suit—R. 10 does not apply)

[See (37) AIR 1937 Sind 47 (48) (Suit instituted against a person who was subsequently found

Cause of action purely personal)

14. (16) AIR 1918 Nag 1 (6) 15 Nag L R 24

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**Notes 13-14**

preliminary and before final decree<sup>2</sup> In fact the Courts which hold that Rules 3 and 4 do not apply to cases of death after the preliminary decree, hold that this rule applies to such cases<sup>3</sup> The assignment of the rights of the plaintiff after a final decree has been passed in a mortgage suit although before sale under the decree is not an assignment during the "pendency of the suit"<sup>4</sup>

This rule does not authorize the addition of a party to the suit after decree<sup>5</sup> and the rule has been held not to apply to cases of assignment of interest between the date of the decree and the date of the filing of the appeal,<sup>6</sup> though the assignee can be joined in the appeal<sup>7</sup> Similarly, where a decree has been amended, the question whether the rule is applicable to cases of assignment, etc., of interest during the period between the original and the amended decree has been left undecided<sup>8</sup>

See also Note 14 below

**14. Application under this Rule, when to be made.**—The rule provides for a continuation of the suit by the assignee or other person on whom the interest has devolved. Therefore, on the one hand, an application under the rule can be made at any time when the suit is pending,<sup>1</sup> on the other hand, it cannot be made after a final decree has been passed<sup>2</sup>

The fact that the assignee made no application when the suit was pending will not however debar him from filing an appeal from the decree as a person claiming under the party within the meaning of Section 146<sup>3</sup> An application under this rule may also be made to the Appellate Court during the pendency of an appeal from the decree<sup>4</sup> Thus the assignee of the interest of a party in the subject matter of a suit during the pendency of the suit can come in at the stage of appeal or second appeal and apply to continue the same<sup>5</sup> A different view has, however, been held by the Oudh Chief Court<sup>6</sup>

to be dead — Person in whom property of deceased vested can be joined as party under O 1 R 10—O 22 R 10 has no application, the person sued being dead before suit]]

2. (01) 23 All 331 (334 335 338)

(24) AIR 1924 Cal 188 (189)

(29) AIR 1929 Nag 142 (144) (F B)

(30) AIR 1930 Nag 212 (213)

(37) AIR 1937 Lah 615 (616)

3. (29) AIR 1929 Nag 142 (144) (F B) (Decisions of other High Courts are considered on this point)

(21) AIR 1921 Nag 32 (33 34) 17 Nag L R 51

4. (38) AIR 1938 Cal 169 (170) 1 L R (1937) 2 Cal 207 (Assignee can apply for execution of decree as a transferee under O 21 R 16)

7. (17) AIR 1917 Oudh 176 (177) 10 Oudh Cas 31 (Under Section 146)

8. (23) AIR 1923 Mad 57 (58)

#### NOTE 14

1. (30) AIR 1930 Cal 267 (269)

(15) AIR 1915 All 83 (83) 87 All 226 (In suits requiring a preliminary and a final decree the application can be made at any time before the final decree)

(03) 30 Cal 609 (611)

(16) AIR 1916 Pat 10 (11) (Decree directing ascertainment of mesne profits—Right to continue mesne profits assigned — Proceedings taken to ascertain mesne profits are proceedings in suit—Assignee should apply to Court for permission to sue)

(18) AIR 1918 Mad 400 (410)

(26) AIR 1926 Mad 244 (245)

3. (19) AIR 1919 Mad 755 (756) 41 Mad 513.

4. (24) AIR 1924 Cal 90 (91)

5. (38) AIR 1938 Mad 757 (759) (Assignee of interest in subject matter of suit pending in trial Court — Assignee can apply to continue proceedings against the decree in the suit)

6. (35) AIR 1935 Lah 119 (120) (Assignment of

**15. Execution proceedings.** — There is a conflict of views on the question whether the rule applies to execution proceedings. On the one hand, the facts that the rule relates to assignment before the final order in the suit, that it relates to assignments *pending suit* and that it provides for a continuation of the *suit*, have been relied on for holding that the rule does not apply to execution proceedings. On the other hand, the fact that Rule 13 makes no mention of this rule as one of those not applicable to execution has been relied upon for holding that by implication, this rule applies to execution proceedings also. The former view has been held by the Allahabad High Court,<sup>1</sup> and the latter view by the Calcutta High Court.<sup>2</sup> In Patna the applicability of the rule to execution proceedings has been doubted.<sup>3</sup> A Full Bench of the Madras High Court<sup>4</sup> held by a majority that the present rule was applicable to execution proceedings. But this decision has been explained away in a later case which has held the rule inapplicable to execution proceedings.<sup>5</sup>

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Notes 15-18

**15a. Sub-rule (2).** — See Note 5a above

**16. Laches.** — This rule vests in the Court a discretion in the matter of allowing the suit to be continued by or against the assignee, and the permission may be refused on sufficient grounds. Thus, delay or laches will be a ground for refusing permission under this rule.<sup>1</sup>

**17. No new suit.** — So long as no final decree has been passed, the assignee can carry on the suit, and cannot in disregard thereof, file a new suit for the same relief.<sup>1</sup> And where an assignee is added in a pending suit the suit merely continues as against him and does not become a new suit.<sup>2</sup>

**18. "By leave of the Court."** — An assignee under this rule is not entitled to continue the suit as a *matter of right*. The leave of Court must first be obtained. The granting of the leave is, however, discretionary with the Court.<sup>1</sup> The discretion should be exercised judicially.<sup>2</sup> Unnecessary delay on the part of the applicant will be a good ground for refusing leave under this rule.<sup>3</sup> The assignee has the option of either getting impleaded or keeping quiet if he considers his interests already protected.<sup>4</sup>

**Note 15**

1. (88) 10 All 97 (106)  
(See also (80) AIR 1930 All 604 (604) (Not

**2. (01) 23 All 331 (335)**

**Note 18**

3. (21) AIR 1921 Pat 160 (181)  
4. (21) AIR 1921 Mad 599 (601, 603) 44 Mad  
919 (F B)  
5. (27) AIR 1927 Mad 824 (824)

(24) AIR 1924 Cal 188 (189, 190) (But the application will as a rule be allowed to avoid multi

**Note 18**

1. (24) AIR 1924 Cal 188 (189),  
(33) AIR 1933 Cal 636 (639) 60 Cal 940 (Preh  
minary decree in partition suit—No steps taken  
beyond appointment of commissioner—Applica  
tion after 53 years to substitute persons as

discretion, Court has to look at the position and see what is contemplated and what is likely to happen)

2. (26) AIR 1936 Mad 714 (715).  
3. (36) AIR 1936 Lah 652 (657) I L R (1937)  
Lah 525  
(36) AIR 1936 Mad 714 (715)  
4. (30) AIR 1930 All 380 (381).

**Note 17**

1. (79) 5 Cal 726 (731)

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**Notes 18-20**

The leave should not be given without *notice* to the party concerned<sup>6</sup> While the admission of assignment by such party is sufficient for giving the leave, it should not be refused merely because the assignment is challenged<sup>6</sup> In such cases the Court should go into the question of the truth or validity of the assignment<sup>7</sup> But where, in addition to the assignment being disputed, there has been long delay in making the application, leave may be refused<sup>8</sup>

**19. Effect of adding new parties under this Rule.** — As already pointed out (in Note 17 above) the suit only *continues* against the assignee. He will be entitled to continue the further proceedings from that date but is bound by all orders passed up to that date<sup>1</sup> Similarly, after the assignee is impleaded, the assignor, though on record, will be concluded by all legal and *bona fide* proceedings taken by or against the assignee<sup>2</sup> Where a person is allowed to continue an appeal on an application by him under this rule and the appeal is dismissed with costs, he is liable for the full costs of the respondent in the appeal and not merely for the costs incurred from the date of his application under this rule<sup>3</sup>

Generally speaking the assignee will not be allowed to set up a case inconsistent with the one set up by his assignor. But, in cases of institutions represented at different stages by different representatives, the Court has a discretion to allow amendments and new pleas in order to avoid multiplicity of suits<sup>4</sup>

See also the undermentioned case<sup>5</sup>

**19a. Suit against municipality.** — See Note 4a to Rule 1 *ante*

**20. Appeal.** — Under the old Code there was a conflict of opinions regarding the appealability of an order granting or refusing permission under this rule<sup>1</sup> This is no longer of any interest as the present O. 43 R. 1 (i) gives a right of appeal from an order granting, as well as from an order refusing, such leave<sup>2</sup> In fact an appeal is the only remedy of a party aggrieved by such order<sup>3</sup>

Where an order purports to be passed under this rule an appeal will lie, even though, on the facts, the order is improper<sup>4</sup> But where the order is not one under strict from

(99) 4 Cal W N 403 (404)

Mad 692

**Note 19**

1. (20) AIR 1920 Mad 391 (396) 43 Mad 37
2. (27) AIR 1927 P C 57 (59, 60) 51 Bom 442  
54 Ind App 111 (PC)
3. (33) AIR 1933 Mad 411 (413) 56 Mad 469
4. (22) AIR 1922 Mad 402 (403) 45 Mad 703
5. (2) AIR 1932 Bom 462 (464) (Suit by inamdar against tenants for recovery of assessment—Decree for plaintiff—Subsequently third party purchasing the land — The vendee intervened in appeal and also filed second appeal — Both dismissed merely confirming first Court's decree—No liability on the vendee—Decree can not be executed against him)

**Note 20**

1. (85) 7 All 681 (687)

tiffs—Order cannot be partly appealable — partly non appealable)  
 (17) AIR 1917 Cal 560 (560)

4. (21) AIR 1921 Mad 593 (600 (601) 919 (I-19)
5. (17) AIR 1917 Cal 560 (560)
- (17) AIR 1917 Cal 627 (628)

substituting) does not come under this rule and an order allowing or refusing such an application is therefore not open to appeal <sup>6</sup>

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Notes 20-22

No second appeal lies from an order under this rule <sup>7</sup>

See also the undermentioned case <sup>8</sup>

**21. Letters Patent Appeal.**—An order refusing the application of an assignee of the plaintiff under this rule is a 'judgment' within the meaning of Clause 15 of the Letters Patent <sup>1</sup>

**22. Limitation.**—The right to make an application under this rule is a right which accrues from day to day. There is therefore no limitation for the application which can be made at any time <sup>1</sup>

Before the insertion of sub section (3) to Section 23 of the Limitation Act of 1908 there was a conflict of opinion as to whether the Section applied to parties added under this rule. One view was that it did <sup>2</sup>. Another view was that it did not <sup>3</sup>. The insertion of sub section (3) in Section 23 of the Limitation Act now makes it clear that that Section does not apply to parties added under this rule. See also the undermentioned case <sup>4</sup>

## R. 11. [S 582] In the application of this Order to appeals,

O. 22 R. 11

Application of Order  
to appeals

so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal

### Local Amendment

#### CALCUTTA

Add the following

Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under O 41 R 14 (3) the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party

- ( 03 ) 30 Cal 609 (612)
- ( 24 ) AIR 1924 Cal 90 (91)
- ( 21 ) AIR 1921 Nag 32 (33 34) 17 Nag L R 81
- ( 27 ) AIR 1927 Oudh 156 (156) 2 Luck 464
- ( 35 ) AIR 1935 Lah 316 (317)
- 2 ( 98 ) 25 Cal 409 (412)
- ( 07 ) 34 Cal 612 (617 618) (FB)
- ( 10 ) 5 Ind Cas 115 (116) (Cal)
- 3 ( 50 ) 5 Cal 720 (724)
- ( 07 ) 1907 Funn Re No 3 page 23

and is not appealable )

Note III

1 ( 01 ) 24 Mad 252 (254)

Note 22

1 ( 82 ) 8 Cal 420 (421)

4 ( 35 ) AIR 1935 Lah 316 (318) (Suit to enforce mortgage—Pending suit mortgagee adjudicated insolvent—Sui tiam used—Appeal—Application to implead Official Receiver as respondent but beyond limitation period—Held he can be impleaded under this rule.)

# **Order 22 R. 11** **Note 1**

## *Synopsis*

- 1 Scope of the Rule
- 2 Abatement of appeals in personal actions
- 3 Appeal by several defendants on grounds common to all
- 4 Death of one of two representatives suing or sued in a representative capacity See Notes 24 to O 1 R 8

- 5 Suit under Section 92
- 6 Guardian cases — Abatement of appeal
- 7 Appellate Court's power to declare abatement of suit
- 8 Appeal in suit for waqf property
- 9 Death during pendency of appeal to the Privy Council
- 10 Limitation for application for substitution

## *Other Topics (miscellaneous)*

Abatement of appeal against deceased party only See Note 1  
Application of Order to appeals See Note 1

**1. Scope of the Rule** — The effect of this rule is to make the provisions of the previous rules applicable as far as may be to appeals.<sup>1</sup> See also Notes under the various rules. A decree passed without impleading the legal representatives of a party who has died pending appeal is a nullity.<sup>2</sup> Further the result of not impleading in time the legal representative of a party who has died pending appeal will be to cause an abatement of the appeal so far as that party is concerned.<sup>3</sup> The fact that in another independent appeal from the same decree the legal representatives have been impleaded will not be enough.<sup>4</sup> But where the legal representative has of his own accord come on record no further application by the appellant is necessary.<sup>5</sup> There will be no abatement when the deceased is only a *pro forma* respondent.<sup>6</sup> This rule and consequently the provisions of the previous rules do not apply when the devolution of interest takes place before the filing of the appeal; i.e., after the decree in the suit and before the appeal is filed.<sup>7</sup>

The rule has been held to be inapplicable to an application under Section 21 A of the Punjab Alienation of Land Act.<sup>8</sup>

## **Order 22 Rule 11 — Note 1**

1 (04) 31 Cal 487 (494) 31 Ind App 71 (P C)  
(33) AIR 1933 All 388 (389) 55 All 509 (Rule 8 applies)

(34) AIR 1934 All 1011 (1012) (Rule 8 (1) applies)  
(0) 28 Mad 359 (360)

(21) 59 Ind Cas 238 (239) (Lah)

(5) AIR 1925 Rang 95 (96) 2 Rang 445 (Rule 2 applies)

(27) AIR 1927 Bom 106 (157) (Rule 8 applies)

(66) 11 Bom II C 81 (81) (Do)

(21) AIR 1921 Lah 160 (161) (Rule 4 applies)

(25) AIR 1923 Pat 250 (252) 7 Pat 285 (Do)

(11) 12 Ind Cas 871 (871) 1911 Pun Ro No 60

(85) 8 Ind 300 (303) (Rule 8 applies)

(09) 4 Ind Cas 412 (413) 36 Cal 418 (Rule 9 applies)

(55) 9 Bom 101 (157) (Rule 10 applies)

(26) AIR 1926 Lah 329 (330)

(35) AIR 1935 Lah 478 (478) 155 Ind Cas 610 (611)

(34) AIR 1934 All 1029 (1030) (Right to sue should be taken to mean right to appeal)

2 (02) 26 Bom 317 (319)

3 (04) 26 Bom 203 (206)

(2) AIR 1927 All 831 (832)

(26) AIR 1926 Cal 193 (203)

(14) AIR 1914 Mad 708 (709) 39 Mad 1064

Defendant's appeal abates

4 (31) AIR 1931 Mad 277 (277)

5 (19) AIR 1919 Mad 1026 (1027)

6 (19) AIR 1919 Mad 1026 (1027) (Deceased

(27) AIR 1927 Lah 779 (779)  
(39) AIR 1933 Cal 639 (640) (Legal representative of *pro forma* respondent not brought a record—Appeal does not abate in toto)

(35) AIR 1935 Cal 202 (203)

7 (96) 18 All 56 (87)

(26) AIR 1926 Lah 329 (330)

(81) 3 Mad 236 (238)

8 (30) AIR 1930 Lah 775 (775) 11 Lah 70.

The rule has no application to appeals pending in Courts which have no jurisdiction to entertain them<sup>9</sup>

After abatement of an appeal, the trial Court has no jurisdiction to go on with the proceedings taken in pursuance of an order of the Appellate Court which was intended to operate only during the pendency of the appeal<sup>10</sup>

**2. Abatement of appeals in personal actions** — As a general rule the right to appeal in a *personal* action does not survive on the death of either party<sup>1</sup> But there are certain personal claims like a claim for damages with respect to which a suit and an appeal will stand on different footings So long as such claims remain unconverted into a decree as, for instance, where the suit to enforce the claim is dismissed and there is an appeal against the dismissal, the appeal will abate on death of the party<sup>2</sup> But if the suit has been *decreed* and the appeal is against the decree the death of either party will not cause abatement of the appeal<sup>3</sup> The principles underlying the above have been discussed in Rules 1, 3 and 4 *supra* If the suit is decreed in the lower Court, but set aside in first appeal and the death takes place pending a second appeal, there will be no abatement<sup>4</sup> The reason is that the claim having once been converted into a decree, the fact that the decree has been set aside in first appeal will not affect the survival of the right

**3. Appeal by several defendants on grounds common to all.** — Where the appeal is by several defendants on a ground common to all of them and one of them dies and his legal representatives are not impleaded within time, the entire appeal can nevertheless proceed as a whole The reason is that there is an abatement only so far as the deceased is concerned But from the nature of the appeal any one of the appellants can get a reversal of the *whole* decree<sup>1</sup>

**4. Death of one of two representatives suing or sued in a representative capacity.** — See Note 24 to Order 1 Rule 8

**5. Suit under Section 92** — Appeal by surviving plaintiff See Note 30 to Section 92

**6. Guardian cases—Abatement of appeal.** — Where the right to guardian ship is based on a *personal* preference the appeal relating to such right will abate on the death of the party<sup>1</sup> otherwise it will not<sup>2</sup>

■ (35) AIR 1935 All 92 (92 93)

10 (86) AIR 1936 Lah 618 (619)

Note 2

I (19) AIR 1919 Lah 18 (19) 1919 Pun Re

while the contract was in execution could be

1 (2) 96 Bom 597 (603)  
(03) 26 Mad 499 (500)

(39) AIR 1939 Nag 256 (258)

4 (17) AIR 1917 Upp Bur 14 (15) 2 Upp Bur

Rul 10

Note 3

1 (03) 95 All 97 (28)

Note 6

1 (99) 23 Bom 719 (722)

2 (14) AIR 1917 Lah 355 (356)

cannot be resurrected against representatives of

debtor)

2 (18) AIR 1918 Mad 1100 (1101 1102)

for damages for breach of contract of marriage—

Suit dismissed—Appeal by plaintiff—Pending

appeal plaintiff dies—Appeal abates—It was

assumed however that the right of appeal in

respect of the amount of pocket expenses incurred

O. 22 R. 11  
Notes 7-10

**7. Appellate Court's power to declare abatement of suit.** — When the sole plaintiff respondent dies in appeal and the defendant appellant claims to be his legal representative, it is not the suit but the appeal that abates<sup>1</sup>

**8. Appeal in suit for waqf property.** — Certain persons sued in their capacity as followers of a shrine for a declaration that certain property was waqf property. They succeeded in the suit and there was an appeal against the decree. Pending appeal one of the plaintiffs respondents died. It was held that appeal did not abate<sup>1</sup>

**9. Death during pendency of appeal to the Privy Council.** — The judgment of the Privy Council is an order of the Sovereign. Order 22 of the Code has no application to appeals before the Privy Council. Consequently, on the death of a party in an appeal pending before the Privy Council, no question of impleading legal representatives or of limitation therefor arises<sup>1</sup> and the judgment given without impleading legal representatives is not, on that ground, a nullity<sup>2</sup>

**10. Limitation for application for substitution.** — Under the old Code and the old Limitation Act there was a good deal of controversy as to the Article of the Limitation Act applicable to applications for substitution under the Section corresponding to this rule<sup>1</sup>. But this is now of no practical importance as the limitation for all applications under this rule is specifically provided for in Articles 176 and 177 of the Limitation Act, 1908, under which the application should be filed within ninety days of the death of the party.

### Local Amendment

#### MADRAS

After Rule 11, add the following as Rule 11A

"11A The entry on the record of the name of the representative of a deceased

O. 22 R. 11A  
(Madras)

O. 22 R. 12

Application of Order  
to proceedings

**R. 12.** [New.] Nothing in rules 3, 4  
and 8 shall apply to proceedings in execution  
of a decree or order.

#### Note 7

1. (19) AIR 1919 All 355 (356) 41 All 283

#### Note 8

1 ('21) AIR 1921 Lah 330 (331)

#### Note 9

1 (02) 4 Ind Cas 454 (4 6) (Cal)

2 (00) AIR 1900 Lat 89 (91 92) 5 Pat L Jour

314  
(32) AIR 1932 Pat 261 (62) 11 Pat 445

#### Note 10

1. See the following cases

(55) 10 All 24 (47 263) (FB)

(07) 29 All 535 (36)

(56) 10 Bom LR (65)

(8) 11 Cal 91 (63)

(56) 12 Cal 530 (33) (11)

(07) 34 Cal 10 (1022, 10.3)

(01) 23 Mad 433 (3 3)

(84) 1861 Pan Ile No 133 page 337.



## Local Amendments

O. 22 R. 12  
Note 1

## ALLAHABAD

At the end of the rule *add* the words

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit"

## OUDH

*Add* the following

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit"

*Synopsis*

## 1. Execution proceedings | 2. Allahabad amendment

**1. Execution proceedings.** — This rule is new Under the old Code there was a great difference of opinion as to whether the provisions relating to abatement contained in the previous rules applied to execution proceedings In several cases it was held that they did not<sup>1</sup> and the present rule affirms the view expressed in those cases<sup>2</sup>

It should be noted that the only provisions specified as not applicable to execution proceedings are those contained in Rules 3, 4 and 8 and that, even as to these it is only in respect to the *abatement* of the proceedings that those rules do not apply<sup>3</sup> In other words, the rule cannot be interpreted to mean that no substitution can be made in execution proceedings<sup>4</sup> and the Judicial Committee have specifically laid down that such substitution can be made<sup>5</sup> On the death, therefore, of a decree holder, pending an execution proceeding, can his legal representative get himself substituted and carry on the proceedings, or should he file a separate execution application? The Bombay,<sup>6</sup> Calcutta<sup>7</sup> and Nagpur<sup>8</sup> High Courts have held that he can continue the proceedings and that he need not present a separate execution application

(88) 1886 Fun Re No 103 page 248

ment debtor application for execution does not

(87) 1887 Fun Re No 42 page 91

## Order 22 Rule 12 — Note 1

1 (81) 3 All 759 (765)

(80) 3 Cal L Rep 105 (111)

(84) 6 All 255 (259)

(78) 3 Bom 221 (222)

(95) 19 Bom 276 (281)

(96) 23 Cal 680 (689)

(83) 6 Mad 160 (181)

(92) 15 Mld 399 (400)

(08) 31 Mad 77 (79)

pending execution proceeding does not abate by reason of the death of any of the joint decree-holders)

(31) AIR 1931 Bom 425 (427)

(26) AIR 1926 Cal 957 (958)

(31) AIR 1931 Bom 425 (427)

(35) AIR 1935 All 27 (28)

(32) AIR 1932 Pat 224 (223) 11 Pat 546 (It is

[See also (24) AIR 1924 Mad 132 (132) 47 Mad 63 (It is desirable to bring them on the record)]

not take steps for substitution under O 22 R 3, but may apply to carry on the proceedings or may file a fresh application)

**O. 22 R 11**  
**Notes 7-10**

**7. Appellate Court's power to declare abatement of suit** — When the sole plaintiff respondent dies in appeal and the defendant appellant claims to be his legal representative it is not the suit but the appeal that abates<sup>1</sup>

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### Local Amendment

#### MADRAS

After Rule 11 add the following as Rule 11A

**O 22 R 11A**  
**(Madras)**

**11A** The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction except in cases under appeal to the King in Council shall be deemed to be a quasi-judicial act within the meaning of Section 128 (2) (c) of the Code of Civil Procedure and may be performed by the Registrar provided that contested applications presented out of time shall be posted before a Judge for disposal.

**O 22 R 12**

**Application of Order**  
**to proceedings**

**R. 12. [New]** Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order

#### Note 7

1 (19) AIR 1919 All 333 (3-6) 41 All 253

#### Note 8

1 (71) AIR 1901 Lh 330 (391)

#### Note 9

1 (09) 4 Ind Cas 4 (4 G) (Cal)  
2 (0) AIR 1901 Pat 89 (91-92) 5 Pat L Jour  
314  
(32) AIR 1932 Pat 661 (262) 11 Pat 445

#### Note III

1 See the following cases  
(55) 10 All 264 (7-26-2) (FB)  
(07) 29 All 535 (36)  
(86) 10 Bo (1-3) (1-5)  
(8) 11 Cal 434 (1-8)  
(86) 12 Cal 530 (33) (1-1)  
(07) 34 Cal 100 (10-22 10-3)  
(0) 23 Mad 433 (4-9)  
(84) 1851 Ind Bo No 133 page 337

## Local Amendments

## ALLAHABAD

O. 22 R. 12  
Nota 1At the end of the rule *add* the words

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit"

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*add* the following

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit"

*Synopsis*

## 1. Execution proceedings | 2. Allahabad amendment

**1. Execution proceedings.** — This rule is new Under the old Code there was a great difference of opinion as to whether the provisions relating to abatement contained in the previous rules applied to execution proceedings In several cases it was held that they did not<sup>1</sup> and the present rule affirms the view expressed in those cases<sup>2</sup>

It should be noted that the only provisions specified as not applicable to execution proceedings are those contained in Rules 3, 4 and 8 and that, even as to these it is only in respect to the *abatement* of the proceedings that those rules do not apply<sup>3</sup> In other words, the rule cannot be interpreted to mean that no substitution can be made in execution proceedings<sup>4</sup> and the Judicial Committee have specifically laid down that such substitution can be made<sup>5</sup> On the death, therefore, of a decree holder, pending in execution proceeding can his legal representative get himself substituted and carry on the proceedings, or should he file a separate execution application? The Bombay,<sup>6</sup> Calcutta<sup>7</sup> and Nagpur<sup>8</sup> High Courts have held that he can continue the proceedings and that he need not present a separate execution application

(86) 1896 Pun Re No 108 page 248

(87) 1887 Pun Re No 42 page 91

ment debtor application for execution does not abate )

## Order 22 Rule 12 — Note 1

1. (81) 3 All 769 (765)

(80) 5 Cal L Rep 108 (111)

(84) 6 All 255 (259)

(78) 8 Bom 221 (222)

(95) 19 Bom 276 (281)

(96) 23 Cal 686 (690)

(83) 6 Mad 180 (181)

(92) 15 Mad 399 (400)

(98) 31 Mad 77 (79)

2 (32) AIR 1932 Mad 73 (82) 55 Mad 352 (FB)

(09) 3 Ind Cas 324 (326) (Cal)

(27) AIR 1929 Pat 200 (200) (By virtue of O 22

R 12 nothing in R 3 applies to proceedings in execution of a decree or order and therefore a pending execution proceeding does not abate by reason of the death of any of the joint decree holders )

(31) AIR 1931 Bom 425 (427)

(26) AIR 1926 Cal 957 (958)

(31) AIR 1931 Bom 425 (427)

(35) AIR 1935 All 27 (28)

(32) AIR 1932 Pat 222 (223) 11 Pat 546 (It is not necessary that in execution proceedings representatives of a judgment debtor should be brought on record within ninety days )

(36) AIR 1936 Bom 456 (457) (On death of judg

(20) AIR 1920 All 171 (172) 42 All 570

(35) AIR 1935 Pat 117 (118) 13 Pat 777

[See also (24) AIR 1924 Mad 132 (132) 47 Mad 63 (It is desirable to bring them on the record )

not take steps for substitution under O 22 R 3, but may apply to carry on the proceedings or may file a fresh application )

O. 22 R. 12  
Notes 1-2

According to the Madras High Court,<sup>9</sup> the legal representative can be substituted under Section 146 and O 21 R 16 and allowed to *continue* the application. The High Court of Patna<sup>10</sup> has also taken the same view as that of the High Court of Madras. Thus, there is a consensus of judicial opinion that the deceased decree holder's legal representative can carry on the execution proceeding started by the decree holder and need not file a fresh execution application. Similarly, where a judgment debtor dies during the pendency of an application for execution, a fresh application for execution is not necessary for proceeding against the legal representatives of the deceased.<sup>11</sup> Where such substitution is allowed there is no fixed time within which the application should be made.<sup>12</sup> But such an application for substitution will not be a step in aid of execution.<sup>13</sup>

There is a conflict of opinion as to the applicability of this rule to appeals against orders in execution. It has been held by the High Courts of Madras,<sup>14</sup> Allahabad,<sup>15</sup> Lahore<sup>16</sup> and Nagpur,<sup>17</sup> by the Chief Court of Oudh<sup>18</sup> and by the Sind Judicial Commissioner's Court,<sup>19</sup> that an appeal against an order made in execution proceedings is not itself a proceeding in execution of a decree or order, that this rule does not apply to appeals against orders made in execution proceedings and that such appeals are subject to the same rules in regard to abatement as any other appeals. The Calcutta High Court<sup>20</sup> has also held that where in an appeal relating to the execution of a joint decree one of the decree holders respondents dies and his legal representatives are not brought on the record within the prescribed period of limitation, the appeal cannot proceed against the surviving respondents alone. The High Court of Patna<sup>21</sup> has, on the other hand, held that this rule applies to such appeals.

Under the old Code, proceedings for the ascertainment of mesne profits were proceedings in execution and therefore this rule applied to such proceedings.<sup>22</sup> Under the present Code, however, the position is different. See also Note 19 to Rule 3 and Note 13 to Rule 10 as to the procedure applicable to cases where a party dies between the preliminary and final decrees in a suit.

An application to set aside a sale is not a proceeding in execution for, after the sale and the subsequent deposit of the sale amount the execution is complete. Consequently, this rule does not apply to such applications.<sup>23</sup>

See also the Notes to the respective rules of the Order as to their applicability to execution proceedings.

**2. Allahabad amendment.** — The amendment of this rule made by the

14. (32) AIR 1932 Mad 574 (575, 576) 55 Mad 1006

(31) AIR 1934 Mad 661 (664)

(24) AIR 1928 Mad 772 (773) 51 Mad 659

15. (33) AIR 1933 All 388 (389) 55 All 509  
(Rule 8 of this Order therefore applies to appeal against orders in execution.)

16. (36) AIR 1936 Lah 1022 (1024) I.L.R. (1937) Lah 80

[See also (11) AIR 1921 Lah 213 (240)]

1. AIR 1934 Oudh 337 (310)  
AIR 1938 Sind 239 (240) I.L.R. (1939)

20. (127) AIR 1919 Cal 1053 (1053)  
21. (229) AIR 1923 Pat 565 (568) 9 Pat 32 (116)

22. (25) AIR 1925 P.C. 117 (117) 4 Pat 207

52 Ind App 188 (P.C.)

(21) AIR 1921 Pat 185 (156)

23. (23) AIR 1923 Pat 29 (29, 30) 2 Pat 241

Note 7

# ORDER XXIII.

## WITHDRAWAL AND ADJUSTMENT OF SUITS

**R. 1. [S 373 ] (1)** At any time after the institution of a suit<sup>10</sup> the plaintiff may, as against all or any of the defendants,<sup>21</sup> withdraw his suit or abandon part of his claim

0.23 R. 1

Withdrawal of suit or  
abandonment of part of  
claim

(2) Where the Court is satisfied —

(a) that a suit must fail by reason of some formal defect,<sup>25</sup> or

(b) that there are other sufficient grounds<sup>26</sup> for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit,<sup>31</sup> grant the plaintiff permission<sup>27</sup> to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit<sup>29</sup> in respect of the subject-matter of such suit or such part of a claim

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission<sup>35</sup> referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit<sup>32</sup> in respect of such subject matter<sup>33</sup> or such part of the claim

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others

[1877, S 373, 1859, S 97 See S 11, O 2 R 2 ]

### Synopsis

- |   |   |
|---|---|
| 1 Legislative changes                                   | 13 Withdrawal of suit by plaintiff respondent                       |
| 2 Scope, object and applicability of the Rule           | 14 Withdrawal of application for execution                          |
| 3 Applicability of Rule to appeals                      | 15 Withdrawal of application for entering up satisfaction of decree |
| 4 Suits in Rent Courts                                  | 16 Withdrawal of application for withdrawal of suit.                |
| 5 Probate proceedings                                   | 17 Withdrawal of suit on behalf of minor                            |
| 6 Execution proceedings                                 | 18 Withdrawal of suit by pauper plaintiff                           |
| 7 Insolvency proceedings                                | 19 Withdrawal of suit by some of several plaintiffs                 |
| 8 Application for final decree                          | 19a Withdrawal of representative suits                              |
| 9 Set off   | 20 Withdrawal of suit by vakil                                      |
| 10 'At any time after the institution of a suit'        | 20a Withdrawal of suit by benamidar                                 |
| 11 Power of appellate Court to allow withdrawal of suit |   |
| 12 Withdrawal of suit by plaintiff appellant            |   |

O. 23 R. 1  
Notes 1-2

- 21 "As against all or any of the defendants"
- 22 Effect of permission.
- 23 Withdrawal from suit pending arbitration.
- 24 Withdrawing from suit after suit has abated against some of the defendants.
- 25 'Formal defect'
- 26 'Other sufficient grounds'
- 27 'May grant permission'
- 28 Form of permission
- 29 Dismissal of suit with liberty to bring a fresh suit
30. Liberty to withdraw two suits in order to bring a consolidated suit

- 31 "On such terms as it thinks fit."
- 32 Fresh suit must be between the same parties
- 33 Same subject matter
- 34 Additional relief in fresh suit.
- 35 Effect of withdrawal without permission
- 36 Erroneous order granting permission
- 37 Effect of reversal of order granting permission
- 38 Power of Court of Small Causes to allow withdrawal
- 39 Appeal
- 40 Letters Patent Appeal
- 41 Revision

### Other Topics (miscellaneous)

Abandonment of part of a claim and effect See Notes 11 13 19 21 and 26  
Cases not allowed to be withdrawn See Note 10  
Consent of defendant—Effect on withdrawal without permission See Note 35  
Court fee See Note 23  
Grant of permission and res judicata See Notes 3 and 29  
Grant of permission not open to question in subsequent suit See Note 36  
Non suit in India See Note 26  
Notice to other side See Note 27

Permission — Availability to one suit alone See Note 27  
Permission express or implied See Note 23  
Permission outside terms of this rule. See Note 26  
"defendant objects" See Note 10  
Withdrawal of suit and withdrawal from suit —Distinction See Note 2

**1. Legislative changes.**—Under the law before the Code of 1809 the Court leave was not necessary for bringing a fresh suit where a suit had been withdrawn by the plaintiff<sup>1</sup> Section 97 of the Code of 1859 gave power to the Court to permit a suit to be withdrawn with liberty to sue afresh, if it was satisfied that there were sufficient grounds for such a course The words as to the suit failing by reason of some formal defects were first introduced in the Code of 1877

**2. Scope, object and applicability of the Rule.**—The law as to the withdrawal of suits as enacted in the present rule is as follows—

(a) A plaintiff can withdraw a suit with the permission of the Court But in this case he cannot withdraw a suit without the permission of the Court

(b) A plaintiff may, in the circumstances mentioned in sub rule (2), be permitted by the Court to withdraw from a suit with liberty to sue afresh on the same cause of action<sup>2</sup>

The rule does not apply to *alternative claims* on the same cause of action<sup>3</sup> No permission to withdraw a suit can be granted where the deficiency in court fee has not been paid<sup>4</sup> The reason is that there is no proper suit till the deficiency in court fee is made up

A suit does not cease to exist in the eye of the law merely because an application is made by the plaintiff for the withdrawal of the suit The suit does not cease to exist

Order 23 Rule 1 — Note 1  
1 (10) 7 Lom H C R A C 23 (21)

1  
(3)  
2

[See also (20) AIR 1920 Mad 106 (10) (Obiter)]  
3 (26) AIR 1 26 Lom 163 (192)  
[But see (24) AIR 1 4 Bom 112 (192) 12]  
4 Bom 103  
4 (34) AIR 1934 All 369 (1934)

till an order is made by the Court on the application<sup>5</sup> It is, therefore, open to the Court to consider and decide any objections that may be made to the withdrawal of the suit before passing orders on the application to withdraw the suit<sup>6</sup>

O 33 R. 1  
Notes 2-4

Where, on the death of one of several co plaintiffs in a case his sons are sought to be added as legal representatives but on their refusal to be joined as co plaintiffs, they are joined as *pro forma* defendants, there is no withdrawal of suit by the legal representatives within the meaning of this rule<sup>7</sup>

Where the Court dismisses a suit as against certain defendants on the ground of misjoinder of parties and causes of action there is no withdrawal or abandonment by the plaintiff<sup>8</sup>

**3. Applicability of Rule to appeals.**—The present rule applies also to appeals and an Appellate Court can therefore allow the withdrawal of an appeal with liberty to bring a fresh appeal or suit<sup>1</sup> The High Court may allow a second appeal to be withdrawn<sup>2</sup> The effect of the withdrawal without liberty of an appeal is to make the decree of the lower Court *res judicata* and the only executable decree in the case<sup>3</sup>

In the undermentioned case<sup>4</sup> it was held by the Bombay High Court that the appellant is entitled as of right to withdraw his appeal provided that the respondent has not acquired any interest thereunder, but that if the respondent has obtained any rights under the appeal, it is not open to the appellant to withdraw his appeal without permission

**4 Suits in Rent Courts**—The rule does not apply to suits under the Bengal Tenancy Act which is a complete Code in itself<sup>1</sup> Nor will the withdrawal without permission of an application under Section 105 of the Act or of a suit under Section 106

5  
(  
lants—Until orders are passed on the application

(O) 4 Ind Cas 137 (135) (Bom) (Decree in favour of dead person without legal representative void—Appeal and withdrawal—Defendant appellant not thereby estopped from pleading inexecutable))  
4 (38) AIR 1938 Bom 442 (443) I L R (1939)

order to have passed was to reject the plaint and that a fresh suit was not barred]]

Note 3

[See however (38) AIR 1938 Bom 442 (443) I L R (1938) Bom 66 (Clearly, the provision

to do so but that the Appellate Court had power to allow him to do so—Appellate Court might where appellant desires to withdraw and it has no jurisdiction to allow him to do so transpose the appellant as respondent and the respondent as appellant and proceed with the appeal but is not bound to do so always)

Note 4

I (69) 11 Suth W R 46 (46)  
(69) 11 Suth W R 3 (4)

O. 23 R. 1  
Notes 4-9

of the Act bar a fresh suit in the Civil Court in respect of its subject matter. The meaning of sub rule (2) of O 23 R 1 is that the plaintiff shall be precluded from bringing a fresh suit in that or in any Court of similar or co ordinate jurisdiction<sup>2</sup>

But the rule applies to suits under the North West Provinces Rent Act 1851, inasmuch as the Rent Courts under that Act are governed by the Code in those matters on which the Act is silent<sup>3</sup>

**5. Probate proceedings.** — The rule does not apply to applications for probate, inasmuch as Section 55 of the Probate and Administration Act (now Section 268 of the Succession Act of 1925) which provides that the provisions of the Civil Procedure Code should apply to proceedings for probate is limited by the words "so far as circumstances of the case permit"<sup>1</sup>

**6. Execution proceedings.** — The rule does not apply to execution proceedings<sup>1</sup> including claim proceedings<sup>2</sup> as is made clear by Rule 4, *infra*. The undermentioned cases<sup>3</sup> holding the contrary view are no longer good law. See also Note 14 *infra*

**7. Insolvency proceedings.** — This rule read with Section 141 applies to proceedings in insolvency<sup>1</sup>

**8. Application for final decree.** — Where an application for final decree is withdrawn, it does not preclude a second application for the same purpose<sup>1</sup>. The reason is that O 23 R 1 applies only where a suit or part of a suit is withdrawn

**9. Set-off.** — It is doubtful whether a defendant claiming a set off can be allowed to withdraw his claim for set off with liberty to sue again for the amount which formed the subject matter of such claim<sup>1</sup>. But it has been held that where a defendant withdraws a plea of set off he will not be debarred from raising the same plea in a subsequent suit against him by way of defence<sup>2</sup>

Where the defendant in a suit makes a counter claim to the suit, but the plaintiff withdraws his suit with liberty to file a fresh suit, the counter claim can be continued as a plaint and can be proceeded with on the merits<sup>3</sup>

(68) 35 Cal 900 (905)  
(94) 21 Cal 514 (516 517 518)  
(94) 21 Cal 428 (430)  
(67) 7 Suth W R 302 (307)  
(1864) 1864 Suth W R 47 (48) (FB)

(92) 15 Mad 240 (241)  
(91) 18 Cal 515 (518)

he Bengal

2

ider S 106

(Application under S 106 of the Bengal Tenancy Act)  
(1900) 5 Cal W R (8 N) Cal (Application under S 104 Bengal Tenancy Act)  
[But see (3) AIR 1923 Cal 624 (626) 50 Cal 626 (Civil suit barred by reason of provisions in S 107 Bengal Tenancy Act)]  
3 (53) 5 All 404 (413)

Note 5

1 (17) AIR 1917 Pat 41 (42) 2 Pat L Jour 535  
(32) AIR 1932 Lah 290 (291) (Permission held implied in this case AIR 1920 Lah 194, 1 of local)

[See (96) 19 Mad 458 (459 460)]  
[See also (10) 6 Ind Cas 912 (916, 917) (Cal)]

Note 6

1. (92) 1892 L un Re N 37 page 148

2 (97) 4 Low Bur Rul 75 (75)  
[See (25) AIR 1925 Nag 2 (6) 20 Nag L R 100]  
3 (89) 10 All 71 (75)  
(90) 12 All 179 (185)  
(94) 16 All 5 (77)  
(83) 1858 All W N 272 (273)  
(91) 1691 All W N 32 (33)  
(91) 1991 All W N 124 (125)  
(70) 5 Mad H C R 293 (303)

Note 7

1 (90) 17 All 156 (161)

Note 8

1. (28) AIR 1928 Mad 1165 (1166)

Note 9

1 (60) 32 Cal 654 (662, 663)

2 (37) AIR 1937 Oudh 334 (336) 13 L. L. 1

3. (31) AIR 1934 Rang 160 (161)



10. "At any time after the institution of a suit." — Sub rule (1) provides that at any time after the institution of a suit a plaintiff can withdraw his suit. As a general rule a plaintiff can do this of his own accord and the order of the Court is not necessary for the purpose.<sup>1</sup> But the withdrawal must be made *before* judgment is passed in the case.<sup>2</sup> A plaintiff cannot also be allowed to withdraw his suit so as to deprive the defendant of any rights that may have accrued to him. Thus, where, in a partition suit, the defendant has become entitled under Section 3 of the Partition Act to purchase the plaintiff's share at a valuation to be fixed by the Court,<sup>3</sup> or where a preliminary decree has been passed in such a suit,<sup>4</sup> or in a suit for accounts,<sup>5</sup> the plaintiff cannot be permitted to terminate the suit by withdrawing it. Where, in such cases, the plaintiff desires to withdraw the suit, the proper course is to transpose the plaintiff as defendant and the defendant as plaintiff and proceed with the suit.<sup>6</sup>

Where in a scheme suit under Section 93 of the Code the plaintiff applies to withdraw the suit and it appears that his object is to prevent the Court from deciding the suit on the merits, the Court can under O 1 R 10 transpose some of the defendants as plaintiffs and proceed with the suit notwithstanding the withdrawal of the suit.<sup>7</sup>

A plaintiff who withdraws a suit under sub rule (1), must do so unconditionally. He cannot abandon the suit and at the same time ask for a decision on the merits of the case.<sup>8</sup> He is also liable to pay such costs as the Court orders him to pay.<sup>9</sup> But the payment of the costs cannot be made a *condition precedent* to his withdrawing the suit.<sup>10</sup> As to costs in a wife's suit for dissolution of marriage which is withdrawn by her see the undermentioned case.<sup>11</sup>

A withdrawal under sub rule (1) may be in any form. Where the plaintiff enters into a compromise with the defendant but does not communicate the terms of the compromise to the Court, he should be held to have withdrawn his suit under this sub rule.<sup>12</sup> Similarly, when a suit is dismissed at the request of the parties on a petition of compromise being filed, the dismissal operates as a withdrawal of the suit under this sub rule.<sup>13</sup>

#### Note 10

1. (98) 32 Bom 345 (347)  
(34) AIR 1934 Mad 485 (492) (Partition suit—  
Plaintiff's right to withdraw can be exercised  
until right in defendant had been legally created  
by preliminary withdrawal)

2. (16) AIR 1916 Mad 575 (577)  
(69) 2 Beng L R (S N) 21  
(75) 1875 Pun Re No 65 page 168  
(29) 116 Ind Cas 823 (824) (Mad) (Even after  
evidence and arguments on the objection of  
pecuniary jurisdiction of the Court the plaintiff  
can withdraw portion of the claim)

3. (18) AIR 1918 All 356 (357)  
[See also (25) AIR 1925 Bom 425 (427) 49 Bom  
672 (Compromise effected—Subsequent with-  
drawal by plaintiff is not permissible)]

4. (12) 14 Ind Cas 259 (260) (Mad)  
(34) AIR 1934 Mad 485 (492)  
(20) AIR 1920 Mad 546 (546) (After withdrawal  
by plaintiff Court can transpose parties under

(185) AIR 1935 Mad 445 (446) 1

5. (26) AIR 1926 All 582 (583) (Proper course

such compromise being certified held fell under  
R 1 or R 5 of O 23)

6. (26) AIR 1926 All 582 (583)

(20) AIR 1920 Mad 546 (546)

7. (20) AIR 1920 Mad 732 (735)

8. (99) 3 Ind Cas 572 (573) 5 Nag L N 121

9. (16) AIR 1916 Mad 575 (577)

(25) AIR 1925 Oudh 699 (699) (The Court is not

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247, 218)

liable to

10. (95) 17 All 156 (161)

11. (98) 25 Cal 222 (229) (Costs allowed)

12. (01) 23 All 219 (220)

(92) 1892 All W N 53 (53)

13. (17) AIR 1917 Nag 1 (4)

O. 23 R. 1  
Notes 10-12

The language of sub rule (2) implies that the Court can permit the withdrawal of a suit only while the suit is pending before it, i. e., before it passes a decree.<sup>14</sup>

**11. Power of Appellate Court to allow withdrawal of suit.** — A Court of appeal has power, in a proper case, to grant permission to withdraw a suit with liberty to file a fresh suit,<sup>1</sup> though such power should be used very cautiously.<sup>2</sup> A contrary view, however, has been taken by the Sind Judicial Commissioner's Court.<sup>3</sup> But it is submitted that this (the latter) view cannot be supported, seeing that in one case even the Privy Council on an appeal allowed the suit with reference to a portion of the subject matter to be withdrawn with liberty to sue again.<sup>4</sup> But the Appellate Court has no power to allow a suit to be withdrawn *before the appeal has been admitted*.<sup>5</sup> So also where a suit is dismissed and the appeal from the decree of dismissal is also dismissed, the Appellate Court cannot, as part of the same order, allow the suit to be withdrawn with liberty to sue again.<sup>6</sup> But, where the trial Court had decreed the suit and the Appellate Court allowed the appeal and set aside the decree of the trial Court but did not expressly dismiss the suit, it was held that the Appellate Court's order passed at the same time, allowing the suit to be withdrawn with liberty to bring a fresh suit was not without jurisdiction. The decision proceeds on the ground that while there is a subsisting decree there can be no power to allow the withdrawal of the suit and the proper course for the Appellate Court in allowing withdrawal of a suit is to first set aside the decree of the lower Court.<sup>7</sup>

**12. Withdrawal of suit by plaintiff-appellant.** — A plaintiff appellant is not entitled as a matter of right to withdraw his suit and he will not be permitted to

cause shown.—Suit reaching its final stage—  
Held, suit should not be allowed to be withdrawn at that stage.]

Note 11

1. (21) AIR 1921 All 65 (66)

(24) AIR 1924 All 260 (260)

(21) AIR 1921 Bom 278 (280) 45 Bom 206  
d in

(37) 106 Ind Cas 290 (290) (Lab) (High Court  
can on appeal from remand order allow suit to  
be withdrawn.)

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late)  
(34) AIR 1934 All 214 (215) (Permission to  
withdraw suit with liberty to bring fresh suit  
not asked in trial Court nor in lower Appellate  
Court till case is fully argued.—Permission should

813 is relied on. But 10 Ind Cas 813 can be distinguished and hence cannot support the view expressed by the Sind Court in these decisions.  
4. (15) AIR 1915 P C 21 (7) 42 Cal 577 42

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(72) 17 South W R 164 (163)

(30) AIR 1935 Mad 445 (446) (Appellate Court

7. (26) 163 Ind Cas 367 (363) 89 Cal W N 1044

the benefit of the lower Court's adjudication in his favour<sup>1</sup>

**13. Withdrawal of suit by plaintiff-respondent.** — A plaintiff respondent is not entitled, as a matter of right, to withdraw his suit pending the appeal but the Court may, in the exercise of its discretion, allow him to do so. A plaintiff sued the Government and some ryots, claiming a certain channel as his private property and praying for an injunction restraining interference with his rights. A decree was passed in the suit in plaintiff's favour. Against this decree the Government did not appeal but the ryots appealed. Then the plaintiff sought to withdraw his suit against the ryots, being satisfied with a decree against the Government. It was held that he could not be allowed to do so as the decree against the Government considerably prejudiced the rights of the other defendants, viz., the ryots and that the proper course was to hear the appeal on the merits<sup>1</sup>

**14. Withdrawal of application for execution.** — The provisions of Order 23 do not apply to execution proceedings (see Rule 4, *infra*). But a party setting the Court in motion has the right to withdraw the proceedings from the Court. Hence, a decree holder may withdraw his application for execution and if the Court persists in selling the judgment debtor's property after such withdrawal, it acts without jurisdiction<sup>1</sup>. But the procedure as to the Court allowing withdrawal with permission to sue afresh does not apply to execution proceedings<sup>2</sup>. Conversely, the withdrawal of an application for execution does not require the sanction of the Court to enable fresh proceedings to be taken<sup>3</sup>. A decree holder cannot, of his own volition, withdraw from execution proceedings where a third party has acquired an interest or right in the property which is the subject matter of the execution proceedings<sup>4</sup>. See also Note 6 *ante*.

**15. Withdrawal of application for entering up satisfaction of decree.** — Where a decree holder applies to enter up satisfaction of a decree but afterwards wants to withdraw his application, it has been held that the Court should not allow him to do so, but should inquire into the matter under O 21 R 2. Allowing a withdrawal of the application without any such inquiry will amount to a refusal to exercise jurisdiction under Order 21 Rule 2 such as would justify interference by the High Court in revision<sup>1</sup>.

**16. Withdrawal of application for withdrawal of suit.** — A plaintiff applying to withdraw his suit unconditionally has a *locus penitentiae* until his petition has been acted upon by the Court, and he can withdraw his petition at any time before an order is made as prayed for in his petition<sup>1</sup>.

#### Note 12

concurrent decrees of two Courts have to be set aside. Where the decree is based upon a concurrent finding of fact, leave to withdraw can not be granted ||

#### Note 13

1. (24) AIR 1924 Mad 79 (79, 80) 46 Mad 611

#### Note 14

4 (38) AIR 1938 Cal 615 (618)

#### Note 15

1. (19) AIR 1919 Mad 198 (199)

#### Note 16

1. (23) AIR 1923 Mad 246 (247)

tarwad — Substitution ordered and appeal proceeded with)

[See also (21) 63 Ind Cas 169 (171) (Cal) (Withdrawal of suit in second appeal by plaintiff appellant depends upon the question if

O 23 R.1  
Notes 17-19a

**17 Withdrawal of suit on behalf of minor** — Courts should be very jealous of the interests of minors and should not allow a suit instituted on behalf of a minor to be withdrawn without being satisfied that the withdrawal is for the minor's benefit<sup>1</sup>. Where the next friend of a minor fraudulently withdraws a suit on behalf of the minor the latter can sue again in respect of the same subject matter<sup>2</sup>.

It has been held by the High Court of Madras<sup>3</sup> that the Court should not allow the unconditional withdrawal of a suit on behalf of a minor by the minor's next friend without liberty being reserved to bring a fresh suit. According to the High Court of Calcutta<sup>4</sup> the withdrawal of a suit by the next friend of a minor has the same effect as the withdrawal by a person of full age.

**18 Withdrawal of suit by pauper plaintiff.** — The withdrawal of a suit by a pauper plaintiff amounts to failure in the suit within the meaning of O 33 R 11 and the plaintiff must pay the court fees under that rule<sup>5</sup>.

**19 Withdrawal of suit by some of several plaintiffs** — Where there are several plaintiffs in a suit the suit cannot be withdrawn without the consent of all the plaintiffs<sup>1</sup>. But one of several co plaintiffs or co appellants may withdraw from the suit or appeal so far as his own interest is concerned<sup>2</sup>.

The withdrawal of unnecessary plaintiffs from a suit does not cause the dismissal of the suit<sup>3</sup>.

**19a Withdrawal of representative suits** — It has been already mentioned in Note 10 *ante* that ordinarily a party prosecuting an action may at any time withdraw it. But where the plaintiff sues in a representative character it is not open to him to put an end to the litigation by withdrawal. But that does not mean that people are interested in it and have a right to

(12) 15 Ind Cas 852 (853) (Mad) (Plaintiff can not withdraw application except on very good grounds—Per Sadasiva Iyer J.)

(10) 7 Ind Cas 892 (893) (Cal)

(74) 6 N W P H O R 66 (68)

[But see (67) 2 Agra 158 (159)]

#### Note 17

1 (34) AIR 1934 Oudh 257 (257) (Suit by person on his own behalf and on behalf of his minor brother to set aside alienation by father—Major withdrawing from suit—Is the suit was for benefit of minor and as minor became a ward of the Court it refused to allow minor a suit to be withdrawn.)

2 (19) AIR 1919 Lah 395 (396) 1919 Pun Re No 59

(84) 10 Cal 557 (367) (Fraudulent withdrawal)

(02) 29 Cal 735 (737) (Guardian grossly neglectful of minor's interest—Minor can have suit reopened on review through another next friend)

3 (04) 27 Mad 377 (3 2 380)

4 (84) 10 Cal 347 (364 365)

#### Note 18

1 (04) 29 Bom 102 (101 103)

(07) 31 Bom 10 (15) (F B)

#### Note 19

1 (0) 55 Ind Cas 906 (92 1) (All)

(33) AIR 1933 Mad 524 (524) 57 Mad 299 (Court can refuse to allow one of several plain

1  
rule (1))

(25) AIR 1925 Cal 687 (640) 52 Cal 130 (Case in Revenue Court)

(19) 52 Ind Cas 183 (184) (U P D R)

(22) AIR 1922 Pat 489 (450 491) 1 Pat 95

(87) 1897 Pun Re No 93 p 209

(23) AIR 1923 Mad 496 (496) (Two plaintiffs one of whom is a minor represented by the other as guardian—Suit cannot be withdrawn)

(19) 1923 AIR 1923 Ponn 49 (44) (Minor and

ther O 23 R 1 sub rule (1) is controlled by any rules of Hindu law—Q are II [But see (83) 153 All W R 153 (150) (Plaintiff exempt on suit by several plaintiffs—One of them withdrawing—Rights of others not affected)]

(8) 9 Cal L R 337 (333) J

2 (27) AIR 1927 Bom 944 (244)

(08) 1903 L un W R No 113

3 (21) CO Ind Cas 652 (55) (U P D R)

#### Note 19a

1 (34) AIR 1934 All 4 (7) 55 All 50

**20. Withdrawal of suit by vakil.**—The authority to compromise an appeal, conferred on a vakil by a vakalatnama, does not authorize him to withdraw the appeal unconditionally.<sup>1</sup> But a vakalatnama which authorizes him to choose arbitrators, prefer objections to the award, file solenama, and do all necessary acts in connexion with the suit will include also an authority to withdraw a suit under this rule.<sup>2</sup>

O. 23 R. 1  
Notes 20-21

**20a. Withdrawal of suit by benamidar.**—Where a benamidar, in breach of trust fails to carry on the suit and withdraws it, the real owner will be entitled to have the order of withdrawal vacated and to continue the suit.<sup>1</sup>

**21. "As against all or any of the defendants."**—Where there are several defendants to a suit the plaintiff may withdraw his suit as against some of the defendants alone<sup>1</sup> and if it is so withdrawn without the liberty of suing again being reserved a subsequent suit against them will be barred.<sup>2</sup> In *Mahant Singh v U Ba Yi*,<sup>3</sup> the plaintiff brought a suit against four persons as the trustees of a certain pagoda. Subsequently these four persons were removed from their office as trustees and eight others were appointed to their place. Upon this the plaintiff applied to the Court for striking out the names of the four persons whom he had originally impleaded as defendants in the suit and for substitution in their place of the eight new trustees and the Court complied with the plaintiff's request. It was found that the four old trustees were personally liable to the plaintiff and not in their capacity as trustees and that the new trustees were not liable to the plaintiff at all. The question arose as to whether the plaintiff could again sue the four persons whose names had been struck out at his instance. It was held by the Privy Council that the plaintiff was not entitled to sue them again and that a suit would be barred under this rule. In the course of their judgment their Lordships observed as follows:

The appellant (plaintiff) indeed contended that he had not proceeded under O 23 R 1 in applying to substitute the new trustees for the old but that his application was made under O 1 R 10 alone. Their Lordships cannot accept this view. The last named rule no doubt authorizes the Court to order the name of the party improperly joined to be struck out and that the name of any person who ought to have been joined be added. But such an order is expressly directed to be made on such terms as may appear to the Court to be just. If no terms are inserted in the order then in their Lordships' view the effect of withdrawing the suit against some of the defendants is to be ascertained from O 23 R 1. That Order is not very happily worded but its meaning is reasonably clear. Under its provisions the Court may give liberty to the applicant to institute a fresh suit after a withdrawal but if it does not do so the plaintiff is precluded from instituting a fresh suit in respect of the same subject matter.

(32) AIR 1932 Mad 31 (32) (Application by karnavan of a Malabar taluk for withdrawal of appeal—Junior members allowed to prosecute the same?)

Note 20

1 (20) AIR 1920 Mad 232 (232) (Power to withdraw must be specifically given)  
[See however (33) AIR 1938 All 450 (451) (Authority of defendant's counsel to enter into compromise or settlement includes authority to consent to withdrawal of suit with liberty to bring fresh suit)]

2 (12) 14 Ind Cas 190 (190) (Cal)

Note 20a

1 (38) AIR 1938 Cal 871 (879)

Note 21

1 [See also (21) 62 Ind Cas 25 (27) (Pat) (Some defendants exonerated—Claim for mesne profits—No joint decree but liability of each to be

proprietary body — One of them withdrawing—  
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ute  
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suit to be withdrawn with liberty to bring a fresh suit<sup>1</sup> And this is so even though the reference is invalid, and the award consequently void<sup>2</sup> But where the reference to arbitration is private and out of Court and an application is made to the Court under Schedule II, Paragraph 20 of the Code, to file the award, the applicant may be allowed to withdraw the application<sup>3</sup>

O. 23 R. 1  
Notes 23-25

**24. Withdrawing from suit after suit has abated against some of the defendants.** — An order granting permission to withdraw a suit with liberty to bring a fresh suit passed after the suit has abated, is without jurisdiction<sup>1</sup> Where a suit abates as against a particular defendant by reason of his legal representatives not having been brought on the record within the period of limitation and the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, the fresh suit can only be brought against defendants who were *actually* on the record at the time of the permission and not against the legal representatives of the deceased defendant<sup>2</sup>

**25. "Formal defect."** — The expression "formal defect" connotes defects of various kinds not affecting the merits of the case<sup>1</sup> A defect which goes to the root of the plaintiff's claim is not a formal defect<sup>2</sup> The "formal defect" need not necessarily be in the pleadings.<sup>3</sup>

The rule requires that the Court must be satisfied that the suit must fail by reason of some formal defect Hence, mere objections by the defendant are not enough<sup>4</sup>

The following are some examples of "formal defects" within the rule —

- (1) Omission to obtain the permission of the Insolvency Court for filing the suit<sup>5</sup>
- (2) Misjoinder of parties or causes of action<sup>6</sup>
- (3) Erroneous valuation of the subject matter of the suit<sup>7</sup>
- (4) The institution of a suit in a Court which has no jurisdiction to entertain the suit is a formal defect or at least one analogous to a formal defect so as to come within sub rule (2)(b) But in such case the Court can only return the

**Note 23**

1. (87) 0 All 168 (172)
- (54) 8 All 211 (218)
- (16) AIR 1916 Oudh 141 (141)
- (03) 7 Cal W N 186 (187 188)
- (88) AIR 1938 All 56 (58 57) I L R (1938) All 145
- [See also (88) AIR 1938 Lah 582 (583)]
2. (26) AIR 1925 Mad 621 (634) (As award was absolutely void the second suit was not in competent)
- [See (28) AIR 1928 Mad 1085 (1086, 1087) (Award much wider than submission—Court refusing to pass decree on award—Permission to withdraw suit and sue again cannot be granted)]
3. (04) 31 Cal 516 (518)

**Note 24**

1. (26) 40 Cal W N 1019 (1022)
2. (14) AIR 1914 Mad 170 (170) 33 Mad 643
- (35) AIR 1935 All 853 (854)

**Note 25**

5. (16) AIR 1918 All 425 (426) 40 All 7
- (94) 16 All 279 (283)
- [See also (69) 12 South W N P 43 (44) (P C)]
7. (07) 29 All 471 (476)

O. 23 R. 1  
Notes 23-26

plaint for presentation to the proper Court under Order 7 Rule 10, and cannot act under this rule<sup>8</sup>

The following are instances of defects which are *not* formal within this rule—

- (1) Where the suit is barred by limitation<sup>9</sup>
- (2) Non joinder of parties The defect in this case can be remedied by the addition of the necessary parties<sup>10</sup>
- (3) Omission to include all the causes of action which the plaintiff has against the defendant<sup>11</sup>
- (4) Where a suit for a declaration of a public right of pathway is instituted without taking steps under Section 91 or O 1 R 8 or proving special damage<sup>12</sup>

**26. "Other sufficient grounds."**—Courts in India have no general power of allowing a suit to be withdrawn with the liberty of suing again, apart from the provisions of the present rule<sup>1</sup> and the Court before granting leave under this rule must satisfy itself that the conditions therein specified exist<sup>2</sup> In *Watson v Collector of Rajshahi*,<sup>3</sup> their Lordships of the

There is a proceeding in the suit without barring the right seems to be limited to cases of mis-joiner to cases in which a material proper stamp, and to cases in which suit In all these cases the suit is

This passage from the judgment of their Lordships of the Privy Council conclusively shows that the failure of the plaintiff to prove his case is no ground for allowing him to withdraw his suit with the liberty of suing again for the same subject matter<sup>4</sup> The object of the rule is not to enable a plaintiff after he has failed to

<sup>8</sup> (19) AIR 1919 Mad 1071 (1075) 41 Mad 701

<sup>9</sup> (18) AIR 1918 Sind 6 (8) 18 Sind L R 1

[See also (10) 6 Ind Cas 285 (285) (Mad)

(19) 1919]

principal no ground—Grant of leave prejudicial to defendant)

<sup>12</sup> (25) AIR 1925 Cal 711 (713)

Note 26

<sup>1</sup> (17) AIR 1917 Cal 830 (830)

(20) AIR 1920 Pat 63 (64)

(35) AIR 1935 Pat 439 (439)

(35) AIR 1935 Pat 251 (252) (Order of withdrawal)

particular pro note — After evidence given finding it to be based on the other note — He cannot be allowed to withdraw

(14) AIR 1914 P C 249 (252) (P C) (*Dams*, claimed in plaint — Inability to prove same — Party not to be given liberty to bring fresh action)

(26) AIR 1926 Cal 482 (482) (Failure of claim on account of mistaken view of law — Withdrawal cannot be permitted)

(25) AIR 1925 Cal 711 (712)

(31) AIR 1931 Cal 107 (103)

(25) AIR 1925 Nag 101 (102) (Plaintiff failing to prove his case — No withdrawal)

(26) AIR 1926 Pat 123 (123)

plaintiff's side closed — Failure to sue as a relationship as respondent — Failure not given — Not formal defect — No withdrawal

(26) AIR 1926 Pat 123 (123)

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in what way the grounds for withdrawal bring



conduct his suit with proper care and diligence, and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party.<sup>5</sup> The defect in the suit must be one not affecting the merits of the case, but having the effect of shutting out a fair trial on the merits and arising out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*.<sup>6</sup> The defect must not be due to the plaintiff's own fault<sup>7</sup> nor one curable by amendment of the pleadings.<sup>8</sup> Further, after a judgment has been passed in the suit, the Court has no jurisdiction to allow the suit to be withdrawn with permission to the plaintiff to bring a fresh suit on the same cause of action.<sup>9</sup>

It has also been held in a series of cases that the expression "other sufficient grounds" should be construed *ejusdem generis* with "formal defect" in clause (a) of the sub rule,<sup>10</sup> although the opinion has also been expressed that the expression should be

(25) AIR 1925 Oudh 291 (293) 27 Oudh Cas 231  
(Non-inclusion of prayer for possession in suit for possession—Suit cannot be allowed to be withdrawn with liberty to sue afresh.)

(18) AIR 1918 Cal 213 (213) (Failure to prove case—No ground to allow withdrawal with leave for fresh suit on alternative case.)

(19) AIR 1919 Cal 534 (535) 46 Cal 168.

(14) AIR 1914 All 487 (459)

(20) AIR 1929 Bom 320 (320)

(25) AIR 1925 Oudh 81 (82)

(13) 21 Ind Cas 76 (76) (All)

(18) AIR 1918 Mad 699 (699)

(69) 12 Suth W R P O 43 (44) (P C)

(74) 21 Suth W R 291 (291)

(10) 6 Ind Cas 629 (631) (Cal) (Dismissal of suit by first Court on the ground that there is no evidence—Court of Appeal cannot grant permission for withdrawal with liberty to institute a

suit must fail if proceeded with—Quare)]

6. ('17) AIR 1917 Nag 121 (123)

7. ('31) AIR 1931 Cal 107 (108)

(95) AIR 1935 Oudh 495 (495) (Failure of plaintiff to produce document at proper time or any other default on his part cannot be regarded as sufficient ground.)

8. ('18) AIR 1918 Oudh 163 (163) 21 Oudh Cas 66

(27) 1927 Mad W N 851 (851, 852)

9. ('31) AIR 1931 Cal 336 (336)

(29) AIR 1929 Cal 88 (89) 55 Cal 1067

(11) 10 Ind Cas 813 (813) 35 Bom 261

(75) 24 Suth W R 23 (23)

(1665) 2 Suth W R 297 (299)

(30) AIR 1930 Lah 175 (176)

(29) AIR 1929 All 633 (635)

(28) AIR 1928 Oudh 433 (434) 3 Luck 403

(26) AIR 1926 Pat 123 (123)

(25) AIR 1925 Oudh 291 (293) 27 Oudh Cas 231.

(18) AIR 1918 Lah 329 (330)

(17) AIR 1917 Cal 409 (410)

(16) AIR 1916 Cal 255 (256) 44 Cal 367

(18) AIR 1918 Mad 499 (499)

(16) AIR 1918 Pat 261 (262) 3 Pat L Jour 651

(22) AIR 1922 Cal 59 (59)

(10) 6 Ind Cas 629 (630) (Cal)

(10) 8 Ind Cas 668 (669) (Mad)

(09) 3 Ind Cas 61 (63) 5 Nag L R 63

(15) AIR 1915 Mad 460 (481)

(13) 21 Ind Cas 23 (24) 37 Bom 682 (Failure to produce documents is not sufficient ground under this rule.)

(19) AIR 1919 Cal 129 (129) (Party desiring to adduce additional evidence is not sufficient ground to withdraw suit or appeal under this rule.)

(16) AIR 1916 Cal 255 (256) 44 Cal 367 (Inability to produce necessary evidence in time,

O. 23 R. 1  
Note 26

given a wider meaning<sup>11</sup> Thus, it has been held that clause (b) is not confined to cases in which the Court considers that the suit must necessarily fail<sup>12</sup>

The following have been held to be "sufficient grounds" for allowing the plaintiff to withdraw his suit with liberty to sue afresh —

- (1) The omission to file a power of-attorney.<sup>13</sup>
- (2) Evidence being not available, for no fault of the plaintiff<sup>14</sup>
- (3) The suit being premature and the cause of action accruing pending the suit<sup>15</sup>
- (4) Where the plaintiff has failed to put in evidence, an important document essential to the success of his case In this respect there is a distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract the defendant's evidence and a case where a plaintiff merely wishes to give formal proof of a document<sup>16</sup>
- (5) Where two suits are brought and both are sought to be withdrawn to be consolidated into one and there is an apprehension that the second of the two suits would be barred under O 2 R 3<sup>17</sup>
- (6) Where the plaintiff had been misled by the absence of a specific denial in the written statement<sup>18</sup>
- (7) Where a material document has been rejected as not properly stamped<sup>19</sup>
- (8) Where the plaintiff finds that the defendant is absent and that even if a decree is passed it cannot be executed<sup>20</sup>

For other instances, see the undermentioned cases<sup>21</sup>

- (85) AIR 1935 Pat 251 (252)  
(88) AIR 1938 Lah 592 (593)  
(85) AIR 1935 Pat 438 (439)  
(88) AIR 1938 Lah 294 (294)

- 18 ('14) AIR 1914 Cal 842 (848) (Plaintiff was allowed to abandon portion of claim with liberty to sue afresh)  
19. ('69) 13 Moo Ind App 100 (170) (PC)  
20 (91) 15 Bom 160 (164)  
(But see (92 96) 1892 1896 Upp Dur Rul 261 (Court should not ask the plaintiff to withdraw his suit if he does not know the address of the defendant))  
21 (108) Ind Cas 999 (997) 5 Low Dur Rul

- (88) AIR 1938 Rang 399 (390) 1938 Rang L R

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of such claim—Leave may be granted with liberty to sue again)

- 13 (26) AIR 1926 All 294 (294, 295)

- 14 (31) AIR 1931 Cal 263 (269)

- (71) 16 Suth W R 100 (100)

15. (See (26) AIR 1926 Mad 594 (595) (Only course where plaintiff brings his suit before cause of action arises is to dismiss the suit

Wards, permission granted to guardian to draw)

(79) 20 Suth W R 163 (163, 164) (Where plaintiff had a good claim for contribution and the best evidence to determine the proportion payable by the various defendants had not been given)

(72) 17 Suth W R 164 (165) (Plaintiff praying for separate possession instead of for joint possession)

(12) 17 Ind Cas 399 (396) (Mad) (Plaintiff set out with no clear conception of the exact nature of

- (21) AIR 1921 Cal 611 (612) (Claim for redemption of rent on the ground of excess area held under 52, Bengal Tenancy Act—Case dismissed to be

In the following cases it has been held that there are no sufficient grounds for allowing the plaintiff to withdraw his suit with liberty to institute a fresh suit —

O. 23 R. 1  
Notes 26-27

- (1) Where the parties are ready for trial, and a withdrawal will prejudice the defendant <sup>25</sup>
- (2) Where the plaintiffs are not ready to go on with the case <sup>26</sup>
- (3) Where notices on the heirs of a deceased defendant could not be served <sup>27</sup>
- (4) Where owing to the mistake of the writer who drew up the plaint, some important items were left out <sup>28</sup>
- (5) Where the plaintiff deliberately and grossly undervalues his suit and pays insufficient court fee <sup>29</sup>

For other instances, see the undermentioned cases <sup>27</sup>

In the undermentioned case<sup>23</sup> it was held by the Allahabad High Court that where on an application by the plaintiff for permission to withdraw his suit, the Court refers the matter to the other side and on the other side stating that it has no objection provided that its costs are paid, permits the suit to be withdrawn with liberty to bring a fresh suit, the Court does not act without jurisdiction. The decision proceeds on the ground that the Court would be called upon to go into the question whether a formal defect or other sufficient ground existed only if the opposite party denied its existence. But where the opposite party did not deny it, there would really be nothing for the Court to examine.

27. "May grant permission."—The Court can pass an order under the rule *suo motu*. An application by the plaintiff is not necessary.<sup>1</sup> Although the rule does not specifically mention anything about notice, still "it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard." Hence, if the Court allows a plaintiff to withdraw his suit with liberty of bringing a fresh suit on the same cause of action, without giving notice to the defendant, the High Court will interfere in revision.<sup>2</sup> The permission under the rule extends only to *one* suit. A plaintiff was allowed to withdraw his suit with permission to bring a fresh suit, on condition of his paying defendant's

proved on the basis of contract--Case not framed

(18) AIR 1918 Cal 797 (797) (Reliefs not properly asked for)

(25) AIR 1925 Oudh 718 (718). (Amendment of  
plaint at late stage refused as necessitating new  
trial — Withdrawal with liberty also not

claim — Leave may be granted with liberty to

28 ('39) AIR 1939 AN 450 (451). (Order not open to revision)

### Note 27

1. (27) AIR 1927 Nag 302 (303). 10 Nag LR 142.  
(38) AIR 1938 Mad 865 (876)

[See however (37) 1937 Oudh W N 114C (1149) 1]

2. ('17) AIR 1917 Cal 633 (633) . 44 Cal 454.

(30) AIR 1930 Nag 151 (151, 152).

(184) G All 211 (213).

(34) AIR 1934 All 137 (138, 139) (Plaintiff not prepared to meet defendant's case, is no ground for withdrawal)

'18) AIR 1918 Nag 93 (94) (Plaintiff who has misunderstood his case is not entitled to the

O. 23 R. 1  
Note 26

given a wider meaning.<sup>11</sup> Thus, it has been held that clause (b) is not confined to cases in which the Court considers that the suit must necessarily fail.<sup>12</sup>

The following have been held to be 'sufficient grounds' for allowing the plaintiff to withdraw his suit with liberty to sue afresh—

- (1) The omission to file a power of attorney.<sup>13</sup>
- (2) Evidence being not available, for no fault of the plaintiff.<sup>14</sup>
- (3) The suit being premature and the cause of action accruing pending the suit.<sup>15</sup>
- (4) Where the plaintiff has failed to put in evidence, an important document essential to the success of his case. In this respect there is a distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract the defendant's evidence and a case where a plaintiff merely wishes to give formal proof of a document.<sup>16</sup>
- (5) Where two suits are brought and both are sought to be withdrawn to be consolidated into one and there is an apprehension that the second of the two suits would be barred under O 2 R 2.<sup>17</sup>
- (6) Where the plaintiff had been misled by the absence of a specific denial in the written statement.<sup>18</sup>
- (7) Where a material document has been rejected as not properly stamped.<sup>19</sup>
- (8) Where the plaintiff finds that the defendant is absent and that even if a decree is passed it cannot be executed.<sup>20</sup>

For other instances, see the undermentioned cases.<sup>21</sup>

18. (14) AIR 1914 Cal 842 (343) (Plaintiff was allowed to abandon portion of claim with liberty to sue afresh)

19. (69) 18 Moo Ind App 160 (170) (PC)

20. (91) 15 Bom 160 (164)

(But see (92 96) 1892 1896 Upp Bur Rut 261  
(Court should not ask the plaintiff to withdraw his suit if he does not know the address of the defendant))

21:

Wards, permission granted to guardian to withdraw)

(73) 20 Suth W R 163 (168, 164) (Where plaintiff had a good claim for contribution and the best evidence to determine the proportion payable by the various defendants had not been given)

(72) 17 Suth W R 164 (165) (Plaint containing prayer for separate possession instead of for joint possession)

(12) 17 Ind Cas 395 (396) (Mad) (Facts set out with no clear conception of the exact nature of the claim)

might lose altogether the right to sue in respect of such claim—Leave may be granted with liberty to sue again)

13. (26) AIR 1926 All 291 (293, 295)

14. (81) AIR 1931 Cal 268 (269)

(71) 16 Suth W R 100 (100)

15. [See (26) AIR 1926 Mad 534 (595) (Only course where plaintiff brings his suit before cause of action arises is to dismiss the suit)]

with court fee under the Court-fees Act.<sup>9</sup>

**29. Dismissal of suit with liberty to bring a fresh suit.** — A Court cannot dismiss a suit with liberty to the plaintiff to bring a fresh suit on the same cause of action<sup>1</sup> See Note 28.

**30. Liberty to withdraw two suits in order to bring a consolidated suit.** — Where a plaintiff files two suits and then prays for permission to withdraw both the suits with leave to bring a fresh suit in respect of the subject matter of both the suits so as to obviate any danger of the claim comprised in the second suit being barred by O 2 R 2, the application may be granted although, in fact, O 2 R 2 may not be applicable to the case<sup>1</sup> See also Note 26.

**31. "On such terms as it thinks fit."** — A defendant should ordinarily be granted his costs where the plaintiff is granted permission to withdraw the suit with liberty to bring a fresh suit<sup>1</sup> Where the payment of costs is made a condition of withdrawal with liberty, the order should limit the time for such payment and should further direct that on default of such payment the suit should stand dismissed with costs<sup>2</sup> Where such direction has not been given and the plaintiff fails to pay the costs within the time fixed, there is a conflict of opinion as to whether the second suit is barred According to the High Courts of Calcutta,<sup>3</sup> Lahore<sup>4</sup> and Patna,<sup>5</sup> the second

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Notes 28-31

9. (1884) 11 Mad 15 (17) (Reference under Stamp Act)

**Note 29**

(87) 9 All 690 (697)  
(89) 11 All 187 (189)  
(28) AIR 1923 Oudh 242 (245)  
(87) AIR 1937 Rang 508 (510) 1937 Rang L R 432  
[See (1884) 11 Mad 15 (17) (18) (When suit by permission is withdrawn under this rule proper order to be recorded is not of dismissal but a simple order in terms of the rule)]

**Note 30**

1. ('24) AIR 1924 Rang 249 (255) 2 Rang 66  
[See ('20) AIR 1920 Mad 1026 (1032) (Permission to consolidate withdrawn suit with a pending suit — Consolidation alone to be made — Fresh suit barred)]

**Note 31**

1. ('23) AIR 1923 Bom 206 (206) 47 Bom 559

on  
be

allowed]]  
2. ('18) AIR 1918 Pat 171 (171, 172) 3 Pat L

2 Hyde 212 (213, 214)

('12) 15 Ind Cas 159 (160) (Cal) (Suit must be taken to be instituted on the day the costs were paid)

('20) AIR 1920 Cal 897 (897) (Withdrawal allowed on condition of payment — Dismissal on default not directed — Fresh suit should only be stayed until payment)

('89) AIR 1938 Cal 13 (15) ILR (1938) 1 Cal 273. (Letters Patent appeal affirming 164 Ind Cas 603)

('38) 68 Cal L Jour 75 (81)

[But see (05) 2 Cal L Jour 480 (484) (Order was that the suit should stand dismissed on default)]

('18) AIR 1918 Cal 749 (750) (Payment of costs made condition precedent to the institution of suit — Order held to be strictly complied with)

('34) AIR 1934 Cal 433 (435) (Where costs are not paid within the time fixed, the order granting permission stands cancelled)]

4. ('27) AIR 1927 Lah 159 (160) (Order of the Court not directing definite time for payment — Fresh suit not barred by default, but can be entertained if costs are paid before suit comes on for trial)

5. ('26) AIR 1926 Pat 403 (410) : 5 Pat 306.

('26) AIR 1926 Pat 472 (473)

may be paid subsequently)

3. ('14) AIR 1914 Cal 207 (208)

('11) 10 Ind Cas 11 (6) (Cal) (Notwithstanding the provision that otherwise suit should stand dismissed)

('04) 31 Cal 965 (965)

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**Notes 31-32**

suit is not barred, whether a date has been fixed for the payment or not, or whether or not such payment has been made a condition precedent to the institution of a fresh suit. These decisions proceed on the view that until the costs are paid the original suit itself cannot be deemed to have been withdrawn but must be taken to be pending till such costs are paid, that inasmuch, therefore, as the second suit must be taken to have been filed at the time when the first suit was pending, it should be stayed under Section 10 of the Code, and that, when the costs are actually paid the first suit will be deemed to be withdrawn on the date of such payment and the second suit can be proceeded with. The High Court of Allahabad<sup>6</sup> has held that where the order of the Court is that the amount should be deposited by a certain date and that date expires, a subsequent deposit would in no way comply with the order granting leave to withdraw. But in regard to cases where no date is fixed, it follows the Calcutta view mentioned above.<sup>7</sup> The Judicial Commissioner's Court of Nagpur<sup>8</sup> has held that where a suit is allowed to be withdrawn with liberty, on payment of costs before the institution of the fresh suit, the failure to pay such costs is only an irregularity which does not entail *ipso facto* dismissal of the suit, and that, if the costs are paid before the hearing the irregularity is cured. The Calcutta view as to the original suit being pending till the costs are paid was not accepted by this Court. But the second suit must be treated as having been instituted on the day the costs are paid and if the costs are paid after the period of limitation for the suit expires, the suit must be dismissed.<sup>9</sup> According to the High Courts of Bombay,<sup>10</sup> Madras<sup>11</sup> and Rangoon,<sup>12</sup> the costs must, where the time for payment is specified, be paid before the specified date, and, where no time is specified, before the institution of the suit, otherwise, the second suit will be barred. According to this view, the permission means a permission to bring a fresh suit and not a permission to withdraw from the first suit, and that the first suit does not continue pending till the costs are paid, but is withdrawn immediately on the order for withdrawal.

Where it is impossible for the plaintiff to pay the costs within the time fixed, it has been held that the Court can extend the time for such payment.<sup>13</sup>

Where a plaintiff suing for redemption is allowed to withdraw his suit with liberty to sue again within two years from the date of the withdrawal but sues after the expiry of the two years, his suit is not barred, provided it is within limitation. It is not open to the Court in which the first suit is instituted, to curtail the period of limitation which the law allows to the plaintiff within which to bring his second suit for redemption.<sup>14</sup>

**32. Fresh suit must be brought by the same parties.** — The bar under

7. (33) AIR 1933 All 810 (812) 56 All 10  
 (AIR 1929 All 692, Not followed.)

(But see (29) AIR 1929 All 692 (693).)

8. (29) AIR 1929 Nag 135(136) 25 Nag LR 171  
 (35) AIR 1935 Nag 56 (56) 31 Nag LR 266

9. (35) AIR 1935 Nag 56 (57) 31 Nag LR 266  
 (This does not mean that Court is bound to keep the second suit pending until period of limitation expires.)

of costs not condition precedent.<sup>11</sup>  
 12. (29) AIR 1929 Rang 378 (380, 381) 1939

**Note 32**

1. (28) AIR 1929 All 692 (694) (33) (Suits by shabait representing idol — The idol need not be

Thus, where the second suit is against a different defendant it is not barred under this rule<sup>2</sup>. Similarly, the withdrawal without the leave of the Court of a suit by a Hindu reversioner, challenging an improper alienation by a Hindu widow, is no bar to another suit by another presumptive reversioner for the same purpose as the reversioners do not claim through each other<sup>3</sup>.

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Notes 32-33

**33. Same subject matter.** — Sub rule (3) provides that where a plaintiff withdraws his suit without the permission of the Court under sub rule (2), he shall be debarred from bringing a fresh suit in respect of the same subject matter. The term "subject matter" means the plaintiff's *cause of action* for his suit<sup>4</sup> and a suit on a different cause of action is therefore not barred under this rule<sup>5</sup> even though the suit may relate to the *same property*<sup>6</sup>. Conversely, a suit based on the same cause of action as the first one is barred<sup>7</sup>.

#### Illustrations

(1) A suit for declaration of title to a war bond is a bar to a suit for the recovery of the bond<sup>8</sup>.

(2) A suit for recovery of plots A and B and which is withdrawn with reference to plot B will bar a second suit for recovery of plot B as the cause of action with reference to both the plots is the same<sup>9</sup>.

(3) A suit for the ejectment of the defendant as a trespasser will not bar a second suit for the ejectment of the same defendant as a tenant, after notice to quit<sup>7</sup>.

(4) A suit claiming ownership of land is no bar to the institution of a suit claiming an easement over the same land<sup>8</sup>.

(5) Where during the lifetime of a Hindu widow, a reversioner sues for a declaration that an alienation made by the widow is not binding on him and he then withdraws the suit without the permission of the Court to sue again a subsequent suit by him after the widow's death, for possession of the property is not barred<sup>9</sup>.

represented by the same alibi)

(17) AIR 1917 Pat 543 (544) (Principle of bar does not apply to a stranger)

(27) AIR 1927 Bom 87 (88) (Same person claiming but in a different capacity—Principle of bar does not apply)

2. (82) 8 Cal 871 (874)

3. (19) AIR 1918 Mad 495 (496)

#### Note 33

(32) AIR 1932 Lah 139 (139 140) (Suit under

fresh suit — Subsequent suit after proper notice is not barred)

(33) AIR 1933 Lah 943 (944) 15 Lah 1 (The word "subject matter" does not mean property but refers to right in property which a person seeks to enforce)

(1900) 4 Cal W N 110 (112)

(94) 21 Cal 265 (268)

4. (30) AIR 1930 Lah 755 (756)

(39) AIR 1939 All 594 (596)

5. (24) AIR 1924 Rang 127 (131) 1 Rang 618

6. (18) AIR 1918 Cal 23 (26)

permission to file a fresh suit—Subsequent suit after proper notice is not barred under this rule]]

8. (06) 2 All L Jour 52 (61)

9. (17) AIR 1917 Mad 512 (517) 39 Mad 937 (F B)

(33) AIR 1933 Lah 943 (944) 15 Lah 1 (Even if plaintiff in the subsequent suit adds prayer in regard to the alienation it may be treated as a surplusage)

00) 9 Oudh Cas 161 (166)

(But see (10) 8 Ind Cas 1066 (1067) (Mad)

(15) AIR 1915 Mad 1190 (1190)]

3. (24) AIR 1924 Oudh 180 (181)

(34) AIR 1934 Cal 433 (436) (Suit for possession against tenants at will — Suit withdrawn for want of proper notice without permission for

**O.23 R.1**  
**Notes 33-34**

(6) Where a suit is withdrawn in view of a compromise between the parties, a subsequent suit to enforce the terms of the compromise is not barred.<sup>10</sup>

(7) On the attachment of a house in execution of a decree, the plaintiff sued to set aside her title. Meanwhile the executing Court refused to confirm the sale. Thereupon the plaintiff withdrew her suit. But the sale was afterwards confirmed in appeal. It was held that a fresh suit by the plaintiff was not barred as there was a fresh cause of action.<sup>11</sup>

(8) The withdrawal of a suit for partition is no bar to the institution of a suit for recovery.<sup>12</sup>

(9) The withdrawal of a suit for partition is no bar to a fresh suit for partition by the same plaintiff and of the same property, as the cause of action for a suit for partition is a recurring one.<sup>13</sup>

For other instances, see the undermentioned cases.<sup>14</sup>

It has been held by the Madras High Court<sup>15</sup> that the withdrawal of a suit instituted by partners who have not been registered as a firm under the Partnership Act is no bar to a fresh suit filed by them on the same cause of action after they registered themselves as a firm, because the later suit would be technically by a different plaintiff.

**33. Additional relief in fresh suit.** — The withdrawal of a suit without the permission of the Court to institute a fresh suit operates as a dismissal thereof. Hence, O. 2 R. 2 will be a bar to the institution of any suit in respect of any portion of the claim which the plaintiff may have omitted in the previous suit in such a case.<sup>16</sup> But where the withdrawal is with the Court's permission to bring a fresh suit, O. 2 R. 2 is no bar to the inclusion in the second suit of any port on of the plaintiff's claim or of any relief which the plaintiff might have included but did not include in his first suit.<sup>17</sup> When a suit is withdrawn with permission to bring a fresh suit on the same cause of action, it is not necessary to allege in the subsequent suit the same title as in the first.<sup>18</sup>

10 (O) 190 P. Re No 3

(67) 2 Agra 100 (159)

(60) 8 Agra 180 (136)

11

in wrongful possession in his own right—dismissed

14 (26) AIR 1906 Cal 170 (170) (Redemption suit—Claim for mesne profits withdrawn—Suit for mesne profits from payment under decree to delivery of possession is not barred)

(17) AIR 1927 Cal 260 (371) (Different portion

withdrawal and no permission to bring fresh suit granted—Subsequent suit on account of promissory note executed for same consideration as original note and in respect of same subject matter is barred)

15 (30) AIR 1936 Mad 697 (690) (Suit by partners of firm not registered under Partnership Act—Withdrawal—Fresh suit after registration not barred)

Note 34

1. (O) 2 Cal L Jour 50 (151)

2. (17) AIR 1917 Lah 114 (116, 117) 1917 P. Re No 65

(11) 9 Ind Cas 956 (956, 957) (Lah)

(20) AIR 1905 Rang 118 (113)

(76) 1 All 324 (320)

(35) 17 All 53 (53)

(85) 7 All 524 (60)

(57) 10 Mad 160 (164)

3 (55) 9 Bom 546 (302)

(26) AIR 1906 All 34 (34) (Right to sue for ejectment under the Agra Tenancy Act is a recurring one from year to year)

(29) AIR 1929 All 67 (67, 68) (Withdrawal of suit to eject year to year tenant is no bar to suit for ejectment with effect from subsequent year)

(17) AIR 1917 Cal 112 (113) (Withdrawal of suit for declaration that defendant's name was wrongly entered as owner of certain share is no bar to suit for declaration of title and recovery of possession)

(39) AIR 1939 All 54 (500) (Suit against co-sharers for recovery of joint possession of certain plots—Some of the plots being in possession of co-sharers as mortgagees, suit in respect of these plots dismissed—Subsequent suit for redemption



**35. Effect of withdrawal without permission.**—The effect of the withdrawal of a suit without the Court's permission to bring a fresh suit is to debar the plaintiff from filing such a suit<sup>1</sup> Thus, where a plaintiff unconditionally withdraws his suit in view of the matter in dispute being referred to arbitration, he cannot subsequently sue again in respect of such matter, although the arbitration may have become infructuous<sup>2</sup> The fact that the plaintiff states at the time of withdrawal that he reserves to himself the liberty of bringing a fresh suit does not remove the bar under the rule<sup>3</sup> Even the defendant's consent to the withdrawal of the suit at the time of such withdrawal will not remove the bar under the rule<sup>4</sup> But an illegal order for withdrawal without liberty being reserved to the plaintiff to bring a fresh suit does not bar a fresh suit<sup>5</sup> Similarly, where the second suit has been *already filed* at the time of the withdrawal of the first suit, the withdrawal does not bar the trial of the second suit<sup>6</sup> The rule merely bars a remedy but does not extinguish the right<sup>7</sup> Where a creditor sues both the principal debtor and the surety in the same suit and later on withdraws the suit as against the former, though he cannot file a fresh suit against the principal debtor he can continue the suit as against the surety<sup>8</sup> The bar of a fresh suit in respect of the same subject matter where a former suit has been withdrawn without the permission of the Court is not based on the principle of *res judicata* (because there is no *decision* of the Court in such a case) but is due to the express provision contained in sub rule (3)<sup>9</sup>

Where the suit properly is partly within the Court's jurisdiction and partly without, the withdrawal of the suit with reference to the former portion is no bar to the continuance of the suit with reference to the latter<sup>10</sup>

In the undermentioned case<sup>11</sup> the Madras High Court held that it was 'very doubtful' whether the prohibition of a fresh suit under this rule where the previous suit was withdrawn without the permission of the Court can apply to cases where the summons had not been served on the defendant at all

1.

suit is mandatory)

(38) AIR 1938 Rang 210 (211)

[See (35) AIR 1935 Cal 744 (746) (Where the defendants have failed to prove that the withdrawal of previous suit was without permission

[But see (97-01) 2 Upp Bur Rul 284]

3 (28) AIR 1928 Rang 273 (274) 6 Rang 494

4 (15) AIR 1915 All 32 (33)

(35) AIR 1935 Cal 157 (159)

(1900) 4 Cal W N 110 (112) ((1865) Bourke's Rep Part 7 page 162 Doubtful)

(38) AIR 1938 Rang 210 (211)

5 (89) 1888 Fun Re No 147

6 (30) AIR 1930 Lah 599 (600)

(26) AIR 1926 Mad 490 (491) (Withdrawal without permission does not prevent the trial of a subject matter so long as such trial is not affected by the principle of *res judicata*)

(23) AIR 1923 Lah 710 (712)

7 (20) AIR 1920 Mad 545 (545)

(39) AIR 1939 P C 110 (112) 1939 Rang L R 358 66 Ind App 193 (P C)

8 (39) AIR 1939 P C 110 (114) 1939 Rang L R 358 66 Ind App 193 (P C) (Reversing AIR 1937 Rang 309)

9 (37) AIR 1937 Mad 718 (719) (Explanation 5

—It precludes only a second suit on same cause of action)

10 (69) 12 Mad 350 (356)

11 (35) AIR 1935 Mad 903 (912)

O. 23 R. 1  
Notes 35-39

The prohibition enacted by sub rule (3) applies to suits and not to defences. Thus, where a defendant raises a plea of set off but withdraws it without the permission of the Court, he will not be precluded from raising the same plea again by way of a defence to a subsequent suit against him<sup>12</sup>

**36. Erroneous order granting permission.** — An order for withdrawal of a suit with liberty to institute a fresh suit, contrary to the provisions of this rule, cannot be treated as an order made without jurisdiction, such order is consequently not null and void and a fresh suit instituted upon leave so granted is not incompetent. Further, the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw his first suit had properly made such order<sup>1</sup>. The undermentioned cases<sup>2</sup> in which a contrary view was held are not good law. But where there are a number of plaintiffs and the Court allows some of them alone to withdraw the suit without the consent of the others, the Court acts without jurisdiction and there should be deemed to be no withdrawal at all within the meaning of Order 23 Rule 1<sup>3</sup>.

**37. Effect of reversal of order granting permission.** — Where after a fresh suit is filed the order permitting the withdrawal of the previous suit with leave to institute a fresh suit is reversed by the High Court in revision, the proper procedure is to declare the fresh suit null and void and to direct the lower Court to go on with the first suit from the stage at which the order set aside was passed<sup>4</sup>.

**38. Power of Court of Small Causes to allow withdrawal.** — A Presidency Small Cause Court which, after dismissing a suit, has granted a new trial, is seized of the case, not as a Court of revision but as an original Court and can allow the suit to be withdrawn under this rule<sup>1</sup>. But where a decree has been passed in favour of the plaintiff contingent on the opinion of the High Court on a certain question which is referred to it and the High Court decides against the plaintiff, the suit cannot be permitted to be withdrawn with liberty to sue again. The Small Cause Court must, in such a case, pronounce judgment in favour of the defendant<sup>2</sup>.

**39. Appeal.** — No appeal lies from an order allowing withdrawal of a suit with liberty to bring a fresh suit. Such an order is neither a decree nor an appealable order under Section 101 or O 43 R 1<sup>1</sup>. Nor does an appeal lie from an order as to

12 (3) AIR 1937 Oudh 394 (395) 13 Luck 328

Note 36

1 (13) AIR 1923 Cal 269 (269)

(21) AIR 1921 Cal 34 (38) 45 Cal 183 (F B)

(12) 14 Ind Cas 275 (175) (All)

(18) AIR 1918 Mad 1033 (1090)

(71) 16 Suth W R 276 (276)

(73) 23 Suth W R 845 (346)

(22) AIR 1922 Pat 44 (46) 1 Pat 90 (F B).

(51) 3 All 529 (529) (Plea as to order allowing withdrawal being bad cannot be raised for first time at the hearing of second appeal in the subsequent suit)

(10) AIR 1930 Mad 1026 (1032)

(20) AIR 1930 Lah 494 (496) (Application for probate and subsequent suit)

(35) AIR 1935 Cal 739 (740) (Objection that previous suit had abated before leave to withdraw was granted to plaintiff)

[See also (55) 1805 All W N 151 (151)]

2 (18) AIR 1918 Pat 575 (577) 3 Pat L.Jour 401

(20) AIR 1920 Pat 63 (64)

(16) AIR 1916 Cal 255 (256) 44 Cal 267 (Or r ruled by AIR 1921 Cal 34 (F B))

3. (22) AIR 1922 Pat 459 (490, 491) 1 Pat 23

Note 37

1. (18) AIR 1918 Pat 452 (454) 3 Pat L.Jour 400

Note 38

1. (02) 99 Cal 239 (241)

(66) 3 Mad H O N 27 (25) (Can, but not bound to allow withdrawal)

2. (96) 24 Cal 129 (132, 133)

Note 39

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(93) 1893 All W N 204 (204)

costs under this rule.<sup>2</sup> Where the Court refuses to permit a suit to be withdrawn with liberty to sue again, its order is not one affecting the decision of the case within the meaning of Section 105 and is therefore not open to attack in the appeal from the decree in the suit.<sup>3</sup> But where a Court, while dismissing a suit reserves a right to institute a fresh suit, an appeal lies from the former part of the decree because the appeal in such a case is not from an 'order' but from a decree.<sup>4</sup> So also where the trial Court allows a suit to be withdrawn and, on the defendant appealing the lower Appellate Court sets aside the order and dismisses the plaintiff's suit the order of the lower Appellate Court amounts to a decree and is appealable to the High Court.<sup>5</sup>

**O. 23 R. 1**  
**Notes 39-41**

**40. Letters Patent Appeal.** — An order of a single Judge of a High Court refusing to set aside in revision an order of the lower Court allowing a plaintiff to withdraw his suit with liberty of bringing a fresh suit is a 'judgment' within the meaning of Clause 15 of the Letters Patent and hence is appealable.<sup>1</sup> So also, an order of a single Judge of a High Court allowing the withdrawal of a suit with leave to sue afresh is a judgment and is appealable as such.<sup>2</sup>

**41. Revision.** — An order allowing the withdrawal of a suit with liberty to sue afresh is a decision of a case within the meaning of Section 115<sup>1</sup> and is therefore open to revision if it is made on grounds not covered by O. 23 R. 1.<sup>2</sup> So also an order permitting a partition suit to be withdrawn after the preliminary decree in the suit has been passed is open to revision.<sup>3</sup> Similarly if the lower Court has not exercised a judicial discretion or has not applied its mind at all to the question in ordering a

(28) AIR 1928 Mad 416 (418 419) 51 Mad 664

**Note 41**

1 (22) AIR 1922 Cal 58 (59)

(18) AIR 1918 Pat 372 (373) 2 Pat L Jour 682  
(Question left open)

[But see (15) AIR 1915 Cal 100 (100) 41, Cal 632]

2 (25) AIR 1925 Oudh 596 (597)

(88) 11 Mad 322 (323)

(93) 15 All 169 (170)

(84) 6 All 211 (213)

(22) AIR 1922 Cal 58 (59)

(18) AIR 1918 1st 485 (486) 3 Pat L Jour 680,

distinction  
re a suit is  
in the cases

where the Courts though allowing the suit to be withdrawn add that the suit is dismissed)

[But see (86) 8 All 82 (84)]

(04) 29 Bom 13 (18)]

2

drawal)

3 (25) AIR 1925 Cal 711 (713)

4 (17) AIR 1917 All 134 (135 136)

[See also (04) 29 Bom 13 (18)]

(485)  
under  
drawn

(18) 21 Ind Cas 23 (24) 37 Bom 682

(25) AIR 1925 Oudh 591 (292 293) 27 Oudh Cas 231

(35) AIR 1935 Oudh 495 (495)

(35) AIR 1935 Pat 551 (552)

3 (35) AIR 1935 Mad 445 (446)

**Note 40**

1 (07) 30 Mad 311 (312)

2 (21) AIR 1921 Bom 267 (268) 45 Bom 317

O. 23 R. 1  
Note 41

suit to be withdrawn with liberty the High Court can interfere in revision on the ground that the lower Court's order is vitiated by material irregularity in the exercise of its jurisdiction.<sup>4</sup> Thus it has been held that if the lower Court orders a suit to be withdrawn with leave to sue afresh *without giving any reasons* it acts with material irregularity and its order is liable to be set aside in revision.<sup>5</sup> But where the lower Court has exercised a judicial discretion and allowed a suit to be withdrawn and the reasons assigned by it are within the scope of the rule the High Court will not interfere with its discretion merely because the High Court itself might have taken a different view of the matter.<sup>6</sup> An order for withdrawal made *ex parte*<sup>7</sup> or made without any enquiry as to the circumstances justifying such withdrawal<sup>8</sup> is liable to be set aside in revision. But where the Court upon an application being made to it for permission to withdraw the suit referred the matter to the other side and the other side stated that it had no objection provided that it got its costs and the Court thereupon allowed the application of the plaintiff, it was held that it could not be said that the Court had not applied its mind to the question and that hence no revision lay.<sup>9</sup> An order refusing permission to withdraw a suit with liberty to bring another suit is interlocutory in nature and is not open to revision.<sup>10</sup>

- 4 (12) 14 Ind Cas 97 (98) (All)  
 (33) AIR 1935 All 331 (332)  
 (34) AIR 1934 All 237 (239)  
 (34) AIR 1934 Cal 59 (60)  
 (25) AIR 1925 Oudh 140 (141)  
 (31) AIR 1931 Cal 336 (336)  
 (26) 95 Ind Cas 556 (556) (All)  
 (28) 92 Ind Cas 1030 (1031) (All)  
 (22) AIR 1922 All 185 (185)  
 (25) AIR 1925 All 466 (466) 47 All 919

[But see (00) 29 Cal 230 (241) (Order not containing ground specified in S 33—it does not  
 50

- (89) 11 Mad 372 (323)  
 (31) AIR 1931 All 19 (19) (Order of lower Court should be in such terms as to make it possible for the High Court to be satisfied that there was *prima facie* at any rate proper ground for the Court's order)  
 (22) AIR 1922 All 185 (185)  
 (31) AIR 1931 Cal 336 (336)  
 (18) AIR 1918 Nag 93 (93)  
 (28) 117 Ind Cas 864 (864) (Cal)  
 (18) AIR 1918 Pat 372 (373) 2 Pat L Jour 682  
 (16) AIR 1916 Mad 674 (674)  
 (17) AIR 1917 Cal 744 (744)  
 (21) 17 Ind Cas 647 (648) (All)  
 (29) AIR 1929 All 633 (634)  
 (31) AIR 1931 Cal 107 (109)  
 (22) 64 Ind Cas 82 (82) (Cal) (Plaintiff's application of joinder—Found against—No other

rightly)  
 (See (17) 14 Ind Cas 414 (415) (All) (Where the order was held to be not open to objection as it

- 7 (17) AIR 1917 Cal 633 (633 634) 44 Cal 454  
 8 (18) AIR 1918 Pat 452 (454) 9 Pat L

d vague  
 sic—No

or other sufficient cause there was nothing  
 the Court to examine)  
 10 (20) AIR 1930 Cal 259 (263)

See also the undermentioned case <sup>11</sup>

As to powers of a special Judge appointed under Section 54 of the Dekkhan Agriculturists Relief Act (XVII of 1879), see the undermentioned case <sup>12</sup>

See also Section 115 for a general discussion of the powers of the High Court in revision and Note 25 above

O. 23 R. 1  
Note 41

**R. 2. [S 374]** In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted [1877, S. 374, 1859, S 97]

O. 23 R. 2

**1. Limitation.** — Under the present rule, a plaintiff withdrawing a suit under O 23 R 1 with liberty to sue again and instituting a fresh suit is not entitled to deduct from the period of limitation applicable to his second suit the time taken up by the withdrawn suit <sup>1</sup> Section 14 of the Limitation Act does not apply where a suit is withdrawn by a plaintiff <sup>2</sup> The rule provides that the law of limitation shall apply in the same manner as if the prior suit had not been brought Hence a plaintiff is not deprived of the benefit of Section 31 of the Limitation Act merely because he has withdrawn a prior suit relating to the same subject matter under O 23 R 1 <sup>3</sup> This rule applies only to a suit withdrawn under Rule 1 but that rule also does not apply except to cases properly pending in a Court in which the leave is granted Therefore where a Court has no jurisdiction to try the suit its order granting leave to withdraw the suit with liberty to file a fresh suit does not fall within Rule 1 Hence this rule does not apply to such a case and Section 14 of the Limitation Act is applicable <sup>4</sup>

Further the present rule applies only where a period is fixed by the law of limitation Hence where a plaintiff who is required by the order of a Revenue Court to institute a suit within three months does so within the three months but withdraws the suit with liberty to sue again his subsequent suit brought on the basis of such liberty is not barred though it may be instituted after the expiry of three months from the Revenue Court's order <sup>5</sup>

See also Notes to S 14 in the Authors Commentaries on the Limitation Act

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- 11 (39) AIR 1938 Cal 615 (618) (D cree holder s (1015)  
(30) AIR 1930 Bom 259 (260)  
(38) AIR 1938 Bom 281 (282) I L R (1938) Bom 327  
(39) AIR 1939 Cal 625 (625, 626) (Order 23 Rule 2 is apparently an exception engrafted on the provisions of S 14 Limitation Act)  
(12) 14 Ind Cas 170 (176) (All)  
(4) (09) 35 Cal 924 (928) (Suit filed with leave of Registrar under Cl 13 of the Charter—Leave bad—Withdrawal of suit—Ultra vires)  
[See also (90) 13 Mad 451 (453) (Suits by some of obligees in one Court and others in another—One suit dismissed—Another withdrawn with permission to file fresh suit—Time saved by S 14 Limitation Act)]  
(14) AIR 1914 All 400 (401)  
[See (24) AIR 1927 All 93 (93)] [The subsequent suit is a continuation of the prior suit]
- 
- to file a fresh suit with liberty to sue again )  
Order 23 Rule 2 — Note 1  
1 (13) 20 Ind Cas 205 (206) (Cal)  
(34) AIR 1934 All 688 (691)  
(88) 12 Bom 625 (633)  
(37) AIR 1937 All 124 (126)  
(38) AIR 1938 Bom 281 (282) I L R (1938) Bom 327  
2 (29) AIR 1928 All 402 (403)  
(34) AIR 1334 All 688 (692)  
(32) AIR 1332 All 377 (378) (Ob ter)  
(05) 29 Bom 219 (225)  
(16) AIR 1916 Mad 344 (344) 32 Mad JJ  
(37) AIR 193 All 124 (127) 1936 All W R 1014

O.23 R.3

**R. 3. [S. 375.]** Where it is proved to the satisfaction of

the<sup>6</sup> Court that a suit has been adjusted<sup>7</sup> wholly or in part by any lawful agreement or compromise,<sup>8</sup>

or where the defendant satisfies the plaintiff<sup>16</sup> in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded,<sup>17</sup> and shall pass a decree in accordance therewith so far as it relates to the suit.<sup>18</sup>

[1877, S. 375; 1859, S. 98. See S. 96 (3) and O. 20.]

**Local Amendments****ODDH**

*Add the following proviso*

"Provided that no agreement, compromise or satisfaction shall be recorded in a suit instituted under Section 92, Code of Civil Procedure, unless previous notice of the same has been given to the Legal Remembrancer to Government, and the Court, after hearing him, if he desires to be heard, decides to accept it"

**RANGOON**

*For Rule 3 the following shall be substituted, namely*

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall either pass a decree in accordance therewith or shall decree that all further proceedings in the suit shall be stayed upon the terms of the said agreement, compromise or satisfaction with liberty to the parties to apply for the purpose of carrying the same into effect

Provided that before recording an agreement, compromise or satisfaction in a suit instituted under the provisions of Section 92, Civil Procedure Code, the Court shall direct notice returnable within a reasonable time to be given to the Advocate-General, Burma, or the officer with whose consent the suit was instituted, of the agreement, compromise or satisfaction proposed to be recorded. The Advocate General or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction "

**Synopsis**

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Applicability to Revenue Courts.</li> <li>4. Applicability to mortgage suits.</li> <li>5. Applicability to divorce suits.</li> <li>6. "Where it is proved to the satisfaction of the Court."</li> <li>7. "Has been adjusted."</li> <li>8. "By any lawful agreement or compromise."</li> <li>9. Submission to award, if a valid adjustment.</li> <li>10. Agreement to take oath.</li> <li>11. Compromise of probate proceedings.</li> <li>12. Compromise of suit under the Dekkhan Agriculturists' Relief Act.</li> <li>13. Compromise pending arbitration.</li> </ol> | <ol style="list-style-type: none"> <li>13a. Compromise of proceedings for setting aside award. See Sch II para 15 Note 4</li> <li>14. Compromise of guardianship proceedings.</li> <li>15. Pre-decree agreements in bar of execution.</li> <li>16. "Where the defendant satisfies the plaintiff."</li> <li>17. "Shall order such agreement compromise or satisfaction to be recorded."</li> <li>18. "Shall pass a decree in accordance therewith so far as it relates to the suit."</li> <li>19. Where compromise includes matters not relating to the suit.</li> <li>20. Parties to the compromise</li> <li>21. Compromise by minor's guardian See Notes to Order 32 Rule 7</li> <li>22. Compromise by Hindu widow.</li> </ol> |
|---|---|

23. Compromise by pleader.

24. Effect of consent decree and admissibility in evidence.

25. Registration, if necessary.

26. Stamp.

27. Execution of consent decree.

28. Mode and effect of setting aside compromise decrees.

29. Compromise of appeal.

30. Compromise of execution proceedings. See Rule 4.

31. Appeal.

32. Revision.

33. Construction of compromise decrees.

O. 23 R. 3  
Notes 1-3

*Other Topics (miscellaneous)*

Compromise not binding on non parties thereto. See Note 20

Compromise to party's disadvantage not invalid. See Note 8.

Jurisdiction of Court under the rule. See Note 18

Partial award not invalid. See Note 9.

Procedure in case of denial of compromise. See Notes 2 and 6

Procedure under this rule not formal. See Note 17.

**1. Legislative changes. —**

1 The words "where it is proved to the satisfaction of the Court that" are new. See Notes 2 and 6 below.

■ The words "the Court shall *order* such agreement, compromise or satisfaction to be recorded" have been substituted for the words "such agreement, compromise or satisfaction shall be recorded" This makes it clear that in every case of a compromise decree, there should be an *order* recording the compromise from which an appeal is provided by Order 43 Rule 1 (m).

3. The words at the end of Section 375 "such decree shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction" have been omitted and a new sub section has been added to Section 96, providing that no appeal lies from a consent decree

**2. Scope of the Rule. —** After the institution of a suit it may be adjusted by the parties either *wholly* or *in part* by any lawful agreement or compromise. The defendant may also *satisfy* the plaintiff in respect of the *whole* or *any part* of the subject matter of the suit. In such cases, on the application of the parties the Court shall *order* such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith *so far as it relates to the suit*. Where the agreement or compromise relates to matters *entirely extraneous* to the suit, no decree can be passed in terms of such agreement or compromise under this rule

The Court must be satisfied that there has been a lawful agreement or compromise, and when one of the parties disputes the legality of the compromise or agreement, the Court should investigate the matter, and, if it finds that there has been a lawful compromise, should pass a decree in terms thereof so far as such compromise relates to the suit<sup>1</sup>

The word "compromise" is more comprehensive than the word "agreement" It means an adjustment of claims in dispute by mutual concessions, and also a mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators<sup>2</sup>

**3. Applicability to Revenue Courts. —** The rule applies to revenue as well

**Order 23 Rule 3 — Note 2**

<sup>1</sup> All 426

<sup>2</sup> Ibid 592.

{See (34) AIR 1934 Pat 390 (391)}

<sup>2</sup> See Wharton's Law Lexicon, 13th Edn., ¶ 193.

(2) AIR 1927 Bom 565 (567, 575) 51 Bom 903.

(31) AIR 1931 Oudh 127 (124) ■ Luck 531

(33) AIR 1933 Nag 186 (167) 1 I. R (1933) Nag 250 (P B)

(37) AIR 1937 Pat 11 (12) 15 Pat 379.

**O. 23 R. 3**  
**Notes 3-6**

as civil proceedings<sup>1</sup> It does not, however, apply to proceedings for the appointment of common manager under Section 93 of the Bengal Tenancy Act<sup>2</sup> Nor does it apply to a rent suit under that Act, though a compromise in such suits can be recorded by the Court under Section 147A of that Act which is identical in terms with this rule<sup>3</sup> The rule does not, likewise, apply to proceedings under some other special Acts<sup>4</sup>

**4. Applicability to mortgage suits.** — The rule applies also to suits on mortgages so that it is open to the Courts to decree such suits on terms settled between the parties, instead of in the form directed by Order 34<sup>1</sup> Similarly, the proceedings for a final decree after the preliminary decree has been passed, are proceedings in suit and can be compromised<sup>2</sup> See Note 14 to O 34 R 5 for a full discussion So also, the rule applies to the adjustment of the claim of a mortgagee for a personal decree against the mortgagor under O 34 R 6<sup>3</sup> But a mere agreement to extend the time given by the preliminary decree for the payment of the mortgage money does not amount to an adjustment of the suit<sup>4</sup> This rule cannot be extended by analogy to proceedings under Section 83 of the Transfer of Property Act<sup>5</sup>

**5. Applicability to divorce suits.** — Where a decree nisi has been passed in a suit for dissolution of marriage it is competent to the Court, where the parties consent, not to make the decree absolute<sup>1</sup>

**6. "Where it is proved to the satisfaction of the Court."** — These words are new Under the old Code there was a conflict of decisions as to whether, where a compromise was alleged by one party and denied by the other, or where one of the parties to the compromise was not willing to abide by the compromise, the Court had the power to record the compromise and pass a decree thereon On the one hand, it

**Note 3**

1 (16) AIR 1918 Oudh 412 (417) 21 Oudh Cas 318

2 (66) 4 Cal L Jour 564 (565)

3 (20) AIR 1920 Pat 602 (604) 4 Pat L Jour 667

4 See S 196 of the Orissa Tenancy Act (II of 1913) and S 199 of the Madras Estates Land Act (I of 1908)

**Note 4**

1 ('21) AIR 1921 Pat 320 (321)

37) AIR 1937 All 103 (112) (Final decree for foreclosure based on a preliminary decree which had been passed as a result of a compromise) [See (34) AIR 1934 Oudh 44 (45) 9 Luck 387]

recorded It is submitted that the dictum drawn does not seem to be correct. This rule if it applies at all, will apply whether the payment is admitted or not and the Court has power under this rule to investigate the dispute and determine whether the alleged payment has been made or not)

(1937) 10 All 103 (112) 11) 59 All 565

(39) AIR 1939 All 174 (175)

(1939) 10 All 174 (175) 17) 71 (232) (Such

between O 34 R 5 which requires payment under preliminary mortgage decree to be made into Court and this rule which recognizes payment

5. (39) AIR 1939 All 174 (175)

**Note 5**

1. (88) 10 All 553 (562, 563)



was held by the High Courts of Madras,<sup>1</sup> Calcutta<sup>2</sup> and Bombay,<sup>3</sup> the Chief Court of the Punjab<sup>4</sup> and the Judicial Commissioners Courts of Nagpur<sup>5</sup> and Oudh<sup>6</sup> that the Court had the power to enquire into the matter, to record it if proved, and to pass a decree thereon on the other hand, it was held by the High Court of Allahabad<sup>7</sup> that under Section 375, the Court could record a compromise and pass a decree thereon only when *at the time of moving the Court* the parties were agreed as to the compromise and the decree to be passed on it. The present rule makes it clear that the Legislature has adopted the former view, viz., that the Court has jurisdiction in the case of a dispute between the parties as to the compromise, to enquire into and decide whether there has been a lawful compromise in terms of which the suit should be decreed.<sup>8</sup> The provision in this rule for an inquiry about the fact and lawfulness of a compromise of a suit in the suit itself is a speedier alternative to a separate suit for specific performance of the contract to compromise the suit on certain terms.<sup>9</sup> As to whether and when appeal lies from a decree passed under such circumstances see Note 15 to Section 96 *ante*.

The onus of establishing that a suit has been adjusted in a lawful manner is on the person who alleges the same.<sup>10</sup> It is open to the Court to decide the matter by taking evidence in the usual way or upon affidavits.<sup>11</sup> The agreement compromising the suit may be written or oral,<sup>12</sup> and may be proved by oral<sup>13</sup> or documentary evidence. The compromise need not be presented by the parties themselves.<sup>14</sup> A compromise otherwise unobjectionable is not vitiated by the want of signature of a party.<sup>15</sup> A compromise disallowed by the Court cannot be again set up in execution of the decree in the suit.<sup>16</sup>

## Note 6

1 (96) 111 Mad 419 (421 422)

(1900) 23 Mad 101 (104 105)

(86) 9 Mad 103 (106 107)

(85) 8 Mad 482 (488)

2 (97) 24 Cal 908 (915) (Overruling 11 Cal 250)

3 (96) 20 Bom 804 (808)

(92) 16 Bom 202 (208 209)

(83) 7 Bom 804 (808)

4 (96) 1896 Pun Re No 8 page 21

(83) 1889 Pun Re No 182 page 477

5 (93) 12 C P L R 50 (58)

6 (99) 2 Oudh Cas 67 (72)

(92) 5 Oudh Cas 49 (58)

9 (33) AIR 1933 Pat 306 (403) 12 Pat 359

10 (37) AIR 1937 Pat 11 (12) 15 Pat 379

11 (83) 7 Bom 304 (309)

(92) 11 Oudh Cas 49 (53)

(99) 2 Oudh Cas 67 (72)

(96) 20 Bom 304 (308)

(86) AIR 1936 Mad 817 (350)

[See (36) AIR 1936 Sind 59 (61) 29 Sind L R 437 (The general rule that evidence should be recorded before a decision is made and not after should also be followed in cases in which the Court records compromise arrived at between the parties)]

[See also (38) AIR 1938 Bom 85 (86) (Record

7

<sup>1</sup>  
case of complicated compromise it is more desirable that its terms should be drawn up

compromises sought to be proved by oral evidence when one party denies the compromise]]

11 (17) AIR 1917 Lah 282 (283) 1917 1 un Re No 78

12 (14) AIR 1914 Lah 130 (131) (In this case the person who later on objected to the compromise was a party to the suit and was also represented by another person who had a power of attorney in his favour)

16 (71) 3 N W P H C R 81 (81)

compromise)

(23) AIR 1923 Pat 102 (102)

(38) AIR 1938 Bom 85 (86)

(37) AIR 1937 1 at 39 (40)

[See also (35) AIR 1935 Cal 239 (240) 62 Cal 822]

[But see (34) AIR 1934 Cal 613 (614)]

O. 23 R. 3  
Note 7

7. "Has been adjusted." — In order that the rule may apply, there must be a completed agreement between the parties<sup>1</sup> and the agreement must amount to an adjustment, in whole or in part of the suit<sup>2</sup> The following cases will show when a suit can be said to be adjusted and when not —

- (1) Where a case is adjourned on the ground that the parties contemplated compromising the matter out of Court, there is no adjustment of the suit within the rule<sup>3</sup>
- (2) Where parties agree that the suit should be disposed of in one way if a certain simple fact was found to exist and in another way if it was found not to exist it has been held by the High Court of Calcutta that it amounts to an adjustment of the suit<sup>4</sup> The High Court of Allahabad has taken a contrary view<sup>5</sup> See also the undermentioned decision<sup>6</sup>
- (3) An agreement between the parties to a suit to abide by the final decision which may be made in another proceeding amounts to an adjustment when that decision is actually passed<sup>7</sup>
- (4) (a) An agreement between the parties that a dispute is to be settled in one way or the other in accordance with the statement of a third person is an adjustment<sup>8</sup>  
(b) But an agreement between the parties to refer their disputes to a third party a decision and abide by his terms is not an adjustment, till the terms are stated and accepted<sup>9</sup>

## Note 7

1. (16) AIR 1916 Pat 159(160) (Parties making mutual concession with a view to terminate the litigation—Agreement)

(11) 9 Ind Cas 426 (427) (Oudh) (Mere offer of certain terms by plaintiff which are rejected by defendant not enough)

(20) AIR 1920 Mad 13 (18) (Mere agreement to draw up a formal document does not prevent the

said to have been adjusted by lawful agreement or compromise)

3 (31) AIR 1931 Cal 205 (206)

(29) AIR 1929 Mad 416 (417)

4 (17) AIR 1917 Cal 827 (828)

5 (92) 14 All 141 (144) (Agreement to make disposal of suit depends upon a certain fact being found upon a certain document or not — Agreement is not adjustment as it leaves something to be done by the Court)

6

decided—Defendant will be estopped from setting aside agreement apart from question of adjustment)

7 (19) AIR 1919 Mad 546 (547) (Distinguishing 15 Ind Cas 378 on ground that terms of agreement in that case were not clear)

[But see (35) AIR 1935 Rang 482 (482) (Agreement between parties that damages claim ed by

by one of the parties on the ground that he does not understand whether a particular matter is included in those terms or not)

(30) AIR 1930 Sind 217 (218) (Inchoate agreement — Evidence of completion is necessary — Agreement is ineffective without it)

(24) AIR 1924 P C 200 (201) (P C) (Parties not

at that

regard

to certain land he should purchase the land from the defendant for a certain price does not amount to an adjustment of the suit)

(20) AIR 1930 Sind 217 (217) (Rule applies to adjustment of whole or part of suit)

(23) AIR 1923 Pat 293 (291) (Partial adjustment — Suit must proceed in usual way in respect of

case the same principle was held applicable in respect of the defendant to be found in

(c) When a dispute is referred by the parties to a third party's decision there is a *locus paenitentiae* to withdraw from such agreement till the third party functions<sup>10</sup>

- (5) A compromise which either party has the option of repudiating afterwards is not an adjustment of the suit<sup>11</sup>
- (6) An agreement to abide by the decision of the Court whether right or wrong amounts to a compromise within this rule<sup>12</sup>
- (7) An agreement for making the decision of Court depend on contingencies *beyond* the control of parties is not an adjustment,<sup>13</sup> while it will be an adjustment if the contingency is within the power of the parties themselves<sup>14</sup>
- (8) The abandonment of an issue does not amount to a compromise<sup>15</sup>
- (9) It has been held by the Allahabad High Court<sup>16</sup> that an agreement that the suit should be decreed if a certain witness eats food served by the plaintiff is binding on the parties and if the witness eats the food the suit should be decreed as per the agreement. In the above case it was held that the present rule did not apply to it. In an earlier case of the same High Court it was held that such an agreement concluded the matter only with reference to one of the issues in the case *viz.*, that of legitimacy and that the other issues should be tried on the merits<sup>17</sup>. According to the Oudh Judicial Commissioner's Court<sup>18</sup> such an agreement does not constitute an adjustment within this rule but the agreement and its performance would be evidence on the issue of legitimacy. In the undermentioned case<sup>19</sup> it was held by the Madras High Court that an agreement by a party that the suit should be decided in a particular way if a certain event should happen will *stop* him from resiling from the agreement afterwards apart from the question of adjustment. The Rangoon High Court in the undermentioned case<sup>20</sup> held that an agreement that the suit should be decided according to the decision in another suit then pending is not an adjustment but is binding on the parties.

It has been held that a suit may be compromised even after a preliminary decree provided that the final decree has not been passed<sup>21</sup>. Similarly, it has been held that there can be a 'satisfaction (under this rule) of the plaintiff's claim between the preliminary and final decrees in a suit<sup>22</sup>. For full discussion, see Note 14 to O 34 R 5.

is no compromise within O 23 R 3)

14 (O) 17 Mad L Jour 37 (18) Agreement that suit should be dismissed if within a given time the plaintiff failed to convey the suit lands to the defendant.)

15 (J) 22 Mad 538 (546)

16 (2) AIR 1925 All 271 (272) 47 All 456

17 (2) AIR 1924 All 311 (312)

18 (24) AIR 1924 Oudh 367 (368) 27 Oudh Cas 157

19 (36) AIR 1936 Mad 856 (857)

20 (3) AIR 1935 Rang 482 (482)

21 (36) AIR 1936 Oudh 320 (320 321) Luck 260 (Appeal against preliminary decree pending — Trial Court can enter in application to record compromise unless Appellate Court has stayed proceedings.)

22 (3) AIR 1935 Pat 995 (995) 14 Pat 489 (Here, is nothing in the rule which makes it inapplicable to a suit after the preliminary decree and before the final decree.)

11 (14) AIR 1914 Lah 306 (307) 1914 Pun Ro No 24

12 (2) AIR 1925 All 559 (559) 47 All 421

(21) AIR 1921 All 110 (310) 43 All 261

(24) AIR 1913 Oudh 451 (452) 5 Luck 391

(28) AIR 1928 All 437 (438) (Judge deviated from ordinary procedure on the strength of agreement between parties and deciding on question of fact — Findings of fact are binding on the parties.)

13 (7) AIR 1927 Oudh 223 (223)

(24) AIR 1924 Oudh 327 (328) 27 Oudh Cas 157

(28) AIR 1928 Cal 103 (110) (Parties agreed to withdraw their respective pleas on certain contingency — Contingency not occurring — There

O. 23 R. 3  
Note 8

8. "By any lawful agreement or compromise." — The rule restricts the power of the Court to record agreements or compromises, to such agreements as are *lawful* and the Court is therefore bound to enquire into the question whether the compromise it is asked to record is a lawful one or not<sup>1</sup> If a *part* of the compromise is unlawful and it can be separated from the rest, the Court can record that portion of the compromise which is lawful<sup>2</sup> Ordinarily, when investigating the fact and lawfulness of a compromise under this rule, it is irrelevant to examine the strength or weakness of the suit itself<sup>3</sup>

The expression 'lawful' refers to the *legality* of the terms of the agreement and not to its *binding character* Therefore, an agreement or compromise may be lawful within this rule although it may not be *binding* on one of the parties on the ground of its having been brought about by coercion, undue influence or fraud<sup>4</sup> The word *lawful* means lawful within the meaning of the Contract Act, that is to say, the rule requires an agreement which is legally enforceable, but it is not necessary that in order to enable a Court to record a compromise the terms, which are to be complied with after decree should be specifically enforceable under the Specific Relief Act<sup>5</sup>

The following have been held to be agreements which are *unlawful* within the meaning of this rule —

- (1) Agreements *prohibited* by law such as an agreement to transfer a property which is inalienable in law<sup>6</sup>
- (2) Agreements which are *opposed to public policy*, such as an agreement for the alienation of a religious office<sup>7</sup> or an agreement relating to a public trust

## Note 8

(25) AIR 1925 All 206 (267)

(36) AIR 1936 Mad 347 (350) (Mere fact that the compromise is voidable is no reason for Court refusing to record it)

(35) AIR 1935 Bom 54 (64)

[See (33) AIR 1933 Pat 306 (399) 12 Pat 359 (Grossly unfair compromise will raise presumption of unconscionableness and fraud and may be relieved against)]

2 (10) 6 Ind Cas 857 (859) (All)

(28) AIR 1928 Pat 495 (496) (Compromise was held not illegal inasmuch as the substantial portion of it was not against the law of the locality)

[See also (19) AIR 1919 Cal 458 (458) (Separate petitions by both parties to a suit for a decree — Held not a compromise under this rule)]

■ (33) AIR 1933 Pat 306 (339) 12 Pat 359

4 (25) AIR 1928 All 494 (496) 50 All 748

(35) AIR 1935 All 137 (138 139) 57 All 426 (Party executing compromise cannot avoid it under O 23 R 3 on ground of fraud)

(32) AIR 1932 All 478 (479) (The fact that the party will

ful as defined in the Contract Act but as agreements which on the face of them are void)]

[But see (27) AIR 1927 Lah 546 (549) (In the peculiar circumstances in the case it was held that the compromise which had been brought about by undue influence was unlawful and could not be recorded)]

5. (33) AIR 1933 Pat 306 (400) 12 Pat 359

6 (19) AIR 1919 Mad 429 (431) (Mortgage invalid under Section 4 of the Madras Impartible Estates Act)

(20) AIR 1920 Nag 35 (37) (Compromise involving sale of the *thekadars* interest the transfer of which is prohibited by law)

(20) AIR 1920 Pat 159 (160) (Compromise amounting to a clear violation of statutory rules is not lawful)

(10) 5 Ind Cas 236 (235) (Cal) (Compromise in excess of powers conferred by S 30 of the Probate and Administration Act is unlawful)

7. (15) AIR 1915 Mad 561 (565) 33 Mad 500  
(02) 26 Mad 31 (33)

which is detrimental to its interest,<sup>8</sup> or an agreement which amounts to a breach of trust<sup>9</sup>

(3) Agreements which involve injury to a third party.<sup>10</sup>

(4) According to the High Courts of Allahabad<sup>11</sup> and Madras<sup>12</sup> an agreement amounting to the transfer of a *spes successionis* which is prohibited by Section 6 of the Transfer of Property Act, is not lawful. According to the High Court of Calcutta<sup>13</sup> an agreement between expectants to divide a particular property in a certain way on the happening of a particular contingency is lawful. Where certain reversioners executed a sale deed of a *spes successionis* before the death of the limited owners but entered into a compromise as to it after the limited owner's death, it was held by the Chief Court of Oudh that the compromise was not unlawful.<sup>14</sup>

For other instances, see the undermentioned cases.<sup>15</sup>

A compromise containing an agreement for the withdrawal of a prosecution for a *compoundable offence*,<sup>16</sup> or for allowing a relief which is barred by limitation,<sup>17</sup> is not unlawful. Nor is a compromise unlawful merely because the parties do not get the shares to which they would be legally entitled<sup>18</sup> or because it contains a penal provision.<sup>19</sup> A compromise in which one party transfers his right to another is not bad on the ground of *lis pendens*.<sup>20</sup>

A *promise* to do a thing can be a good consideration for the adjustment of a suit, it is not necessary that the promise should have been carried out before the adjustment can be recorded under this rule.<sup>21</sup> The rule contemplates an adjustment by act of parties and not an adjustment which has a statutory operation. Hence, a scheme of arrangement which when sanctioned by the Court acquires a statutory

8. (30) AIR 1930 Mad 629 (630) 53 Mad 398  
(22) AIR 1922 Mad 429 (432) (Compromise relating to public trust is not necessarily unlawful. But Court must scrutinize compromise to see if it is not detrimental to trust.)

(15) AIR 1915 Mad 915 (919) (Compromise by *maladhyapaks* under influence of indirect motive, viz., to avoid appearing in Court as a witness is breach of duty and not lawful.)

(27) 100 Ind Cas 645 (646) (Pat) (Agreement by mahant to transfer *muti* property for no necessary purpose is unlawful.)

(01) 11 Cal W N 404 (405, 406) (Decree for removal of mahant—Appeal pending—Parties compromising suit not lawful.)

[See (07) 34 Cal 249 (255, 256) (Compromise by shelaht for benefit of endowment is valid and binding.)]

[See also (15) AIR 1915 Cal 193 (194) (Suit relating to public trust under S. 92, C. P. C., cannot be compromised.)]

[But see (20) AIR 1920 Mad 608 (602) (*Dona fide* compromise by trustee of public trust is

ignoring the rights of the other defendants.)]

(23) AIR 1923 Oudh 252 (253) (Compromise between plaintiff and one defendant prejudicial to other defendants.)

(24) AIR 1924 Cal 159 (160) (*A* suing *B*, the mortgagor and *C* the puisne mortgagee—*A* and *B* compromising whereby *A* agrees to pay *B* more than what was due.)

11. (03) 2 Ind Cas 865 (873) (All)

12. (07) 80 Mad 255 (263).

13. (82) 8 Cal 139 (145)

14. (29) AIR 1929 Oudh 63 (64) 4 Luck 181

15. (35) 61 Cal L Jour 88 (90) (Agreement which purports to deal with the rights of certain minors who are not parties to the suit is not a lawful agreement as it involves and implies injury to the property of minors.)

(36) 38 Pun L R 283 (283, 284) (Compromise affecting the rights of a person who is not a party to it cannot be considered to be lawful.)

16. (30) AIR 1930 Lah 560 (561)

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18. (20) AIR 1920 Cal 269 (269)

19. (6) AIR 1906 All 278 (280)

20. (35) AIR 1935 Bom 54 (64)

21. (37) AIR 1937 Pat 33 (33) (Defendant agreeing to execute sale deed in consideration of plaintiff agreeing to have suit decided in parti-

to worship in a temple against the settled custom.)

10. (14) AIR 1919 Pat 146 (155) 4 Pat L Jour 560

(19) AIR 1919 Pat 325 (328)

(05) 32 Cal 561 (566) (Compromise between the plaintiffs and the executors in administration suit

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Notes 8-9

operation under Section 153, sub section (2) of the Companies Act cannot be said to be a lawful agreement or compromise within the meaning of this rule<sup>22</sup>

**9. Submission to award, if a valid adjustment.** — Under the old Code it was held that where the parties to a pending suit referred the matter to arbitration the award could be filed as an adjustment under this rule<sup>1</sup> The present Code, however, contains a new Section, namely Section 89, which provides as follows

<sup>1</sup> Save in so far as is otherwise provided by the Indian Arbitration Act, 1893, or by any other law for the time being in force all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule "

The question has arisen whether, in view of this Section a submission to arbitration by parties without the intervention of the Court and the award passed by the arbitrators on such submission can be filed as an adjustment by way of compromise under this rule On this question there is a conflict of opinion According to the High Courts of Calcutta,<sup>2</sup> Lahore,<sup>3</sup> Nagpur<sup>4</sup> and Rangoon,<sup>5</sup> the words "any other law in force" cannot include the provisions of the Code itself, and therefore cannot include the provisions of this rule Hence, in view of Section 89 such a matter must be governed only by the provisions of the Second Schedule, and the submission and the award cannot be filed as an adjustment under this rule On the other hand, the High Courts of Allahabad,<sup>6</sup> Madras<sup>7</sup> and Patna,<sup>8</sup> the Chief Court of Oudh<sup>9</sup> and the Judicial Commissioner's Court of Sind<sup>10</sup> are of the opinion that the words "any other law in force" include the provisions of this rule and that therefore such submission and award can be filed as an adjustment by way of a compromise within the meaning of this rule The High Court of Bombay has reached the same conclusion but on a

cular way—Sale deed need not have been executed before defendant can apply under this rule)

22. ( 87 ) AIR 1937 Cal 381 (382)

#### Note 9

1. ( 97 ) 21 Bom 335 (341)
- ( 96 ) 20 Bom 304 (303)
- ( 01 ) 24 Mad 326 (330)
- ( 02 ) 26 Bom 76 (78, 80, 81)
2. ( 22 ) AIR 1912 Cal 404 (406) 49 Cal 608
- ( 35 ) AIR 1935 Cal 239 (241) 62 Cal 229
- ( 34 ) AIR 1934 Cal 643 (644) (But otherwise if consented to by parties)
- ( 21 ) AIR 1921 Cal 238 (239)
- ( 27 ) AIR 1927 Cal 887 (888) 55 Cal 538 (But otherwise if consented to by parties)
- [But see ( 20 ) AIR 1920 Cal 269 (269)]
3. ( 21 ) AIR 1921 Lah 232 (233) (But otherwise

7. ( 28 ) AIR 1928 Mad 1025 (1028) 51 Mad 800 (F B)

( 25 ) AIR 1925 Mad 50 (51)

( 27 ) AIR 1927 Mad 1126 (1127)

( 23 ) AIR 1923 Mad 56 (57, 577) (Partial award not allowed)

8. ( 32 ) AIR 1932 Pat 205 (205) 11 Pat 20

[But see ( 35 ) AIR 1935 Pat 243 (245, 247)]

9. ( 31 ) AIR 1931 Oudh 127 (129, 131) 6 Luck 591

( 22 ) AIR 1922 Oudh 189 (190) 25 Oudh Civ 213

10. ( 13 ) 19 Ind Cas 470 (450) 6 Sind L R 176

( 29 ) AIR 1929 Sind 107 (109) 23 Sind L R 349

(Obiter)

( 25 ) AIR 1925 Sind 266 (269) 13 Sind L R 111

( 21 ) AIR 1921 Sind 63 (67, 70) 16 Sind L R 174

(F B)

( 35 ) AIR 1935 Sind 184 (185) (But if the plaintiff wants a decree for certain reliefs granted to him under the award which according to the tenor of the award are enforceable under the provisions of the Arbitration Act and not by virtue of any decree which might be passed in the suit the application of the plaintiff for the reference and award being recorded as an adjustment of the suit under O. 23 R. 3 should be allowed)

overruled  
AIR 1931

5. Rang L R 200 (F B) (Overruling AIR 1931 Rang 53)

( 25 ) AIR 1925 All 503 (506, 503) 47 All 637 (F B)

04) 1930

somewhat different reasoning. According to it, the words "any other law in force" mean only any other law of *arbitration* for the time being in force, such as Section 132 of the Companies Act or Sections 43 to 45 of the Dekkhan Agriculturists' Relief Act or the Co-operative Societies Act or the general law of contracts whereby parties may agree to refer their disputes to arbitration, and that they do not include this rule. It is, however, of opinion that the words in Section 89 of the Code "shall be governed by the provisions of the Second Schedule" are totally inapt to convey a prohibition and that they mean no more than that in those arbitrations which are dealt with by the Second Schedule the procedure of that Schedule shall be followed. Where, therefore, a submission and award are not covered by the provisions of the Second Schedule, as where the reference is made in a *pending suit* without the intervention of the Court, Section 89 has no application at all and the award can therefore be recognized as an adjustment of the suit by way of compromise under this rule.<sup>11</sup> In the undermentioned case of the Bombay High Court,<sup>12</sup> Rangnagar, J., sitting as a single Judge, was inclined to agree with the Calcutta view. The observations were, however, *obiter*. Where both the parties accept the award of the arbitrators, the award becomes a compromise and can be recorded under this rule.<sup>13</sup>

The Court acting under this rule (in cases where it has been held that an award can be pleaded in a compromise) can enquire into any alleged misconduct of the arbitrator.<sup>14</sup> Further, if a party does not raise any objection to the recording of a submission and award as a compromise under this rule, he is estopped from questioning the Court's power to do so.<sup>15</sup> But a mere agreement to refer to arbitration has been held not to be a compromise within this rule.<sup>16</sup> Nor can an award under an invalid reference be accepted as a compromise or adjustment under this rule.<sup>17</sup>

**10. Agreement to take oath.**—The Oaths Act does not provide for the *adjustment* of a suit in an arbitrary way by the oath of a party. Hence an agreement to be bound by the oath of the opposite party does not amount to an adjustment of the suit but the oath amounts only to a *conclusive proof*, as against the party agreeing to be bound, of the matter stated.<sup>1</sup> Similarly, if a party has agreed that if he fails to take a certain oath the suit should be decreed or dismissed, his failure to take the oath does not justify the disposal of the suit under the present rule. Under Section 12 of

11. (27) AIR 1927 Bom 565 (574-577) 51 Bom 908 (F B) (Overruling by necessary implication A I R 1916 Bom 125)

(21) AIR 1921 Bom 310 (314, 316) 45 Bom 245

(30) AIR 1930 Bom 481 (435) 54 Bom 606

(18) 11 Ind Cas 786 (787) 37 Bom 639

12. (30) AIR 1930 Bom 93 (103) 54 Bom 197.

13. (30) AIR 1930 Lah 860 (861)

(26) AIR 1926 Mad 1211 (1211, 1212)

(12) 15 Ind Cas 959 (960) 11 Low Bur Rul 55

(37) AIR 1937 Rang 287 (290) 14 Rang 766

(34) AIR 1933 Rang 300 (301) 1333 Rang L R

280 (1 B).

14. (23) AIR 1923 Bom 401 (401).

15. (29) AIR 1923 Bom 1 (6) 53 Bom 75

16. (03) 30 Cal 218 (228-229)

(82) 1852 Pun Re No 130 page 397

(22) AIR 1922 Bom 436 (437) 46 Bom 854

(24) AIR 1925 P C 70 (73) (P C)

(11) 12 Ind Cas 372 (375) 36 Mad 353

(12) 16 Ind Cas 478 (482) (Mad)

(14) AIR 1914 Sind 35 (36) 8 Sind L R 157.

(16) AIR 1914 Bom 184 (186) 38 Bom 637.

(17) AIR 1917 Cal 327 (328)

17. (03) 33 Bom 69 (76)

(21) AIR 1921 Mad 709 (709)

(31) AIR 1931 Bom 343 (341) 55 Bom 503

(Compare (26) AIR 1926 Mad 366 (366) ]

Note 10

1. (99) 22 Mad 234 (237)

(79) 2 Mad 356 (460)

(22) AIR 1922 All 160 (161) 44 All 117.

(92) 14 All 141 (145)

(18) AIR 1918 Lah 126 (126) 1918 Pun Re No

83

[See (33) AIR 1933 All 956 (957) (Reference of dispute to arbitration—Defendant's subsequent statement on oath—De rec reus, it is passed as prayed for in plaint—Plaintiff making required statement on oath—There is no compromise as defined in O 23 R 3 and arbitrator was not deprived of his powers to give whatever award he thought proper)]

[See also (33) AIR 1933 All 463 (464) 55 All 233]

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**Notes 17**

parties to a suit<sup>3</sup> The Court cannot refuse to record the compromise merely because the Court considers it too favourable to one side<sup>4</sup> or that the working of it would give trouble<sup>5</sup>

It has been held by the Madras High Court<sup>6</sup> and the Chief Court of the Punjab<sup>7</sup> that till judgment is delivered in open Court, the Court has jurisdiction to record a compromise In a Calcutta case<sup>8</sup> where an appeal had been dismissed for default, both parties being absent and they then presented a petition asking that the case should be decreed in terms thereof, it was held that the Court ought to restore the case giving effect to the petition of compromise Where an *ex parte* decree is set aside by suit on the ground of fraud, the original suit is restored as on the date of the *ex parte* decree and any compromise entered into before the decree should be recorded<sup>9</sup> But there can be no consent decree unless the case has come on the cause list of the Court<sup>10</sup>

Where a plaintiff, in pursuance of a compromise, merely asks for a withdrawal of suit, the Court is not bound to record the compromise<sup>11</sup> Where the parties enter into a compromise outside Court, but a compromise decree is not duly passed under this rule, and a decree is passed in the usual way, the terms of the agreement between the parties cannot be enforced<sup>12</sup> If the Court's order does not embody the whole compromise but embodies only a portion of it, the compromise is not enforceable<sup>13</sup> But the rule does not require that the order should set out the compromise *verbatim* It is enough if the terms of the compromise are indicated with sufficient clearness<sup>14</sup> An order of adjournment incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment is not a record of the compromise<sup>15</sup> Where the claim is beyond the jurisdiction of the Court it cannot pass a compromise decree It can only return the plaint under O 7 R 10<sup>16</sup>

2. (23) AIR 1923 P C 93 (101) (P C)

(39) AIR 1933 Pat 306 (406) 12 Pat 359

(30) AIR 1930 P C 158 (162) 57 Ind App 183 57 Cal 1311 (P C)

(28) AIR 1928 Oudh 48 (48)

(35) AIR 1935 P C 119 (120) 14 Pat 545 62 Ind App 196 (P C) [If there is no separate record of the compromise the decree ought to recite the fact of a compromise and its terms and then proceed to set out the orders made by the Court to enforce the decree]

(39) AIR 1933 Nag 233 (238) I L R (1933) Nag 607 (F B)

(36) AIR 1936 Mad 347 (350)

(36) AIR 1936 All 433 (433)

(36) AIR 1936 Pat 401 (401) 15 Pat 456 (Passing of decree based on compromise may be postponed but not actual recording of compromise)

(36) AIR 1936 All 9 (101) 58 All 565

(See also (32) AIR 1932 Bom 466 (467) ]

4. (98) 22 Bom 239 (240)

(30) AIR 1930 Mad 629 (630) 53 Mad 399

(36) AIR 1936 Mad 347 (350) (Court has no jurisdiction, except in the case of minors etc., to investigate the fairness or unfairness of a compromise which has been accepted by the parties)

5. (10) 6 Ind Cas 857 (858) (All)

(39) AIR 1933 Pat 306 (406) 12 Pat 359 (It is not the business of the Court to speculate on the difficulties that may arise at the time of execution)

6. (21) AIR 1921 Mad 690 (690 691) (Though result of suit announced on notice board)

7. (60) 1903 Pun W R 67 (Though judgment already written)

8. (23) AIR 1923 Cal 319 (319).

9. (19) AIR 1919 Cal 903 (904)

10. (79) 5 Cal L Rep 464 (464).

11. (16) AIR 1916 Cal 80 (81)

(17) AIR 1917 Nag 1 (4) (Dismissal at party's request amounts to withdrawal of suit without leave to sue afresh)

12. (21) AIR 1921 Lah 243 (240) 1 Lah 445

(24) AIR 1924 Nag 325 (327)

[But see (74) 8 Mad H C R 1 (5) (Suit lies on the agreement against the party violating its terms)]

13. (23) AIR 1923 Lah 291 (292) 10 Lah 655

14. (28) AIR 1928 Nag 51 (51) 23 Nag L R 124

(32) AIR 1932 Lah 24 (24, 25) (A reference to the agreement in the order held sufficient record of its terms)

15. (16) AIR 1916 Mad 819 (819)

16. (21) AIR 1921 Mad 630 (630).



18. "Shall pass a decree in accordance therewith so far as it relates to the suit." — A decree on a compromise under this rule can be passed only so far as it relates to the suit<sup>1</sup> The question whether a particular term of a petition of compromise relates to the suit must be decided from the frame of the suit, the relief claimed and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down and each case must be governed by its own facts<sup>2</sup> Where the suit is merely for the recovery of specific properties, the compromise must relate to such properties only. But where the suit is not merely for the recovery of the property, but to establish particular rights, the facts have to be looked at as a whole to decide whether matters that do not relate to the suit have been introduced. In such cases, all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject matter of the suit or not, become related to the suit, and can be embodied in the decree<sup>3</sup>

The following are instances in which the compromise was held to 'relate to the suit' within the meaning of this rule —

- (1) The compromise of a suit for a money decree may provide for a charge being created on the defendants' immovable property for the payment of the amount agreed on<sup>4</sup>

#### Note 18

- 1 (95) 18 Mad 410 (414)  
(86) 13 Cal 170 (171)  
(20) AIR 1920 I at 150 (160)  
(9) 2 Oudh Cas 880 (834)  
(11) AIR 1922 Cal 358 (361) 302 49 Cal 220  
(36) AIR 1936 Pat 401 (401) 15 Pat 456  
(85) AIR 1985 All 127 (129)  
(39) AIR 1984 All 454 (456) I L R (1939) All 435 (Where the compromise does not relate to the suit the presumption is that the rule implies that the Court should not pass a decree in regard to it)  
(35) AIR 1935 P C 119 (122) 14 Pat 545 62 Ind App 136 (P C) (Matter compromised collateral to suit—Court not to pass decree in respect of such matter under this rule)  
2 (03) 35 Cal 837 (841)  
(14) AIR 1915 Mad 210 (215) 38 Mad 959  
(32) AIR 1932 Bom 47 (48 to 51)  
(40) AIR 1940 Oudh 27 (29)  
(37) AIR 1387 Pat 232 (233) (Whether a particular matter is the subject matter of or relates to suit is primarily a question of fact)  
(37) AIR 1387 Sind 130 (132) 31 Sind L N 153 (Whether a compromise does or does not relate to suit = question of fact depending upon particular facts of each case)  
3 (21) AIR 1921 Cal 202 (207) 48 Cal 103  
(34) AIR 1934 Lah 623 (625) (Donation of wall not in suit consideration for abandoning claim of wall in suit—Compromise as to former wall is deemed as relating to suit)  
(37) AIR 1933 Pat 177 (178) (Matter relating to the suit means either relating to the suit or not collateral to the suit)  
(18) AIR 1918 Pat 507 (512) 3 Pat L Jour 255 (S R)  
(32) AIR 1932 Bom 466 (467)  
(15) AIR 1915 Mad 210 (215) 38 Mad 959  
(15) AIR 1915 Mad 322 (323)  
(15) AIR 1915 Mad 683 (684)  
(18) AIR 1918 Pat 133 (142) 3 Pat L Jour 43  
(32) AIR 1932 Bom 47 (51)  
(31) AIR 1931 Bom 295 (296)  
(25) AIR 1925 Mad 1101 (1104)  
(20) AIR 1920 Pat 602 (604) 4 Pat L Jour 667  
(00) 33 Mad 102 (105) (Relief granted under O 23 R 3 (S 375) can extend to what is not prayed for in the plaint)  
(22) AIR 1922 Low Bur 22 (24) 10 Low Bur Rul 349 (The words 'so far as it relates to the suit' mean 'so far as it relates to the adjustment or  
4 (30) AIR 1930 Nag 17 (18)  
(29) AIR 1929 Nag 164 (167, 168) 25 Nag L R 110  
(25) AIR 1925 Mad 1101 (1103 1104)  
(18) AIR 1918 Mad 1307 (1305)  
(0.) 30 Mad 478 (450 491)

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**Nota 18**

- (2) The compromise of a suit for a declaration may include a term as to the payment of a sum of money by one of the parties to the others<sup>6</sup>
- (3) Where one co tenant who has paid the entire rent of the land sues the other co tenant for contribution, the suit may be compromised by providing that the defendant should give up his share of the land in favour of the plaintiff<sup>6</sup>
- (4) Where a suit is for the recovery of certain property, a compromise providing that the defendant should redeem a certain house under mortgage and deliver it to the plaintiff is one relating to the suit<sup>7</sup>
- (5) A and B, a lessee from A, sued C asserting A's title to certain land. The suit was compromised by providing that C, the defendant should recognize the lease granted by A to B and that, in consideration for this, was to be entitled to a half share of the rent paid by B. The compromise was held to be one relating to the suit<sup>8</sup>

See also the undermentioned cases<sup>9</sup>

The following are instances in which the compromise was held *not* to relate to the suit —

- (1) A consent decree in a partition suit between brothers cannot deal with the rights in their mother's share after her death<sup>10</sup>
- (2) Plaintiff claimed a certain sum with interest at nine and a half per cent per annum. The suit was compromised by the defendant agreeing that he would pay a smaller sum within a fixed time and that on default he would pay the amount with interest at a very much higher rate. It was held that the stipulation as to the higher rate of interest did not relate to the suit<sup>11</sup>
- (3) A suit for damages for crops misappropriated was compromised by the amount of damages being settled and also by a provision being made that the defendant should hold the land under the plaintiff at a certain rent. It was held that the agreement as to tenancy was outside the scope of the suit<sup>12</sup>
- (4) Plaintiff sued to restrain the defendant from building a house in such a way as to interfere with the plaintiff's enjoyment of light and air. The suit was compromised by providing that the defendant should not build his house higher than it originally was and also that the defendant should not let water into the passage between the houses. The agreement as to the passage was held to be beyond the scope of the suit<sup>13</sup>

(09) 35 Cal 837 (843)

(07) 17 Mad L Jour 200 (201) (Suit on mortgage bond and for accounts compromised—Mortgage decree for the whole amount including the sum not forming part of the mortgage amount may

A abandoning suit and B agreeing to pay rent to landlord — Compromise is one relating to suit)  
(37) AIR 1937 Pat 232 (234) (Suit for account — Agreement by plaintiff to take only her share of income of certain villages in consideration of her giving up her rights to an account is one relating to suit)

10 (21) AIR 1921 Cal 202 (207) 48 Cal 109

11 (18) AIR 1918 Pat 635 (636) 2 Pat L Jour 673

12 (07) 5 Cal L Jour 15 (17)

13 (83) 7 Bom 204 (209)

L R 55

(33) AIR 1933 Pat 176 (178)

6 (20) AIR 1920 Cal 194 (195)

7 (03) 2 Ind Cas 470 (430) (Mad)

8 (03) 33 Mad 102 (105 106)

9 (03) 1 Ind Cas 672 (672) (Cal) (Suit by A against his landlord for possession of leased land — B impleaded as party — Real contest being between B and landlord—Compromise of suit—

[See also (37) AIR 1937 Sind 100 (121 12) 31 Sind L R 153 (Suit for injunction against defendant restraining him from turning his house in such a manner as to block certain apertures of plaintiff's house and thus deprive light and air — Compromise between plaintiff preventing defendant from raising certain structure — Compromise giving plaintiff

Although it is obligatory upon a Court, under this rule, to pass a decree in terms of a compromise, after it has been recorded, it is not necessary that the decree should be passed *simultaneously* with the order recording the compromise. There is nothing to prevent the Court from postponing the passing of a decree in a proper case.<sup>14</sup> Also, the Court is not bound to pass a decree in the exact form which the parties propose.<sup>15</sup> Further, the decree is not vitiated merely because it does not recite *verbatim* the compromise.<sup>16</sup> A Court acting under this rule cannot make a *declaratory* decree inasmuch as, not having heard the case on the merits, the Court is not in a position to form its own opinion as to the merits of the case.<sup>17</sup> As the decree should be in accordance with the compromise, where the latter does not provide for a personal remedy, the decree also cannot grant it.<sup>18</sup> If a suit has been compromised by the original parties thereto, a third party cannot be allowed to intervene and oppose the passing of a decree on the compromise.<sup>19</sup>

**19. Where compromise includes matters not relating to the suit.**—It has been seen that a decree can be passed under this rule only so far as the compromise relates to the suit. But a compromise which includes matters extraneous to the suit is not unlawful<sup>1</sup> and cannot be rejected in its entirety by the Court.<sup>2</sup> Where a compromise comprises matters unconnected with the suit, the proper course for the Court is to recite the compromise as a whole in its decree or in the form of a schedule to the decree for purposes of reference but to restrict the operative part of the decree to those terms of the compromise which relate to the suit. In such a case the decree would be executable only in respect of the matters that relate to the suit.<sup>3</sup> The remaining terms of the compromise, i.e., those which are not incorporated in the operative part of the decree, may be enforced by means of a separate suit.<sup>4</sup>

Where a compromise which includes matters extraneous to the suit has been entered into on condition that it should be given effect to as a whole, the Court should not dismiss the suit,<sup>5</sup> but should permit the parties to suitably enlarge the scope of the suit by means of amendment of pleadings, so as to enable the compromise to be passed into a decree.<sup>6</sup>

adequate relief and not full relief.—Decree based on compromise—Compromise falls within scope of suit—Decree on such compromise can be executed under O. III § 1.

14. (80) AIR 1330 Pat 305 (379 400) 9 Pat 314 (36) AIR 1336 Pat 401 (401) 15 Pat 456

15. (29) AIR 1913 Bom 350 (352)

(See also (97 01) 1897 1901 Upp Bar Rul 256 (Court to ascertain terms of compromise and decree accordingly))

16. (21) AIR 1913 Lah 527 (529)

17. (29) AIR 1913 Bom 350 (352)

18. (20) AIR 1920 Nag 20 (21)

19. (26) AIR 1926 Mad 341 (341 342)

(32) AIR 1332 All 478 (473 460)

#### Notes 19

1. (17) AIR 1917 Lah 282 (284) 1917 Pun Ro No 78

2. (17) AIR 1917 Lah 282 (284) 1917 Pun Ro No 78

3. (13) AIR 1919 P O 79 (81) 46 Ind App 240 47 Cal 485 (PC)

(33) AIR 1943 All 649 (651) 55 All 775 (FB)

(01) 5 Cal W N 485 (487)

(18) AIR 1919 Pat 507 (512) 3 Pat L Jour 255 (81)

(32) AIR 1932 Bom 466 (467)

(21) AIR 1921 Cal 500 (500)

(28) AIR 1928 Rang 43 (43 44) 5 Rang 662

(39) AIR 1939 All 454 (456) 1 L R (1939) All 435

(36) AIR 1936 Cal 446 (448)

(40) AIR 1940 Oudh 27 (32) (Merely saying that compromise is made part of decree is not embodying it in operative part of it.)

[See (20) AIR 1920 Do a 359 (359)]

[See also (36) AIR 1936 Pat 300 (301 302)]

(Compromise decree—Reference to property not subject of dispute in compromise—Operative part of decree not dealing with such property but dealing with subject-matter of dispute only)

—Compromise operates as bare agreement—It does not create title)

4. (19) AIR 1913 Mad 305 (310)

(98) 2 Cal W N 663 (664)

(09) 2 Ind Cas 430 (430 (Mad)

(05) 3 All L Jour 680 (631)

(32) AIR 1932 Bom 466 (467)

(39) AIR 1939 All 454 (456) 1 L R 1939 All 435

5. (92) 22 Mad 214 (216)

(06) 1903 Pun Ro No 77, page 359

6. (57) 9 All 2.9 (2.0)

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Notes 19-20

As to whether, where a decree erroneously includes in the operative part of it, terms extraneous to the suit, the executing Court can refuse to execute the decree with respect to those terms and whether a separate suit lies in respect of them, see Note 27.

**20. Parties to the compromise.** — A compromise to which some of the parties to a suit alone are parties is not necessarily invalid<sup>1</sup> though on good cause being shown by any of the other parties, the Court has a discretion to reject such a compromise.<sup>2</sup> Thus, where a partial compromise would be prejudicial to the interests of the parties not joining it, it cannot be recognized.<sup>3</sup> Similarly, where the interests of the several parties to a suit are *inseparable*, it is not open to some of them alone to compromise the matter.<sup>4</sup> Thus, a suit for partition cannot be compromised by some only of the parties to it.<sup>5</sup>

A compromise between some parties alone cannot affect the position of the other parties to the suit. They are neither bound by it nor are entitled to enforce it.<sup>6</sup> In the undermentioned case,<sup>7</sup> however, it was held by the Oudh Chief Court that where certain defendants were *ex parte* and the Court passed an *ex parte* decree against them in the terms of the compromise that had been entered into between the other defendants and the plaintiff, the decree was not a nullity as against the *ex parte* defendants. A party is not bound by an unauthorized compromise entered into by his agent.<sup>8</sup> But a person who is suing or is being sued in a representative capacity can enter into a *bona fide* compromise and thereby bind the persons represented.<sup>9</sup> See also Note 23 to Order 1 Rule 8.

Where a compromise includes, as parties thereto, some persons who are not parties to the suit and the terms affecting the parties to the suit are not separable from

#### Note 20

1. (27) AIR 1927 PC 57 (59) 51 Bom 442 54 Ind App 111 (PC)  
(34) AIR 1934 Lah 54 (85) (Party having no interest — His consent to compromise is not

(95) 1895 Pun Re No 48, page 203  
(101) 171 1919 Cal 1019 (1049 1044)

(36) AIR 1936 All 1 (3)  
(But see (101) 5 (19) W N 988 (830, 321)

valid against minors but valid against the plaintiff)

[See also (36) AIR 1936 Lah 971 (971) (Some defendants contested claim—Others confessing judgment—Plaintiff should be given advantage of confession as against latter)]

2. (26) AIR 1926 Cal 193 (198)  
3. (29) AIR 1923 Oudh 252 (253, 254)  
(05) 32 Cal 561 (566)  
4. (19) AIR 1919 Cal 727 (728)  
(25) AIR 1925 Lah 250 (280)  
(27) AIR 1927 Oudh 222 (223)

7. (35) AIR 1935 Oudh 358 (361, 362) 11 Ind 187 (FB)

8. (04) 31 Cal 357 (362)  
(14) AIR 1914 Lah 112 (113) 1914 Pun Re No 40,  
(16) AIR 1916 Cal 479 (482) (Though agent entrusted with the general conduct of the litigation)

9. (13) 18 Ind Cas 369 (371, 372) (Mad) (Person

L R 245 (Some only of the partners in a part-

by compromise entered into by judgment—  
(10) 8 Ind Cas 91 (95) (Cal) (Compromise by purchaser with regard to title to property binds vendor)

those affecting the non parties the Court cannot pass a decree under this rule<sup>10</sup> Where consent decree between some of the parties alone is sought to be enforced in execution against the other parties to the suit who however are not parties to the compromise and such persons object to the execution of the decree against them on the ground that the consent decree is not binding on them the dispute falls within Section 47 of the Code<sup>11</sup>

O 23 R 3  
Notes 20-24

A purchaser *pendente lite* is bound by a compromise decree.<sup>13</sup>

Where a party has no further interest in the property which is the subject matter of the suit and the compromise (he having parted with his interest in favour of another party to the suit) his consent is not necessary for a compromise of the suit <sup>13</sup>

**21 Compromise by minor's guardian** — See Notes to Order 32 Rule 7

**22 Compromise by Hindu widow** — A bona fide compromise by a Hindu widow as representing her husband's estate binds the reversioners<sup>1</sup>

**EE Compromise by pleader** — See Note 7 to O 3 R 4 *ante* and also the undermentioned cases<sup>1</sup>

**24 Effect of consent decree and admissibility in evidence** — As has been seen in Note 114 to Section 11 a compromise decree does not operate as *res judicata* though it will create an estoppel between the parties and is as much binding upon them as a decree in *invitum*.<sup>1</sup> Hence a compromise decree is admissible in evidence in a later suit between the same parties for the same purposes for which an ordinary

2 4

ng on successors of persons making compro

**Note 23**

1 (32) AIR 1932 Cal 231 (233) 59 Cal 31  
(34) AIR 1234 Oudh 417 (417)  
(35) AIR 1935 Rang 150 (150) 13 Rang 819  
(Court will refuse to give effect to compromise  
when it finds that there has been some misander  
standing between party and counsel as to the  
terms of the compromise)

some of the plaint fs and some of the defend  
dants alone will not bind the rest ))

1

not allow either of them to compromise but must require no compromise

11 (85) 8 Nud 4 3 (4 5)  
12 (10) 6 Ind Cas 750 (751) 13 Oudh Cas 98  
(10) 6 Ind Cas 109 (169) (All)  
[See however (11) 14 Cal 169 (193 196)  
(All not by Pr vy Co cal in 22 Cal 909)]  
13 (34) Allr 1931 Lab 34 (34)

L R 35

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1. The above proceedings cannot be re-opened by either party.

**O. 23 R. 3**  
**Notes 24-25**

decree would be admissible under the provisions of the Evidence Act<sup>2</sup> Where a suit is terminated by a compromise decree a breach of its terms does not restore the parties to the rights which they had prior to the decree<sup>3</sup> But a compromise decree is a creature of the agreement on which it is based and is subject to *all the incidents of such agreement*<sup>4</sup> A compromise decree is but a contract with the command of a Judge superadded to it<sup>5</sup> Hence such a decree is of no greater validity than the contract on which it is based<sup>6</sup> It can therefore, be set aside on any of the grounds such as fraud mistake misrepresentation etc., on which a contract may be set aside<sup>7</sup> (See Note 23 *infra*) For the same reason where a compromise decree contains any term which is in the nature of a penalty under Section 74 of the Contract Act or of a forfeiture it is open to the Court to grant relief against the forfeiture incurred under such penal clause<sup>8</sup> As a minor's contract is void, a decree on a compromise with a minor is a nullity<sup>9</sup> See also the undermentioned cases<sup>10</sup>

**25 Registration, if necessary** — Under Section 17 (2) (vi) of the Registration Act before the amendment thereof by Act XXI of 1929 a decree or order of a Court was exempt from registration, even though it may otherwise come within the scope of

- (62) 11 Cal 138 (141)  
(80) AIR 1930 Bom 431 (4)  
(14) AIR 1914 Mad 70 (77)  
(13) 21 Ind Cas 533 (539)  
(11) 9 Ind Cas 875 (881)

decree operates as a waiver  
cedura not going to root of  
(19) AIR 1919 Mad 905 (8)  
(20) AIR 1920 Oudh 258 (264) 23 Oudh Cas 308  
(14) AIR 1919 Mad 177 (179)  
(18) AIR 1918 Mad 1331 (1332)  
(17) AIR 1917 Mad 578 (580) 40 Mad 177  
(15) AIR 1915 Cal 464 (467)  
(24) AIR 1924 Nag 180 (183) (Terms attacked as  
contrary to Hindu law—Compromise still bind

(1864) 1 South W R 205 (206)  
(186) 1 Agra L (G) (FB)  
[See also (191) 91 All 429 (436) (Where the

promise decree between landlord and tenant  
(settling rate of rent)  
(86) AIR 1936 Sind 93 (104) 29 Sind L R 455  
(40) AIR 1936 Bom 301 (303 304) (Even if the

barred])  
(4) (30) AIR 1930 Lah 937 (941)  
(15) AIR 1915 Cal 464 (467)  
(01) 24 Mad 205 (270)  
(5) (24) AIR 1924 Pat 231 (232) 2 Pat 740  
(33) AIR 1933 Pat 305 (402) 12 Pat 359  
(35) AIR 1935 Pat 123 (125)  
(6) (17) AIR 1917 Mad 578 (580) 40 Mad 177  
(37) AIR 1937 Nag 413 (414)  
(7) (39) AIR 1939 Lah 439 (451) 1 L R (10-2)  
Lah 433  
(37) AIR 1937 Nag 413 (414)  
(8) (07) 31 Bom 15 (22) (K B) (Overruling 10  
Bom 435)  
(60) 8 Moo Ind App 237 (261) (PC)  
(37) AIR 1937 Nag 413 (414)  
[See also (84) 10 Cal 305 (311) 10 Ind App

decree passed in contravention of S 29 of the  
Ben-gal Tenancy Act is binding in subsequent  
suit until vacated]

(34) AIR 1 34 Cal 799 (801) (Party to decree  
including collusive compromise decree is bound  
by it—But third party affected by such decree  
is not bound)  
(35) AIR 1935 All 771 (3) (Compromise given  
effect to in decree—it is not collusive unless it  
is fraud on rights of third party)  
[See also (06) 4 Cal L Jour 323 (327) (Compromise  
will not be set aside on the ground that  
it gave to one party more than he would have  
got if he had obtained judgment)  
(31) AIR 1934 Lah 218 (219) (Compromise not

(73) 1 Ind App 157 (166) (P C) (Compromise  
based on the assumption that there was an  
antecedent title of some kind in the parties—  
Suit on compromise did not rest on contract  
only but also on title)

sub section (1) of Section 17 which made the registration of certain types of documents obligatory. Hence, a compromise decree was held exempt from registration,<sup>1</sup> even in cases where the compromise which it embodied affected matters extraneous to the suit.<sup>2</sup> Under the Section as amended, a compromise decree comprising properties *extraneous* to the suit is not exempted from registration under Section 17, sub section (2). As to whether a compromise decree requires registration in cases falling under clauses (a) and (d) of Section 17 of the Registration Act, there is a conflict of opinions, for which see the undermentioned cases.<sup>3</sup> A compromise in so far as it is not incorporated in a decree, is not exempt from registration if it is otherwise compulsorily registrable.<sup>4</sup>

A petition to the Court, which merely recites the compromise arrived at between the parties and prays for an order recording the compromise, does not come within the provisions of the Registration Act regarding compulsory registration of documents,<sup>5</sup> even though the compromise may include terms affecting matters extraneous to the suit.<sup>6</sup> Where the compromise does not transfer or declare any rights in immovable property but merely provides for the temporary management of the property, registration is not necessary.<sup>7</sup> Even where a compromise is compulsorily registrable the doctrine of part performance applies to such a compromise and where it has been acted upon, parties cannot resile from it.<sup>8</sup> (See Section 53A of the Transfer of Property Act as amended in 1930.)

When both the parties are agreed in stating that the suit has been adjusted, the Court has no option but to record the compromise. In such a case, it does not

O. 23 R. 3  
Note 25

#### Note 25

1 (39) 8 Cal W N 495 (489) 22 Mad 508 26 Ind App 101 (PC)

(35) AIR 1935 Mad 282 (284) (Suit for money compromised — Charge created over attached properties—Property relates to subject matter of

(33) AIR 1933 Pat 457 (460) (Where the party is already a lessee and the compromise merely varies the terms of the tenancy compromise)

R

(27) AIR 1927 Lah 186 (157) (Compromise embodied in decree of Revenue Court—Registration not necessary)

(80) AIR 1930 Lah 937 (940)

(32) AIR 1932 Lah 24 (24)

suit is dismissed in accordance with the terms of a deed of compromise if that compromise has not been recorded under the provisions of O 23, § 3 the deed is not exempt from registration under S 17 (2) (ii) Registration Act)

[See also (37) AIR 1937 Lah 353 (359 360)]

5 (03) 1 Cal L Jour 359 (406) (Per Mookerjee J)

6 (18) AIR 1918 Pat 507 (517, 519, 520) 3 Pat L Jour 255

(17) AIR 1917 Pat 9 (10) 1 Pat L Jour 203

[But see (03) 30 Cal 783 (757)

(02) 25 Mad 553 (555)]

7. (26) AIR 1926 Bom 22 (25)

8 (14) AIR 1914 P O 27 (22) 42 Cal 601 42 Ind App 1 (PC)

[But see (19) AIR 1919 Lah 400 (402) 1919 Pun Re No 31

(15) AIR 1915 Cal 170 (172)]

3 (32) AIR 1932 Pat 97 (100) 11 Pat 93

(Requires registration)

(10) 3 Ind Cas 701 (706) 33 Mad 102 (Registration is not necessary)

O. 23 R. 3  
Notes 25-27

matter whether the compromise, though requiring registration under the law, was embodied in an unregistered document, because the admissions of the parties constitute in themselves the "proof" required by this rule. It is only when the matter is in dispute that the *writing* has to be used as evidence and the question of registration becomes material.<sup>2</sup>

**26. Stamp.** — A *solanamah* on stamped paper is not necessary for a compromise decree to be passed under this rule.<sup>1</sup>

See also the undermentioned cases.<sup>2</sup>

**27. Execution of consent decree.** — A consent decree is executable in the same manner as an ordinary decree.<sup>1</sup> Thus, a consent decree providing for the execution of a document by one of the parties may be enforced under O. 21 R. 34.<sup>2</sup> But where the decree is *incapable of execution*, as for instance, where it merely creates a charge on property and does not confer the power of sale, a separate suit is necessary to enforce the right created by the decree.<sup>3</sup> Similarly, a decree can be executed only in respect of the terms included in the *operative part* thereof. Hence, where certain terms of a compromise are not included in the operative part of a decree as being concerned with matters extraneous to the suit, such terms cannot be enforced in execution.<sup>4</sup>

With regard to the power of an executing Court to go behind a consent decree, the question has arisen with reference to three matters as noted below —

(1) *Where the decree gives effect to an unlawful compromise* — In such a case, the executing Court is entitled and bound to refuse to execute the decree.<sup>5</sup>

(2) *Where the operative part of the decree gives effect to terms of a compromise which do not relate to the suit* — On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras,<sup>6</sup> Allahabad,<sup>7</sup> Lahore<sup>8</sup> and Patna<sup>9</sup> and by the Chief Court of Oudh<sup>10</sup> that the executing Court cannot refuse to execute the decree in such a case. The reason, according to the Madras High Court, is that an objection to the decree cannot be allowed to be raised in the executing Court.

9 ('89) AIR 1939 Nag 233 (238) I L R (1939) Nag 507 (F B)

## Note 26

1. (15) 29 Ind Cas 511 (512) (U P B R)  
(08) 12 Cal W N 59 (60)

2. (69) 12 Suth W R 376 (376)  
(1862) 1 H<sub>2</sub> de 149 (149)  
2 May 213

## Note 27

1. (22) AIR 1922 Oudh 150 (152) 25 Oudh Cas 53  
(21) AIR 1921 Cal 227 (229)

(30) AIR 1930 Mad 805 (314) 53 Mad 805  
(03) 26 Mad 31 (33)

[But see (38) AIR 1933 Bom 298 (301) (Objection in execution on the ground of want of registration of compromise and decree—Objection should have been taken before decree and cannot be taken in execution)]

6. ('15) AIR 1915 Mad 683 (684)

(07) 30 Mad 421 (423)

(32) AIR 1933 Mad 657 (558)

7. ('87) 9 All 229 (231)

(39) AIR 1933 All 649 (652) 55 All T<sup>5</sup> (F1)

8. (34) AIR 1934 Lah 623 (625)

[But see ('19) AIR 1919 Lah 400 (400.) 1919 Pun Re N= 31)]

9. ('31) AIR 1931 Pat 203 (203) 13 Pat 17

10. ('27) AIR 1927 Oudh 33 (33) 29 Oudh Cas

3. (95) 22 Cal 813 (816)

(90) 22 Cal 859 (863, 864)

4. (18) AIR 1918 Mad 1331 (1332)

(16) AIR 1916 Mad 550 (550)

(24) AIR 1924 Cal 49 (51)

5. (10) 11 Ind Cas 226 (238, 239) (Cal)

(24) AIR 1924 Nag 84 (80) 20 Nag L R 1.

compromise though erroneous is not without jurisdiction and would be binding on the parties unless set aside in appeal.]



but must be taken by way of appeal.<sup>11</sup> The High Court of Calcutta,<sup>12</sup> on the other hand, has held that such a decree is inoperative and invalid and cannot be executed in so far as it gives effect to the terms of a compromise not relating to the suit. The High Court of Bombay seems to take the latter view.<sup>13</sup>

**O. 23 R. 3**  
**Note IV**

(3) *Where the decree contains any provision in the nature of a penalty* — A compromise decree being of no greater validity than the contract on which it is based, an executing Court can, in the exercise of its equitable jurisdiction, relieve against any forfeiture incurred under any penal clause in a consent decree.<sup>14</sup>

It follows from the differences in views noted above that in respect of the terms of a consent decree which do not relate to the suit, a separate suit, according to the Calcutta High Court, can be brought on the contract,<sup>15</sup> while according to the Allahabad High Court, the question in such a case is one relating to execution and hence a fresh suit is barred under S 47 of the Code.<sup>16</sup> Where, however, any terms of a compromise are not embodied in the operative part of a decree, the bar of S 47 cannot apply to a suit to enforce such terms and such a suit will therefore lie.<sup>17</sup>

Where a consent decree orders the sale of any property, it can be executed and the property can be sold without the formality of an attachment.<sup>18</sup> Similarly, a consent decree in a mortgage suit can be executed without any final decree being passed (unlike the case of an ordinary preliminary decree on the mortgage).<sup>19</sup>

See also the undermentioned cases.<sup>20</sup>

11. ('15) AIR 1915 Mad 210 (215) 38 Mad 959 ('35) AIR 1935 All 862 (868) 63 All 230.  
(07) 80 Mad 421 (423) [See ('84) AIR 1934 Oudh 44 (45) 9 Luck 387]
12. ('09) 86 Cal 198 (228)  
(12) 14 Ind Cas 701 (701) 30 Cal 668  
(05) 1 Cal L Jour 898 (899)  
(07) 34 Cal 456 (463)  
(25) AIR 1925 Cal 286 (288)  
(21) 62 Ind Cas 658 (654-655) (Cal)  
[See also ('36) AIR 1936 Cal 446 (448) 63 Cal 760 (A term in a compromise petition which goes beyond the scope of the suit has no force beyond that of an agreement, even though such term is made part of the consent decree which is passed on the compromise)]
13. ('22) AIR 1922 Bom 466 (467) (Compromise including extraneous matters—Executable only as to subject matter of suit — Extraneous matters to be enforced by separate suit)
14. ('11) 12 Ind Cas 334 (335) (Mad)  
(33) AIR 1933 All 252 (255) 55 All 334 (FB) (Overruling A I R 1924 All 689)  
(26) AIR 1926 Bom 81 (81)  
(21) AIR 1921 Cal 356 (352)  
(21) AIR 1921 Cal 585 (566)  
(01) 24 Mad 265 (270, 271)  
(20) AIR 1920 Cal 716 (717)  
(1900) 28 Cal 557 (567) 28 Ind App 59 (P C) (Compromise decree in a mortgage suit and enforcement of its terms)  
(16) AIR 1916 Mad 1006 (1006)  
(16) AIR 1916 Mad 774 (774)  
(33) AIR 1933 Lah 23 (24) (Court has no unrestricted power to relieve defaulting party barred)
15. (07) 34 Cal 456 (463)  
(25) AIR 1925 Cal 286 (288)  
(87) 9 All 229 (231)  
(19) AIR 1919 Mad 305 (310)  
(94) 16 All 423 (436) (Suit for specific performance lies)
16. (21) AIR 1921 Pat 320 (321)  
(26) AIR 1926 Oudh 385 (386) 29 Oudh Cas 26  
(25) AIR 1925 Bom 509 (510)  
(21) AIR 1921 Pat 320 (321)  
[But see ('11) 10 Ind Cas 431 (435, 436) (All barred)]
17. (01) 26 All 299 (300) 31 Ind App 116 (PC) (Suit based on compromise decree is not a suit for breach of contract)  
(27) AIR 1927 Bom 87 (88) (Earlier suit brought in a different right is as if it was brought by a different person)



But a consent decree cannot be set aside by rule on motion,<sup>5</sup> or by an application under Section 151<sup>6</sup>

An interlocutory consent order can be set aside by application in the same suit<sup>7</sup>

Parties cannot rescind a consent decree as an ordinary contract by mutual agreement<sup>8</sup> So a consent decree cannot be varied by consent of parties<sup>9</sup>

Where by a mistake, the Court passes a decree which *purports* to be in accordance with the terms of the compromise between the parties but is not *actually* in accordance with such terms it has got power under Section 151 to correct its mistake and amend the decree so as to be in accordance with the agreement of the parties<sup>10</sup>

When a compromise decree is set aside, both the parties are restored to their original rights in the former suit when the compromise was effected and the suit can be proceeded with from that stage<sup>11</sup>

Ignorance of real facts when it was within the party's power to know them<sup>12</sup> or a mistake or ignorance of law<sup>13</sup> is no ground for setting aside a compromise decree A compromise decree cannot be set aside on the ground of the defendant's absence at the time when the compromise was recorded by the Court<sup>14</sup> See also the undermentioned case<sup>15</sup>

**29. Compromise of appeal** — The present rule applies also to appeals and an Appellate Court can pass a compromise decree if the appeal is compromised<sup>1</sup>

**30. Compromise of execution proceedings** — See Rule 4 *infra*

**31 Appeal** — See also Note 15 to Section 96 *ante* for a full discussion

An order recording or refusing to record a compromise is appealable under O 43 R 1 (u)<sup>1</sup> An order recording a compromise is appealable although a decree has

(66) 6 Suth W R Misc 86 (87)

(11) 11 Ind Cas 568 (568) 56 Bom 77

(2) AIR 1932 Bom 615 (616) 56 Bom 231

(11) 11 Ind Cas 856 (857) (Bom)

(98) 25 Cal 640 (652) (Charges of fraud cannot properly be tried on affidavits)

(22) AIR 1922 Mad 446 (446)

(33) AIR 1933 Sind 29 (31, 32) 96 Sind L R 395

(29) AIR 1933 Bom 490 (491) 41 Bom L R 934

(936)

(See (34) AIR 1934 Pat 229 (231) 13 Pat 165

(If fraud is practised on Court remedy is by application—But if practised on party remedy is by way of suit))

(But see (26) AIR 1926 Oudh 315 (315) 1 Luck

341 (May be set aside under the inherent

be dismissed in terms of compromise—Defendant not paying within time—Plaintiff seeking execution—Order can be amended and execution allowed))

11 (81) 6 Cal 687 (704)

(76) 2 Cal 184 (196) 3 Ind App 291 (PC)

(24) AIR 1924 Pat 759 (759)

(But see (85) 10 Bom 338 (340))

#### Note 29

1 (92) 5 Oudh Cas 49 (53)

(25) AIR 1925 Lah 145 (146)

#### Note 31

7

(

(11) 9 Ind Cas 85 (879) 35 Mad 75

(37) AIR 1937 Cal 222 (224)

(See however (38) AIR 1938 Oudh 103 (105)

(Decree can be varied by consent of parties))

(34) AIR 1934 Rang 103 (102)

(See also (33) AIR 1933 1 at 135 (135) (Com prom to petition—Court passing order set aside

(25) AIR 1925 Mad 606 (606)

(37) AIR 1936 Sind 89 (60) 29 Sind L R 437

(36) AIR 1936 Nag 8 (10) 31 Nag L R (Supp) III

**O. 23 R. 3** Notes 31-33 been passed on the compromise.<sup>2</sup> The High Court of Bombay<sup>3</sup> has held that where an order under this rule is made with the consent of the parties in the trial Court, there can be no appeal against the order under O 43 R 1. The reason is that there is no material before the Court on which a decision can be come to. The Madras High Court<sup>4</sup> has, however, dissented from this view and held that an appeal will lie against an order recording a compromise, whether such order has been passed after contest or not. It has been held by the High Court of Lahore<sup>5</sup> that that rule applies only where a compromise was actually made but the Court for some reason has refused to record it, and not where it has been found that there has been no compromise at all. The Allahabad High Court has taken a contrary view.<sup>6</sup>

**32. Revision.** — Although under this rule a Court has power only to record a "lawful" compromise, yet, where it requires evidence to be given of an illegal compromise, its order is not open to revision as such order is not likely to cause irreparable injury.<sup>1</sup> It has been held by the Allahabad High Court<sup>2</sup> that no revision will lie against a decree on a compromise on the ground that the Court omitted to order the recording of the compromise.

**33. Construction of compromise decrees.** — See the undermentioned cases.<sup>1</sup>

**O. 23 R. 4**

Proceedings in execution of decrees not affected.

**R. 4. [S. 375A.]** Nothing in this Order shall apply to any proceedings in execution of a decree or order.

### Synopsis

1. History of the Rule. | 2. Effect of the Rule

### Other Topics (miscellaneous)

Adjustment of decrees Merge profits—Compromise as to	See Note 2	See Note 2	Order 21 Rule 30 — Note 2	Proceedings under Note 2	See
2. ('36) AIR 1936 Mad 385 (386)					
(84) AIR 1934 Cal 846 (846)	61 Cal 910				
('88) AIR 1938 Lah 766 (766)					
3. ('33) AIR 1933 Bom 205 (207, 208)	57 Bom 206				
4. ('36) AIR 1936 Mad 385 (386)					
(86) AIR 1936 Mad 347 (349)					
5. ('24) AIR 1924 Lah 248 (249)					
6. ('30) AIR 1936 All 433 (433)					
<b>Note 32</b>					
1. ('12) 16 Ind Cas 3 (4) (Cal)					
2. ('35) AIR 1935 All 738 (739)	(Defect cured by S. 99 of the Code)				
<b>Note 33</b>					

against several defendants—Joint and several liability cannot be implied in the absence of

gagoo—Mortgagor's remedy is not by execution only but he can sue to redeem ('35) AIR 1935 Pat 123 (125) (Patent decree in consent decree—Evidence should not be allowed to construe it)

(97) 20 Mad 256 (268) 24 Ind App 218 (P C)

**1. History of the Rule.**—There was no provision in the old Code corresponding to the present rule. Hence, there was a conflict of decisions as to whether, by virtue of Section 617 (now Section 141) the provisions of this Order could be applied to proceedings in execution, some cases holding that they could be so applied<sup>1</sup> and others holding that they could not.<sup>2</sup> This conflict was set at rest by Act VI of 1892 which introduced Section 375A into the Code, by which the provisions of the Chapter were declared inapplicable to proceedings after the passing of the decree. In 1894 the Privy Council in *I L R 17 Allahabad 106*<sup>3</sup> decided that irrespective of the changes made by Act VI of 1892, Section 617 (now Section 141) had not the effect of making the provisions of the Code relating to withdrawal and adjustment of suits applicable to execution proceedings. The present rule states in explicit terms that Order 23 does not apply to execution proceedings.<sup>4</sup> For fuller information, see Notes under Section 141.

**2. Effect of the Rule.**—Order 23 Rule 1 relating to withdrawal and abandonment of a suit does not apply to execution proceedings. But a decree holder may apply to have his application for execution dismissed.<sup>1</sup> The Court has no power to allow an application for execution to be withdrawn with liberty of bringing a fresh application.<sup>2</sup> Similarly, the withdrawal of an application for execution without the Court's permission to bring a fresh application is no bar to a fresh application for execution.<sup>3</sup> Order 23 Rule 3 does not apply to execution proceedings and the Court has no power to pass a consent order in such proceedings.<sup>4</sup> Order 31 Rule 2 and Section 47 provide a complete procedure for the adjustment of decrees out of Court.<sup>5</sup> Where a decree leaves the amount of mesne profits to be ascertained in further proceedings, the suit being undisposed of the parties can enter into a compromise pending the proceedings for the ascertainment of mesne profits.<sup>6</sup> But it has been held by the Rangoon High Court<sup>7</sup> that an agreement between a mortgagor and mortgagee after preliminary decree for sale and before the final decree for sale, whereby the mortgagor is to be given an extension of time for the payment of decretal amount, falls within O 21 R 2 and not under this rule. The High Courts of Patna<sup>8</sup> and Lahore<sup>9</sup> hold that an application to set aside an execution sale, under O 21 R 90 is not a proceeding in execution and hence O 23 R 3 applies to such application. According to the Bombay High Court,<sup>10</sup> where a preliminary decree is passed in a suit for partnership accounts and an enquiry is pending before the commissioner for taking the accounts, the parties can enter into a compromise, as the proceedings before the commissioner are not proceedings in execution.

**Order 23 Rule 4 — Note 1**

1. (185) 7 All 359 (362)  
{ 82 } 11 Bom 631 (682)  
{ 70 } 12 All 392 (395) (F B)  
{ 95 } 19 Bom 846 (849)  
{ 88 } 11 All 228 (232)  
2. { 86 } 10 Bom 62 (64)  
{ 91 } 18 Cal 635 (639)  
3. { 95 } 17 All 106 (111) 22 Ind App 44 (F C)  
4. { 24 } AIR 1924 Lah 342 (343)

**Note 2**

3. (14) AIR 1914 Mad 1 (1)  
4. { 18 } AIR 1918 Nag 110 (111)  
{ 24 } AIR 1924 Lah 312 (313)  
{ 12 } 17 Ind Cas 752 (752) (Mad)  
{ 16 } AIR 1916 Mad 604 (604)

6. { 02 } 4 Ind Cas 1040 (1041) 33 Mad 78 (79)  
7. { 28 } AIR 1928 Rang 191 (195) 11 Rang 255  
8. { 21 } AIR 1921 Pat 107 (107) 6 Pat L Jour 253  
9. { 29 } AIR 1929 Lah 886 (887)  
10. { 02 } 11 Bom 76 (82)

O. 23 R. 4  
Note 2

Whatever its other effects may be, Rule 4 does not in any way affect the rule of estoppel<sup>11</sup> Thus, where an application for execution is allowed to be dismissed on the basis of a compromise which provides for a fresh application if the compromise was not carried out and the compromise is broken, the defendant is estopped from contending that as O 23 R 3 does not apply to applications for execution, the decree-holder cannot file a fresh application for execution as on the basis of the compromise<sup>12</sup>

A pre decree arrangement concerning the execution of the decree cannot be set up in bar of execution in the executing Court But it can be enforced by means of a separate suit<sup>13</sup>

## ORDER XXIV.

### PAYMENT INTO COURT

O. 23 R. 1

**R. 1. [S. 376.]** The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

Deposit by defendant  
of amount in satisfaction  
of claim.

[1877, S. 376; R. S. C., O. 22 R. 1.]

### Synopsis

- |                                     |   |
|-------------------------------------|---|
| 1. Scope of the Rule                | 5. Suits for accounts.                              |
| 2. Payment into Court.              | 6. "At any stage of the suit."                      |
| 3. Suit to recover debt or damages. | 7. Insolvency of defendant after payment into Court |
| 4. Suit for injunction.             |   |

### Other Topics (miscellaneous)

Expression of willingness to pay See Note 2

May deposit in Court See Notes 1 and 2

**1. Scope of the Rule.** — This rule deals with payments into Court in satisfaction of a claim *after* the institution of a suit and *before* decree<sup>1</sup> Payments made after decree are dealt with by O 21 R 1 This rule does not apply to payments made into Court under Section 83 of the Transfer of Property Act, *before* the institution of the suit,<sup>2</sup> nor to payments made in pursuance of the order of the Court under the provisions of O 9 R 13 setting aside an *ex parte* decree<sup>3</sup>

The rule contemplates an unconditional deposit of a sum of money in Court by the defendant<sup>4</sup> This is contrary to the corresponding English Rules of the Supreme Court (O 22 Rules 1 and 6), whereunder a deposit may be made coupled with a denial of liability

11. ('12) 13 Ind Cas 81 (82) (Mad)  
(30) AIR 1930 Pat 615 (617, 618) 10 Pat 173  
(80) 6 Cal 27 (30, 31)  
12. ('12) 13 Ind Cas 81 (82) (Mad)  
13. ('25) AIR 1929 Cal 527 (530)

### Order 24 Rule 1 — Note 1

1. See Note 6 below  
2. [See ('11) 10 Ind Cas 393 (397) 35 Mad 209.

to run )  
{ See also (1859) 7 Moo Ind App 223 (35c)  
(84) 6 All 393 (402) }

**2. Payment into Court.** — A mere expression of willingness to pay made in a written statement is not equivalent to a payment into Court<sup>1</sup> nor, it is conceived, will a payment into a post office by a money order be a valid payment under this rule unless and until it reaches the Court's hands.<sup>2</sup> But a payment into Government treasury under rules framed by the High Court will be a payment into Court.<sup>3</sup> Where moneys in the hands of the defendant were sought to be attached before judgment, and the defendant deposited the same into Court and the attachment was subsequently found not to have been validly made, the money deposited was construed to be a payment under this rule.<sup>4</sup>

**O. 24 R. 1**  
**Notes 2-7**

**3. Suit to recover debt or damages.** — The rule applies to all suits to recover a debt or damages, though there may be other reliefs claimed in the suit.<sup>1</sup> It does not apply to a suit for a *return of goods* taken or their value.<sup>2</sup>

**4. Suit for injunction.** — A suit for injunction for obstruction to light and air is not a suit to recover a debt or damages within the meaning of this rule, even though the Court may, in a proper case, allow damages in lieu of injunction. According to the practice of the High Court of Bombay, however, where a defendant deposits money into a Court in a suit for injunction in satisfaction of the plaintiff's claim and the Court allows damages in lieu of injunction to the extent of the amount deposited, the Court should apply the provisions of Rule 4 in directing the payment of costs.<sup>1</sup>

**5. Suits for accounts.** — The rule does not apply to suits for accounts.<sup>1</sup> But the Court has, in such suits, the power to direct the payment into Court of admitted sums in the possession of parties liable to account, or of persons in a fiduciary capacity, such a power is not, in any way, controlled by this rule.<sup>2</sup>

**6. "At any stage of the suit."** — These words show that the payment must be made before decree.<sup>1</sup> Note also the words "in full of the claim."

**7. Insolvency of defendant after payment into Court.** — According to English law where the defendant pays money into Court admitting liability to the plaintiff and then becomes a bankrupt, the plaintiff is secured creditor in respect of such amount. When the liability is denied, he is a secured creditor to the extent to which the claim is admitted or proved.<sup>1</sup>

## **R. 2. [S. 377.]** Notice of the deposit shall be given through

**O. 24 R. 2**

the Court by the defendant to the plaintiff, and  
the amount of the deposit shall (unless the Court  
otherwise directs) be paid to the plaintiff on his application.  
[1877, S. 377; R. S. C., O. 22 R. 4.]

	Note 2	Note 4
1.		
2.		
3.		
4. (27) AIR 1927 Rang 278 (278) 5 Rang 753.		Note 5
		1. (1883) 22 Ch D 611 (613), <i>Nichols v Evans</i>
		2. (1892) 3 Ch 226 (236), <i>Holles v Burton</i> .
		[See also (1875) 8 Ch D 84 (90), <i>London &amp; S. Jud</i>
		<i>cate v. Lord</i> ]
		Note 6
		1. (26) AIR 1926 Mad 1009 (1070).
		Note 7
		1. (1897) 2 Q B 316 (319, 320), <i>Re Gordon</i>

secured debts — The rule applies to suits to enforce charge on mortgage.  
(1877) 1 Ch D 93 (103, 105), *Cootes v. Ford*  
2. (1857) 1 H & N 572, *Allan v Dunn*

O. 24 R. 2  
Notes 1-2

### Synopsis

1 Form of the notice. | 2 "Unless the Court otherwise directs"

**1. Form of the notice.** — The words "in writing" which occurred in the old Code have been omitted as unnecessary in view of Section 142 of the present Code under which all notices under the Code should be in writing.

Where the deposit made is on the challenge of the plaintiff and in the presence of the plaintiff, a separate notice is not necessary<sup>1</sup>.

For form of notice, see Appendix H, Form No. 11

**2. "Unless the Court otherwise directs."** — The Court has a discretion under this rule to refuse to allow the plaintiff to withdraw the money deposited in Court, but such discretion must be exercised reasonably. "In a case where the money sued for is due on a promissory note, it would be unreasonable, in the absence of special circumstances, not to allow the plaintiff to take the money out"<sup>1</sup>. But where the amount in deposit is claimed by different parties, no party can, without an order of the Court, withdraw the amount<sup>2</sup>. The money deposited to the credit of the plaintiff but not withdrawn by him should not be treated as the defendant's money and paid over to the person who attaches the same in execution of his decree against the defendant<sup>3</sup>.

It is the practice of the Court to appropriate payment upon a bond first to the interest due, and then to the principal<sup>4</sup>.

O. 24 R. 3

**R. 3. [S. 378.]** No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

[1877, S. 378.]

Interest on deposit not allowed to plaintiff after notice.

### Synopsis

- 1 Scope of the Rule.
2. Tender without payment.
3. Execution proceedings.

### Other Topics (miscellaneous)

Plaintiff, whether entitled to interest after notice - Tender and payment, refusal to accept — Effect of deposit. See Note 1. See Note 11

**1. Scope of the Rule.** — No interest can be claimed by the plaintiff after he receives notice of the payment into Court<sup>1</sup>.

#### Order 24 Rule 2 — Note 1

1. (35) AIR 1935 Mad 342 (344) (Plaintiff is not entitled to interest in such a case between date of deposit and date when he gets formal notice)

#### Note 2

1. (29) 26 Cal 766 (769)
2. (22) 16 Bom 141 (150)
3. (91) 15 Bom 681 (684)
4. (03) 28 All 25 (27)

#### Order 24 Rule 3 — Note 1

1. (197) 58 Cal 2d 177 (179) 270

wrongly refusing to withdraw deposit —



W

not be paid —  
and the plaintiff is entitled to interest even after the deposit <sup>4</sup>

**2. Tender without payment** — The general rule is that a creditor is not bound to accept a sum tendered which is less than what is due to him <sup>1</sup> This rule provides an exception to the general rule in that interest ceases to run on the deposit whether such deposit is in *full* satisfaction of the claim or *falls short* thereof But the plea of tender before action must in order to stop interest be accompanied by a payment into Court after the suit otherwise the tender is ineffectual <sup>2</sup> Where the defendant was restrained by an order of injunction not to pay the amount due by him on a bond to the plaintiff but the Court ordered him to deposit the amount in Court and he did not do so, he was held bound to pay interest from the date of the order <sup>3</sup> A deposit in Court before the due date, of money due upon a bond is not a valid tender of the debt <sup>4</sup> nor is a mere offer to pay the amount a valid tender <sup>5</sup> A valid tender if improperly refused stops interest <sup>6</sup>

As to the effect of a tender made to one of two joint promisees see the undermentioned cases <sup>7</sup>

**3. Execution proceedings.** — This Order does not apply to proceedings in execution <sup>1</sup> But the benefit of this rule has been extended by way of analogy to judgment debtors and the amount immediately deposited is <sup>2</sup>

## R. 4. [S 379] (1) Where the plaintiff accepts such amount

O. 24 R. 3

Procedure where plaintiff accepts deposit as satisfaction in part

as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant

was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim

tion suit.—Mortgagor is entitled to interest from service of summons on mortgagor

6 (0\*) 34 Cal 305 (323)

(03) 7 Cal W N 20 (723) (No valid tender—

2 (36) AIR 1936 Lah 76 (78)

7

Note 2

1 (78) 3 Cal 6 (16)

(78) 3 Cal 463 (471)

(See (78) 2 Cal L Rep 183 (184))

(

for the others mortgage discharge to the debtor)

(12) 16 Outh \* 25 Outh (1007)

(19) 12 Outh W R 20 (52)

[But see (67) 7 Outh W R 20 (100)]

O. 24 R. 4  
Notes 1-2

(2) Where the plaintiff accepts such amount as satisfaction

in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full.

#### Illustrations

(a) A owes B Rs 100 B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suits, A's conduct having shown that the litigation was necessary.

(c) A owes B Rs 100, and is willing to pay him that sum without suit. B claims Rs 150 and sues A for that amount. On the plaint being filed A pays Rs 100 into Court and disputes only his liability to pay the remaining Rs 50. B accepts the Rs 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

[1877, S. 379. Cf. R. S. C., O. 22 R. 6.]

#### Synopsis

1 "May prosecute his suit for the balance." { 2 Apportionment of costs.

1. "May prosecute his suit for the balance." — Where the plaintiff accepts the payment only in part satisfaction of his claim, he is entitled under this rule to prosecute the suit for the balance.

2. Apportionment of costs. — The Court has a discretion under this rule in awarding costs<sup>1</sup> and, in exercising such discretion, the Court ought to find which of the parties is most to blame for the litigation.<sup>2</sup> Where, at the settlement of issues, the defendant paid the amount into Court which plaintiff took out in part satisfaction and raised an issue as to damages and subsequently the plaintiff withdrew the suit accepting the same in full satisfaction of his claim, it was held that the plaintiff was entitled to his costs up to the settlement of the issues.<sup>3</sup> Where the suit is not one "to recover a debt or damages" within the meaning of this rule, the Court has full discretion to apportion costs under Section 35 of the Code.<sup>4</sup> In the undermentioned case<sup>5</sup> it was held that the principles of this rule applied to a suit for injunction and damages in respect of an infringement of a registered design.

Order 24 Rule 4 — Note 2

5

1. { 12 } 13 Ind Cas 200 (201) (Mad)

2. { 12 } 13 Ind Cas 188 (189) (Mad)

(94) 21 Cal 650 (683) (Defendant not blameable—  
He is entitled to his costs)

3. { 1863 } 1 Lom H C R O O 70 (71)

4. { 97 } 21 Bom 502 (509)

prior is liable to pay order's costs  
after date of offer)

## ORDER XXV.

### SECURITY FOR COSTS

R. 1. [Ss 380, 382 ] (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff<sup>11</sup> is, O. 25 R. 1

When security for costs  
may be required from  
plaintiff

or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1)

Residence out of British India

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India

### Local Amendments

#### ALLAHABAD

After the words property in suit add or that the plaintiff is being financed by a person not a party to the suit

#### MADRAS

The following shall be inserted as sub rule (4)

(4) In all cases in which an element of champerty or maintenance is proved the Court may on the application of the defendant demand security for the estimated amount of the defendant's costs or such proportion thereof as from time to time during the progress of the suit the Court may think just

#### NAGPUR

In Rule 1 (1) insert the words or that any plaintiff is being financed by a person not a party to the suit between the words other than the property in suit and the Court may

#### ODISH

111 the following as sub rules (4) and (5)

(4) Where the plaintiff has for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit the Court may order such person to be made a plaintiff to the suit if he consents and may either of its own motion or on the application of any defendant order such person within a time to be fixed by the Court

**O. 23 R. 1**  
**Note 1**

to give security for the payment of all costs likely to be incurred by any defendant in case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned, or may declare that he shall be debarred for claiming any right to, or interest in, the property in suit

(5) If such person declines to be made a defendant and may order him, within a time for the payment of all costs likely to be incurred by any defendant in case of his default the Court may declare that he shall be debarred from claiming any right to or interest in, the property in suit "

**RANGOON**

*Substitute the following*

*'Costs and security for costs in special cases —*

1 (1) Where at any stage of a suit it appears to the Court that a sole plaintiff is or (when there are more plaintiffs than one) that all the plaintiffs are plaintiffs of British India and that the plaintiff does not own any sufficient immovable property within the Court may either of its own motion or on the application of the plaintiff or plaintiffs within a time to order the plaintiff or plaintiffs to give security for the payment of all costs incurred and likely to be incurred by any defendant

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub rule (1)

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make an order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India "

*Synopsis*

- |  |  |
|--|--|
| 1 Scope, object and applicability of the Rule      | 11 Inherent power to order security for costs.               |
| 2 Residence outside British India                  | 12 "Suit for the payment of money"—Sub-rule (3)              |
| 3 "British India" See Note 1 to Section 1          | 13 Claim and cross-claim.                                    |
| 4 Trading corporations                             | 14 Appeal  |
| 5 Immovable property.                              | 15 Revision  |
| 6 "The Court may order"                            | 16 Other cases under the Code where security may be required |
| 7 Poverty of plaintiff                             | 17 Liability of a person standing surety.                    |
| 8 Where plaintiff is a minor                       | 18 Enforcement of security bonds given under this Rule       |
| 9. Where the plaintiff is a woman — Sub rule (3)   |  |
| 10 Where leave has been granted to sue as a pauper |  |

*Other Topics (miscellaneous)*

Plaintiff See Note 11  
Principle on which the Court should act See Note 6  
Security in suit by a foreigner See Notes 1 and 2  
Security in suits by undischarged insolvent See Note 7

Security in suits for administration and partition of property See Note 1  
Security in suit to enforce a religious trust See Note 1  
When to apply for security See Note 6

**1. Scope, object and applicability of the Rule** — This rule provides for the taking of security for the costs of the suit and O 11 R 10 provides for the taking of security for the costs of the appeal Security for costs of the suit may, under this rule,

be ordered to be given in the following cases —

O. 25 R. 1  
Notes 1-2

- (1) Where the sole plaintiff is, or where there are more plaintiffs than one, *all* the plaintiffs are, residing outside British India and none of them has sufficient immovable property in British India other than the property in suit
- (2) Where, in a *suit for money*, the plaintiff is a *woman* and she does not possess sufficient immovable property in British India

In *Bidhatree Dasse v Muttu Lall Ghose*,<sup>1</sup> Mr. Justice Sale observed as follows

'The object of the Section clearly is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realising their costs. But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant's costs of suit. In illustration I may refer to an administration suit by a creditor or legatee where the claim is admitted or to a suit on a mortgage or promissory note where there is no defence. Is it to be supposed that it was intended that the defendant in such cases should be in a position to ask as a matter of absolute right that security may be given for costs that he may choose to incur needlessly?'

And his Lordship held that no security should be demanded in such cases, even though the plaintiff is a woman having no sufficient immovable property within British India. See also the undermentioned cases.<sup>2</sup>

The provisions of the rule are wide enough to cover the case of *every* plaintiff, including a *minor* plaintiff<sup>3</sup> and will apply even though the defendant is himself a *resident outside British India*.<sup>4</sup> In the case of a *pauper plaintiff*, however, no security should be ordered to be furnished except in exceptional circumstances, inasmuch as it virtually deprives the plaintiff of the benefit of the order made in his favour under Order 33 of the Code.<sup>5</sup> As to when security for costs can be demanded from infants, see Note 8 below.

The rule does not apply to a reference under the Revenue Jurisdiction Act as there is no *suit* before the Court.<sup>6</sup> Irrespective of this rule, the High Court may, by Section 26 (3) of the Indian Patents and Designs Act, II of 1911, demand security for the costs to be incurred by the opposite party, from the person applying for the revocation of a patent, in proceedings under that Act.<sup>7</sup>

**2. Residence outside British India.** — "Residence" should be residence under such circumstances as will afford reasonable probability that the plaintiff will be forthcoming when the suit is decided.<sup>1</sup> A mere temporary residence at the time of the suit is not "residence" within the meaning of this rule.<sup>2</sup> Thus, a resident of a Native State temporarily staying in British India for the purpose of legal proceedings to get his wife back from the person who had enticed her cannot be said to be "residing" in British India.<sup>3</sup> But where a subject of Bhopal, a Native State, was living for four years at Poona and there was nothing to show that he had come to Poona on a mere

#### Order 25 Rule 1 — Note 1

1. (74) 21 Cal 831 (836).

Act (II of 1911)

#### Note 2

1. (78) 3 Bom 227 (223)

[See also (32) AIR 1932 Sind 33 (34) 26 Sind

O C 119)

3. (98) 111 Bom 100 (101)

100 L.S.

# **O. 25 R. 1** **Notes 2-6**

temporary purpose, it cannot be said that he resides outside British India.<sup>4</sup> Where there are several co-plaintiffs, all of them must reside outside British India, if one of them resides ordinarily within the jurisdiction no security will be ordered from any of them although the resident co-plaintiff may be a bankrupt.<sup>5</sup> Where a plaintiff leaves the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided.<sup>6</sup> But security will not be ordered on an affidavit that plaintiff is about to leave the country.<sup>7</sup>

## **3. "British India."** — See Note 1 to Section 1.

## **4. Trading corporations.** — Trading corporations comprise —

(a) chartered companies,

(b) companies incorporated by special Acts of Parliament, such as railway companies and the like including joint stock companies incorporated under special Acts, and

(c) companies incorporated under the Companies Act<sup>1</sup>

A trading corporation ought to have a place of foundation. It may have more than one residence. But it "dwells" at the place where it carries on its general administrative business and not where it carries on even a considerable part of its other businesses.<sup>2</sup> See Note 3 to Section 20.

## **5. Immovable property.** — See Note 4 to Section 16, ante

A beneficial interest in a part of the surplus income derived from immovable property cannot be said to be immovable property.<sup>1</sup> But a lease is a transfer of an interest in immovable property and a leasehold interest is therefore itself immovable property within the meaning of this rule.<sup>2</sup>

**6. "The Court may . . . order."** — The Court has a discretion under this rule to require or not, security for costs from the plaintiff.<sup>1</sup> There is no rigid rule for the exercise of such discretion, but the Court will not ordinarily make an order for security, unless it is shown that the exercise of power is necessary for the reasonable protection of the interests of the defendant.<sup>2</sup> The order should be in the Judge's own handwriting<sup>3</sup> and should contain reasons for ordering such security.<sup>4</sup> No specific sum need, however, be mentioned in the order, for which security should be granted.<sup>5</sup> A defendant asking that security may be taken from the plaintiff under this rule should

4. ('80) AIR 1930 Bom 220 (221)

5. (1755) 1 Dick 282 (282), *Winthrop v Royal Exchange Co*

(1801) 1 East 431 (432), *McConnell v Johnston* (1832) 10 Q B D 13 (15), *D Hormusjee v Grey*

6. ('67) 8 Suth W R 217 (217)

7. (1795) 2 Aust 552 (553) 1 R R 201n, *Adams v Colethurst*

### **Note 4**

1. Halsbury Laws of England, Vol 8, page 304

2. Halsbury Laws of England, Vol 8, page 312, paragraphs 702, 703

### **Note 5**

1. ('94) 21 Cal 832 (835)

2. ('71) 7 Beng L R App 60 (60)

### **Note 6**

1. ('90) 17 Cal 610 (613)

( '99) 3 Cal W N 753 (754).

( '04) 6 Bom L R 1072 (1072) (The principle on which the Court acts is to see whether, at first sight, the suit appears bona fide and whether the defence is such as is likely to succeed)

( '05) 7 Bom L R 495 (497)

( '39) AIR 1939 Cal 154 (154) ILR (1938) 1 Cal 633

( '36) 164 Ind Cas 560 (560) (Cal)

2. ('94) 21 Cal 832 (836)

( '36) 161 Ind Cas 560 (560) (Cal) (Court is not bound to exercise discretion provided requirements of the rule as to nature of property are satisfied)

( '39) AIR 1939 Cal 154 (154) ILR (1933) 1 Cal 633

3. ('83) 1839 All W N 241 (241) (Decision under O 41 R 10)

4. ('03) 7 Cal L Jour 312 (314).

5. ('96) 18 All 101 (103) (FB) (Decision under O 41 R 10)

not be guilty of delay in making the application<sup>6</sup> He should supply full information on all necessary points<sup>7</sup>

An order for security will not be made before the defence has been filed<sup>8</sup> or after the judgment has been passed<sup>9</sup>

**7. Poverty of plaintiff.** — The mere poverty or insolvency of the plaintiff is not a sufficient ground for ordering him to give security for costs as a condition precedent to his going on with the suit<sup>1</sup> 'The general rule is,' said Bowen, L J, in *Cowell v Taylor*,<sup>2</sup> "that poverty is no bar to a litigant that, from time immemorial, has been the rule at common law, and also, I believe, in equity" There is, however, an exception to this rule introduced for the purpose of preventing abuse, that is, if an insolvent sues as *nominal* plaintiff for the benefit of somebody else, he must give security, in that case the nominal plaintiff is a mere shadow<sup>3</sup> Thus, where A, an undischarged bankrupt, and his daughter B sued C for damages for breach of promise of marriage and it was contended by C that the suit was brought really for the purpose of benefiting A out of his daughter's engagement and that the daughter B had no property within British India, it was held that an order for security should be made against A<sup>4</sup> But an insolvent plaintiff who is bound to hand over the fruits of his suit to the Official Assignee cannot be said to be a nominal plaintiff,<sup>5</sup> especially if the insolvent is also to benefit himself by the result of the suit as, for instance, where the suit is in respect of a sum earned by him subsequent to his adjudication and the amount claimed is in excess of the amount of his debt provable in insolvency<sup>6</sup>

**8. Where plaintiff is a minor.** — As has been seen already in Note 1 *ante*, the rule applies to *all* plaintiffs including minors But, save in exceptional circumstances neither a minor nor his next friend should be called upon to give security for costs<sup>1</sup> A suit on behalf of a minor plaintiff should not be stopped merely on the ground that the next friend is unable to give security for costs The other parties are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for the benefit of the minor or if there is a just cause other than the poverty of the next friend to have him removed<sup>2</sup>

**9. Where the plaintiff is a woman** — Sub-rule (3). — It has always been a principle of the law relating to security for costs that persons privileged from legal

6 ('84) 1884 All W N 99 (99)  
(05) 7 Bom L R 485 (496) (About two years

apply before judgment)

Note 7

1. ('78) 3 Bom 241 (241)  
(32) AIR 1932 Sind 33 (35) 26 Sind L R 21  
(85) 7 All 542 (545 546) (Decision under O 41,

Note 8

of the  
suit is

(15) AIR 1915 Cal 595 (595) (Decision under O 41,

O. 25 R. 1  
Notes 9-11

process can be called upon to give security<sup>1</sup> and this sub rule has been enacted in view of the provisions of Section 56 of the Code which provide that a woman is exempted from arrest in execution of a decree<sup>2</sup> The Court has, however, a discretion in the matter and the principle to be adopted in the exercise of such discretion has been thus stated by Mr Justice Davar in *Sonabai v Tribhuvandas*<sup>3</sup> "I have always been most averse to making orders against women for depositing security for the defendant's costs when I find that such an order would embarrass them and hamper them in the conduct of their cases In the case of poor women, such an order amounts to a denial of justice to them Unless the suit is on the face of it vexatious, or is one which I feel is filed merely for the harassment of the defendant, I do not make an order against a woman plaintiff for security for defendant's costs — when she says she is not in a position to give such security and I believe her statement"<sup>4</sup> This principle was approved in a later case<sup>5</sup> by the same High Court though it was recognized that "the discretion given by the rule is one of the most difficult that a Court can be called upon to exercise" In no case will a Court order a female plaintiff to give security unless grounds are made out tending to show that the defence is true<sup>6</sup>

A suit in which there are male and female plaintiffs, cannot properly be described as a 'suit in which the plaintiff is a woman'<sup>6</sup>

**10. Where leave has been granted to sue as a pauper.** — There is a conflict of opinions as to whether security can be ordered against a plaintiff who has been allowed to sue in *forma pauperis* On the one hand, it has been held by the High Court of Calcutta<sup>1</sup> that this rule does not apply to such cases and that the Court has no power to order security against a plaintiff suing in *forma pauperis*, the reason being that to do so would be to render the leave granted under O 33 R 8 nugatory The High Court of Bombay<sup>2</sup> has held that where an order is made against the plaintiff for security for costs and subsequently he is granted leave to sue as a pauper, the order as to security ceases to operate, provided the leave is granted before the time limited for giving security has expired On the other hand, it has been held by the High Courts of Lahore,<sup>3</sup> Madras<sup>4</sup> and Rangoon<sup>5</sup> that the rule is wide enough to cover the case of a pauper plaintiff also, though, as a rule, very special grounds must be shown for granting an order for security for costs against him

**11. Inherent power to order security for costs.** — There is a difference of opinion on the question whether, apart from the provisions of this rule, the Court can order security for costs against a plaintiff It has been held in the undermentioned cases<sup>1</sup> that the Court has such power to act in proper cases, as for example, where

Note 9	clearly come within its purview)	Note 10
1 (1834) 2 Myl & K 401 (403) <i>Aldbrough v Burton</i>	1. ('08) 7 Cal L Jour 312 (313, 314)	Note 10
her	172	1. ('08) 7 Cal L Jour 312 (313, 314)
:	2.	2.
:	3.	3.
:	4.	4.
(190) 3 Cal W N 753 (754)	35 AIR 1935 Mad 230 (231) (If pauper is a mere creature in the hands of persons able to find security, order for costs can be passed.)	10)
(See also (35) AIR 1935 Mad 230 (231) (Pauper	5 (28) AIR 1923 Rang 244 (245)	5
"	[But see (17) AIR 1917 Low Bur 163 (164) 8 Low Bur 387 ]]	17)
6	Note 11	Note 11
"	1. (32) AIR 1932 Sind 33 (35) 26 Sind L R 21.	26 Sind L R 21.
"	131) 20 Ind Cas 703 (704) (Cal)	20 Ind Cas 703 (704) (Cal)
"	76) 2 Cal 233 (253) 4 Ind App 23 (P C)	76) 2 Cal 233 (253) 4 Ind App 23 (P C)



the plaintiff suing is not the real plaintiff but a mere puppet in the hands of others. A contrary view has however been expressed by Cuming, J., in the undermentioned case<sup>3</sup> to the effect that the Court has no inherent power to order security for costs apart from the provisions of this rule

O. 25 R. 1  
Notes 11-14

**12. "Suit for the payment of money" — Sub-rule (3).** — A suit which, though not exclusively for money, will result in a decree for money on the relief sought, is a "suit for the payment of money" within the meaning of this rule<sup>1</sup>. Thus, a suit to recover possession of certain ornaments and other moveable properties, or in the alternative to obtain a decree for their value is a "suit for the payment of money"<sup>2</sup>. Similarly, a suit by an actress for damages for wrongful dismissal<sup>3</sup> or a suit on which a claim is made for a share in a partnership business<sup>4</sup> is a "suit for the payment of money". But the main claim in the suit must be one for money, the other reliefs being only incidental. A suit for dissolution of partnership and accounts and for the recovery of *stridhanam* property<sup>5</sup> or a suit for the administration of an estate consisting largely of immovable property and in which it may ultimately be necessary to sell the estate and distribute the proceeds in money,<sup>6</sup> is not a "suit for the payment of money" within this rule.

**13. Claim and cross-claim.** — A defendant cannot as a general rule be ordered to give security for costs<sup>1</sup> inasmuch as he is a person *compelled* to litigate and take proceedings in defence of the claim<sup>2</sup>. But where there is a *claim and a counter claim* the position is different. The substantial position of the parties will have to be taken into consideration<sup>3</sup>. If the claim and the cross claim arise out of *one subject-matter* a defendant setting up a cross claim will not be ordered to give security<sup>4</sup>. If, however, the cross claim is in respect of a matter *wholly distinct* from the claim, an order for security may be made<sup>5</sup>. In other words, if the counter claim is really in the nature of a *cross action* a defendant out of jurisdiction will as a rule be required to furnish security for costs,<sup>6</sup> but if a cross claim arising out of the same subject matter is, in substance, *the defence to the claim*, the Court has a discretion to refuse to order such defendant to give security<sup>7</sup>.

**14. Appeal.** — No appeal lies under the Code from an order under this rule. It is, however, appealable under Clause 15 of the Letters Patent as a "judgment"<sup>1</sup>. Where

(74) 22 Suth W R 188 (148)  
[See also (88) AIR 1938 Bom 510 (512) 1 L R  
(1938) Bom 748 (Applications under Sec 115,

6. (25) AIR 1923 Rang 300 (300) 3 Rang 311.  
(05) 7 Bom L R 495 (496, 497)  
(78) 10 Beng L R App 25 (25).

Note 13

1. (1815) 6 Launt 379 (379), *Baxter v Morgan*  
(1876) 2 Ch D 531 (532), *Re Percy v Manning*

order of the nature provided for in O 25 R 1]]  
2. (24) AIR 1924 Cal 251 (252, 254, 256) 50  
Cal 853

Note 12

1. (08) 111 Bom 602 (603, 611)  
2. (12) 14 Ind Cas 290 (290) (Cal)  
(03) 27 Bom 100 (101, 103) (Suit for damages  
and return of presents)  
(30) 17 Cal 610 (613)  
(33) 23 Bom 100 (100)  
3. (13) 18 Ind Cas 217 (219) (Cal)  
4. (03) 5 Bom L R 661 (662)  
5. (23) AIR 1923 Cal 316 (317)

Note 14

1. (05) 32 Bom 602 (603, 610).  
(03) 26 Mad 501 (503)

**O. 25 R. 1 Notes 14-18** the plaintiff deposits in Court security for costs and ultimately the suit is decreed in his favour, the defendant appealing against the decree is not entitled to an order for detaining in Court, the money deposited by the plaintiff, pending the appeal<sup>2</sup>

**15. Revision.** — A Court will be acting "illegally" in the exercise of its jurisdiction in ordering security for costs in a case to which this rule does not apply, as where it orders security for costs in an administration suit which is not a "suit for the payment of money" within this rule<sup>1</sup> Similarly, it will be acting with "material irregularity" in the exercise of its jurisdiction if it orders security for costs against a plaintiff suing as a pauper, in the absence of exceptional circumstances<sup>2</sup> In such cases, therefore, a revision will lie against the orders so passed See also the undermentioned case<sup>3</sup>

**16. Other cases under the Code where security may be required.** — The following are some of the other provisions of the Code under which security may be required by the Court —

- (1) O 16 R 16 (Security from witness for his attendance)
- (2) O 21 R 26 (Security from judgment debtor)
- (3) O 23 R 8 (Insolvency of plaintiff)
- (4) O 32 R 6 (Security from next friend or guardian *ad litem* of minor)
- (5) O 37 R 3 (Summary suits on negotiable instruments)
- (6) O 38 Rules 1, 2 and 5 (Arrest and attachment before judgment)
- (7) O 40 R 3 (From receiver)
- (8) O 41 Rules 5 and 6 (Stay of execution)
- (9) O 41 R 10 (Security for costs of appeal)
- (10) O 45 Rules 7 and 10 (In Privy Council appeals)
- (11) O 45 R 13 (Stay of execution in Privy Council appeals)

**17. Liability of a person standing surety.** — A was surety for costs for B, and the surety bond provided that if B failed to obey the order of the Court, the property of A would be liable, and that if the property proved insufficient, A would be personally liable There was no provision for the principal debtor being proceeded against in the first instance It was held that a failure to execute the decree against B in the first instance did not amount to a release of the surety's liability<sup>1</sup>

**18. Enforcement of security bonds given under this Rule.** — The proper mode of enforcing a surety bond given under this rule is the one indicated in Section 145 (c) of the Code For decisions under the old Code, see the undermentioned cases<sup>1</sup>

**O. 25 R. 2**

**R. 2. [S. 381.]** (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

2. (70) 4 Beng L R O C 92 (93)

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of jurisdiction and order is open to revision)

**Note 17**

1. ("26) AIR 1926 All 657 (658)

**Note 18**

1. (60) 5 Cal 437 (433) (By assignment and institution of suit on assigned bond)  
(94) 19 Bom 694 (696) (Do)  
(03) 31 Cal 162 (163) (Do)  
(01) 24 Mad 637 (639)

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant

[1877, Ss 380, 381, 1859, S 35]

### Local Amendments

#### BOMBAY

The following shall be *added* as sub rule (4)

(4) The provisions of Section 5 of the Indian Limitation Act 1908 shall apply to applications under this rule

#### RANGOON

##### *Substitute for Rule 2*

2 Where it is proved to the satisfaction of the Court that the plaintiff is deriving assistance from or is being maintained by a person in consideration of a promise to give to such person a share in the subject matter or proceeds of the suit or in consideration of having transferred his interest in the subject matter of the suit the Court may either of its own motion or on the application of any defendant—

(a) award costs on a special scale to be decided by the Court and approximating to the actual costs reasonably incurred by the defendant

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n

### Synopsis

- |  |              |
|--|--------------|
| 1 Scope of the Rule                                | 3 Notice     |
| 2 Dismissal under this Rule if <i>res judicata</i> | 4 Limitation |
|  | 5 Appeal     |

1 **Scope of the Rule** — The Court has power to extend the time for furnishing security under Section 148<sup>1</sup> Sub rule (2) enables the Court to restore a suit dismissed under sub rule (1)<sup>2</sup> The rule applies to a suit as a *whole* and not in regard to particular plaintiff or plaintiffs alone<sup>3</sup>

2 **Dismissal under this Rule, if *res judicata*** — A suit dismissed under this rule for failure to furnish security for costs cannot be said to have been heard and

#### Order 25 Rule 2 — Note I

- 1 (84) 6 All 250 (252)  
 (7) 2 Cal 272 (273)  
 (84) 10 Cal 557 (61) 11 Ind App (P C)  
 (76) 2 Cal 128 (129)  
 [See also (90) 17 Cal 512 (513) 1 Ind App 1

#### (1 C) (Case of appeal)

- 2 (86) 8 All 315 (319) 13 Ind App 37 (P C)  
 3 (37) AIR 1937 Cal 58 (59) 63 Cal 609 (Suit by male in law and mother— On default in furnishing security suit cannot be dismissed against mother only in such cases security should not be ordered)

O. 25 R. 2  
Notes 2-3

finally decided" within the meaning of Section 11 of the Code and cannot operate as *res judicata* in a subsequent suit between the parties <sup>1</sup>

3. **Notice.** — The general principle is that no order affecting a party should be made without notice to him <sup>1</sup>

4. **Limitation.** — The limitation for an application to set aside a dismissal under this rule is thirty days from the date of the dismissal, under Article 163 of the Limitation Act, 1908

5. **Appeal.** — Under the old Code, an order under this rule was held to be a decree and appealable as such <sup>1</sup> Under the present Code, the order is only an *appealable order* [See O 43 R 1 (n)] No appeal will lie, however, from such an order passed in a suit in which a decree itself is not open to appeal See Section 104

### Local Amendments

#### NAGPUR

After Rule 3, add the following new Rule 3

O. 25 R. 3  
(Nagpur)

'3 (1) Where any plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it to give security for the payment of all costs incurred and likely to be incurred by any  
; furnished within the time fixed,  
far as his right to, or interest in,  
-e shall be debarred from claiming

any right to, or interest in, the property in suit

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of Rule 2 shall apply *mutatis mutandis* to such application "

#### RANGOON

Add the new Rule 3

O. 25 R. 3  
(Rangoon)

"3 (1) In the event of security demanded under Rule 1 or Rule 2 not being furnished within the time fixed the Court shall make an order dismissing the suit unless the plaintiff is permitted to withdraw therefrom

(2) Where a suit is dismissed under this rule the plaintiff may apply for an

(3) The order of dismissal shall not be set aside unless notice of such application has been served on the defendant "

#### Note 2

- 1 (O2) 26 Bom 637 (640) (Suit )  
(82) 6 Bom 482 (486) (Defence)

#### Note 3

1. (83) 5 All 350 (352)  
(84) 5 Mad 265 (266)

#### Note 5

1. (86) 8 All 103 (111)

# ORDER XXVI.

## COMMISSIONS

### *Commissions to examine witnesses*

**R. 1. [S. 383.]** Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

O. 26 R. 1

Cases in which Court may issue commission to examine witness.

[1877, Ss. 383, 385; 1859, S. 175. See S. 75.]

### *Synopsis*

#### 1. Scope of the Rule.

1a. Applicability to proceedings under other special or local Acts.

2. "May in any suit issue."

3. "Who is exempted under this Code."

4. "Who is from sickness or infirmity unable to attend."

5. Procedure where evidence is taken on commission.

6. Arbitration.

7. Appeal.

8. Revision.

### *Other Topics (miscellaneous)*

Commission—When Court may not issue See Note 1

Notice to opposite side, whether necessary See Note 2

Pardanashin ladies See Note 3

Party applying must procure attendance of witnesses See Note 5

Right of opposite party to cross-examine. See Note 5

**1. Scope of the Rule.**—The grounds upon which a commission can be issued are specified in this rule and in Rules 4 and 5 *infra*, they ought not to be relaxed or nullified because the witness is a man of rank or is a man of social status<sup>1</sup> and it will be derogatory to him to appear personally in Court<sup>2</sup>

The Court can issue a commission even after remand<sup>3</sup> The issue of a commission being a matter of routine, the successor of a Judge has power to cancel the issue of a commission made by his predecessor<sup>4</sup>

See also Note 1 to Section 75, *ante*

**1a. Applicability to proceedings under other special or local Acts.**—Rules 1 to 8 of this Order, dealing with the issue of commission for the examination of witnesses, have been made applicable to enquiries and proceedings under the under-mentioned Acts<sup>5</sup>

#### Order 26 Rule 1 — Note 1

1. (17) AIR 1917 Bom 155 (157) *111 Bom 136* (OS) 31 Mad 60 (61)

2. (OS) 23 Mad 23 (35, 36)

3. (25) AIR 1925 Lah 33 (41) & Lah 252

4. (30) AIR 1930 Rang 815 (316)

#### Note 1a

1. The Punjab Sikh Gurdwaras and Shrines Act (VI of 19-4), S. 24 (4). The Official Trustees Act

(III of 1913), S. 20. The Madras Ganjam and Vizagapatam Act (XIV of 1933) R. 16. The Administrator Generals' Act (III of 1913) S. 46. The Bengal Tenancy Act (VIII of 1905) S. 31 (b). The Presidency Towns Insolvency Act (III of 1909) S. 37. The Indian Naturalisation Act (VII of 1906), S. 11. The Charitable and Religious Trusts Act (XIV of 1920), S. 11. The Chota Nagpur Tenancy Act (VI of 1909), S. 263 (j).

O. 26 R. 1  
Note 2

2. "May in any suit issue."—The general trend of opinion is that the issue of a commission is a matter of *judicial discretion*<sup>1</sup>. The High Court of Madras, has, however, held in the undermentioned cases<sup>2</sup> that the word "may" must be read as equivalent to "is given authority to" and that a commission should issue as a *matter of right* unless the application for commission amounts to an abuse of the process of the Court. As a general rule, an application will not be granted unless—

- (1) the application is made *bona fide*,
- (2) the issue in respect of which the evidence is required is one which the Court ought to try,
- (3) the witness to be examined would give evidence material to the issue, and,
- (4) there are some good reasons why the witness cannot be examined in Court<sup>3</sup>.

But the Court has not the absolute discretion or inherent power to issue a commission except when authorized by the provisions of the Code, nor, according to the general trend of opinion, is the Court *bound* to issue a commission simply because all the conditions laid down in the rule exist. Where the examination on commission may result in *manifest injustice* to any party, or where it is not calculated to permit of the evidence being *tested fairly*, or when the application is made to avoid cross examination before the Court, the Court is not bound to issue a commission<sup>4</sup>. The difference between the examination of a witness on commission and a *viva voce* examination in open Court is so greatly to the disadvantage, almost invariably, of the opposite party that the Court should very jealously inquire, in every case, into the reason for the commission<sup>5</sup>. The question is whether the Courts can be said to have acted with jurisdiction in taking away from a litigant the right which he undoubtedly has of having the witness brought before the Court in accordance with the normal procedure<sup>6</sup>. Regard must always be had to the possibility of the witness not being a credible witness in which case the opportunity of noting his *demeanour*<sup>7</sup> and of hearing the exact and precise answers given by him would be lost<sup>8</sup>. This is specially so in a case where a party accused of fraud seeks to examine himself on commission<sup>9</sup>.

The fact that the witness sought to be examined is *interested*, or that the case of the party asking for the issue of the commission is improbable<sup>10</sup> or that the Judge thinks that no useful end would be attained by the evidence<sup>11</sup> is, however, no ground *per se* for refusing to issue a commission. See also the undermentioned case<sup>12</sup>.

As a matter of practice, notice ought to be given to the opposite party before ordering a commission<sup>13</sup>.

#### Note 2

1. (99) 23 Bom 626 (799)

(99) 26 Cal 650 (652)

6 (27) AIR 1927 Mad 524 (525)

7. (99) 23 Bom 626 (628)

(33) AIR 1933 Mad 48 (53) (In cases involving large amounts even women should rarely be examined on commission)

8. (24) AIR 1924 Cal 971 (972, 973)

9. (23) AIR 1923 P C 73 (76) (P C)

10 (30) AIR 1930 Sind 83 (86)

11. (71) 15 Suth W R 447 (448)

(11) 12 Ind Cas 74 (75) (Mad)

- (11) 12 Ind Cas 74 (75) (Mad)  
(See (35) AIR 1935 Mad 21 (21) 58 Mad 400 (Madras Civil Rules of Practice—R 59—Commission—Application for, not made at first hearing—It need not necessarily be refused if made afterwards—Party is entitled to commission subject to risk of not being completed and returned in time))

3. (13) 19 Ind Cas 643 (644) (All)

- 4 (05) 28 Mad 29 (35, 37)

- 5 (73) 20 Suth W R 253 (255).

It is open to the Court to order the issue of commission on condition of the applicant depositing in Court security for the costs of the opposite party in regard to the commission<sup>14</sup>

**O.26 R.1**  
**Notes 2-5**

**3. "Who is exempted under this Code."**—Section 132 of the Code recognizes the right of *pardanashin* ladies who according to their custom can claim the privilege of being examined on commission<sup>1</sup> The fact that an allegation of immorality is made against such a lady<sup>2</sup> or that she had appeared on a former occasion in public<sup>3</sup> or in Court,<sup>4</sup> is no ground for refusing to issue a commission In the undermentioned case<sup>5</sup> a commission was issued even though the lady was old and had entirely abandoned the *pardah*

But where no custom of not appearing in public is made out,<sup>6</sup> or the custom alleged is of a varying and uncertain character,<sup>7</sup> the Court will not issue a commission A *pardanashin* lady is not entitled to decline to be examined on commission at any place other than that of her choice<sup>8</sup>

A religious preceptor is not entitled to be examined on commission on the ground of his social status<sup>9</sup>

**4. "Who is from sickness or infirmity unable to attend."**—In the case of persons who, owing to illness, are unable to attend the Court, a commission ought not to be refused<sup>1</sup> If sickness or infirmity is alleged, the Court will, of course, have to take into account the character and gravity of the sickness and the risk consequent upon the refusal to issue a commission<sup>2</sup> Infancy, however, is not a ground for the issue of a commission<sup>3</sup>

**5. Procedure where evidence is taken on commission.**—It is the duty of the party obtaining the commission to take all such steps as are necessary to secure the attendance of the witnesses before the commissioner<sup>1</sup> The examination is on the same footing as that in Court<sup>2</sup> and the opposite party is entitled to cross examine the witnesses,<sup>3</sup> though where the cross examination is unnecessarily prolonged or amounts to an abuse of process the Court can fix a time limit and order the cross examination to be finished<sup>4</sup> But the commissioner has no power to disallow questions and give

14. (36) AIR 1935 Pat 33 (34)

**Note 3**

1 (28) AIR 1928 Cal 814 (815)

(25) AIR 1925 Mad 905 (906) (Plaintiff, a *gosha* lady applying for commission for examining herself—Application should be granted)

(83) AIR 1933 All 551 (553) 55 All 666 (Order insisting on personal attendance in Court, of *pardanashin* lady, is wrong)

(See however (72) III Suth W M 230 (230))

Where *pardanashin* lady can be examined in Court in a *paleh*—Court can refuse

2 (01) 5 Cal W N cccxxx (cccxxx)

3. (99) 26 Cal 650 (652)

regular exercise of jurisdiction))

9 (17) AIR 1917 Bom 153 (157) 42 Bom 136

**Note 4**

1. (23) AIR 1923 Mad 321 (322) 46 Mad 574

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defendant in a suit)

3. 2 Hyde 152

**Note 5**

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7. (90) 14 Bom 594 (596)

8 (21) AIR 1921 Cal 229 (231) 48 Cal 449

[See however (37) AIR 1937 Pat 31 (22)]

(24) AIR 1924 Pat 234 (235) (Commissioner can stop proceedings if cross-examination is abusive)

O. 26 R. 4

Persons for whose examination commission may issue.

**R. 4. [S. 386.]** (1) Any Court may in any suit issue a commission for the examination of —

- (a) any person resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and
- (c) *any person in the service of the Crown* who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

[1877, Ss. 383, 384, 385, 386; 1859, Ss. 175, 176.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "any civil or military officer of the Government"

### Synopsis

- |   |   |
|---|---|
| 1. Scope and applicability of the Rule.                     | 5. Commission to England to take evidence.    |
| 2. "May issue."   | See Rule 5                                    |
| 3. Plaintiff asking his evidence to be taken on commission. | 6. Second commission on failure of the first. |
| 4. Defendant asking his evidence to be taken on commission. | 7. Appeal.                                    |
|   | 8. Revision.                                  |

### Other Topics (miscellaneous)

Discretion of lower Court how far will be interfered with in appeal or revision See Notes 7 and 8  
 "Resident beyond the limits of its jurisdiction" See Note 1

**1. Scope and applicability of the Rule.** — The power of the Court is not more restricted under this rule than under Rule 1<sup>1</sup> A party is entitled to the issue of a commission if it is clear that the witness is residing outside the jurisdiction of the Court<sup>2</sup> It is not for the Court, as has already been pointed out in Rule 1, to decide whether the party will be benefited or not, as it is a matter entirely for the party<sup>3</sup>

Where a commission is issued to a Court it should be addressed to the Court of

1. (26) AIR 1926 Mad 345 (346)

[See however (67) 7 Suth W R 349 (352)  
 (Commission issued to a Magistrate to examine

2. (11) 12 Ind Cis 74 (74) (Mad)

3. 17 W R H C Rules and Orders (Civil Circular Order No 7, page 3 (3))



This rule applies only to 'suits' and does not apply to execution proceedings<sup>1</sup>

O. 26 R. 4  
Notes 1-4

2. "May issue." — As has been seen in Note 3 to Rule 1 *ante*, the word "may" in this rule as well as in Rule 1 has been construed in the undermentioned decisions<sup>1</sup> of the Madras High Court to mean 'is given authority to' and the issue of a commission is a matter of statutory right. But according to the general trend of opinion, the Court has a discretion to grant or refuse a commission<sup>2</sup>. The discretion must, however, be exercised *judicially*<sup>3</sup>. See also Note 2 to Order 26 Rule 1, *supra*.

3. Plaintiff asking his evidence to be taken on commission. — The general and accepted rule is that the evidence of a plaintiff in a case ought not to be taken on commission except for very strong reasons<sup>1</sup>. The reason is that the plaintiff has had a choice of the forum, and having chosen to institute his suit in a particular Court, he cannot ask for his examination elsewhere<sup>2</sup>.

4. Defendant asking his evidence to be taken on commission. — 'But the case is entirely different,' observed Mr Justice Chitty in *Ross v Woodford*, (1894) 1 Ch D 38, "when it is the defendant's application, and particularly that of a defendant lawfully resident out of the jurisdiction, according to the ordinary course of his life and business and to compel these defendants to come over here at great expense to attend the trial, or give up their case would be oppressive and unfair, and in my opinion it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself"<sup>1</sup>. Thus, where a suit was instituted in Cuttack against a defendant residing at Colombo, a commission was issued for the defendant's examination at Colombo on the ground that it would be obviously unfair to compel him to come to Cuttack or practically give up his defence<sup>2</sup>.

A defendant residing abroad should ordinarily be permitted to be examined on commission<sup>3</sup>.

rule does not apply )  
Note 2

(35) AIR 1935 Pat 220 (221, 222) (Where it is risky to compel plaintiff to attend Court to give evidence commission may be issued for his examination on his paying costs of defendant for making arrangements for his cross examination)

2. (26) AIR 1926 Pat 277 (278)  
(35) AIR 1935 Pat 220 (221, 222)

Note 4

1. (12) 16 Ind Cas 750 (751) (Cal).  
(24) AIR 1934 Mad 399 (400) 57 Mad 705  
(22) AIR 1922 Cal 42 (43, 44)

before the jury )  
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Note 3

1. (20) AIR 1920 Low Bur 63 (64)  
1 Ind Jur N S 357, *Dowsett v Wise*

O. 26 R. 4  
Notes 5-8

5. Commission to England to take evidence. — See Rule 5 *infra*

6. Second commission on failure of the first. — If the first commission fails for no fault of the party, a second commission can be issued<sup>1</sup> See also Rule 10 *infra*

7. Appeal. — A Full Bench of the High Court of Madras<sup>2</sup> overruling two earlier decisions<sup>3</sup> has held that an order under this rule directing or refusing to issue a commission is only an *interlocutory order* and not a "judgment" within Clause 15 of the Letters Patent and is not appealable. The High Courts of Bombay,<sup>4</sup> Calcutta<sup>5</sup> and Rangoon<sup>6</sup> have also taken the same view as that of the Madras Full Bench

An order under this rule is *not an appealable order*. Nor will the Appellate Court interfere with the order in the regular appeal from the decree in the suit, unless the discretion is shown to have been improperly exercised which has prejudiced the party aggrieved<sup>7</sup>

8. Revision. — An order under this rule can be revised when the order is one made *without jurisdiction, & c*, in the absence of any of the grounds mentioned in the rule<sup>1</sup> or where the Court has acted with *material irregularity, & c*, in refusing to issue a commission to a defendant residing outside its jurisdiction<sup>2</sup>. Where the refusal to issue a commission would be tantamount to a denial of justice or would result in manifest injury, the High Court can interfere in revision<sup>3</sup>

The High Court of Allahabad<sup>4</sup> has held that an order under this rule refusing to issue a commission is an *interlocutory order* and is not a case decided within the meaning of Section 115 *ante*

O. 26 R. 5

**R. 5. [S. 387.]** Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

Commission or request to examine witness not within British India.

[1877, S. 387; 1859, Ss. 177, 178.]

application to examine on commission — Fact that defendant could have approached Court and asked it to record his evidence before he went abroad is not sufficient ground to refuse issue of commission }

**Note 5**

1 (67) 8 Suth W R 448 (448)  
(05) 9 Cal W N 268n (268n). (Commissioner examined witnesses *ex parte* — Court ordered a fresh commission on deposit of costs)

**Note 7**

1 (10) 11 Ind Cas 340 (343, 344, 348, 349) 35 Mad 1  
2 (05) 28 Mad 28 (31)  
(07) 30 Mad 143 (144)  
3 (09) 2 Ind Cas 157 (158) (Dom)  
(31) AIR 1934 Bom 168 (169)  
4 (20) AIR 1920 Cal 894 (895)

5 (26) AIR 1926 Rang 64 (64) 8 Rang 605  
6. (22) AIR 1922 Cal 42 (44)  
(12) 16 Ind Cas 750 (751, 752) (Cal)

**Note 8**

under

574  
usual

to issue commission — *Revocable* )  
(2.) AIR 1925 Mad 192 (193)  
(02) 11 Oudh Cas 151 (152) (But the discretion cannot be interfered with in revision)  
3. (25) AIR 1925 Cal 1118 (1119)  
4 (34) AIR 1934 All 37 (39) (Order of lower Court held to be unjustified — But that was not a ground for revision)

## Synopsis

O. 26 R. 5  
Notes 1-4

- 1 Evidence of witnesses not residing within British India.
- 2 Plaintiff in foreign territory asking for a commission to examine himself.
- 3 "Letter of request"
- 4 Revision.

1. Evidence of witnesses not residing within British India. — This rule deals with the issue of a commission for the examination of persons residing outside British India<sup>1</sup> For the definition of "British India," see Note 1 to Section 1 *ante* Bangalore is not within British India<sup>2</sup> Where the evidence of a person residing outside British India is necessary and an application is made for the issue of a commission for the examination of such person, the Court has no further discretion in the matter and the commission should be issued as a matter of course<sup>3</sup>

Where a commission is issued for taking evidence in England, the bill of costs with respect to such commission is to be taxed by the Taxing Master in India though it is to be taxed on the same principle as would be adopted in England<sup>4</sup> See also the undermentioned case<sup>5</sup>

2. Plaintiff in foreign territory asking for a commission to examine himself. — As noticed in Note 3 to Rule 4, the Court will be very reluctant to accede to the request of the plaintiff for the issue of a commission to examine himself abroad except upon very strong grounds The plaintiff is entitled to choose his own forum and having chosen the forum, he is not entitled to say "I reside outside the jurisdiction Therefore examine me on commission"<sup>1</sup>

3. "Letter of request." — These words are new As for the form of letter of request, see Appendix H, Form No 8

4. Revision. — Interlocutory orders passed in the exercise of discretion under this rule cannot be revised by the High Court<sup>1</sup> See also Notes to Section 115, *ante*

**R. 6. [S. 388.]** Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

O. 28 R. 6

Court to examine witness  
pursuant to commission

opportunity of producing his evidence merely  
on the ground that it may involve some delay]]  
4. (91) 15 Bom 209 (211, 214, 215)

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## Note 2

1. (94) 1 Ch 38 (42), *Ross v Woodford*  
(25) AIR 1925 Pat 125 (126) ■ Pat 863  
(83) 25 Ch D 21 (29, 30), *Nadin v Bassett*

## Note 4

1. (86) 9 Mad 256 (257)  
[But see (88) AIR 1938 Mad 616 (618) (Order  
refusing issue of commission is revisable)]

[See also (37) AIR 1937 Lah 73 (74) (Court  
will be fully justified in satisfying itself that  
the evidence is really relevant and necessary  
for the purposes of the case before a summary process  
— But a party cannot be deprived of the

O. 26 R. 7

*Return of commission  
with depositions of wit-  
nesses.*

**R. 7. [S. 389.]** Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

[1877, Ss. 389, 390; 1859, S. 179.]

### *Synopsis*

1. Return of commission.
2. "Duly executed."
3. Commissioner can note demeanour of witness.
4. "Shall form part of the record."

**1. Return of commission.** — The return should show that the evidence was recorded as the law requires it, *viz*, in the language in ordinary use in the proceedings before the Court and duly read over and signed by the witness<sup>1</sup>

The time for the execution of the commission may be enlarged on the application of a party<sup>2</sup>

**2. "Duly executed."** — If a party to the suit dies before the examination of a witness on commission is completed and the fact of death is brought to the notice of the Commissioner, the proceedings after death are rendered illegal and consequently the commission cannot be said to have been *duly executed*<sup>1</sup>

**3. Commissioner can note demeanour of witness.** — A Commissioner is entitled by law to note his observation as to the *demeanour* of the witness examined by him<sup>2</sup>

**4. "Shall form part of the record."** — Evidence taken on a commission duly executed, subject to Rule 8, shall form *part of the record* and a party is entitled to refer to such evidence as a matter of record, though not tendered in evidence<sup>1</sup>

O. 26 R. 8

*When depositions may  
be read in evidence.*

**R. 8. [S. 390.]** Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) the person who gave the evidence is beyond the jurisdiction

#### **Order 26 Rule 7 — Note 1**

1. ('70) 14 South W. R. 269 (271)
2. ('70) 14 South W. R. O. C. 17 (19)

#### **Note 2**

1. ('29) AIR 1929 Pat 101 (101)

#### **Note 3**

1. ('18) AIR 1918 Cal 363 (379) (3 B)

#### **Note 4**

1. (03) 35 Cal 23 (32)
- (26) AIR 1926 Sind 34 (35)
- ('83) 12 Cal L. R. p. 50 (52)
- ('72) 8 Bang L. H. App 102 (102)
- ('99) 26 Cal 591 (592)

of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a *person in the service of the Crown* who cannot, in the opinion of the Court, attend without detriment to the public service, or

- (b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

[1877, S. 390 ; 1859, S. 179.]

a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for 'Civil or Military Officer of the Government'

### Synopsis

- |   |  |
|---|--|
| 1. Legislative changes  | 3. Objection to admissibility of evidence. |
| 2. Evidence on commission, when may be read as evidence in the suit | 4. Admissibility of documents.             |

### Other Topics (miscellaneous)

"Shall not be read as evidence" See Note 2      Unless the Court in its discretion, dispenses " See Note 2

1. **Legislative changes.**—The words 'or is a civil or military officer who cannot, in the opinion of the Court, attend without detriment to the public service' in clause (a) were newly introduced in the Code of 1908. For subsequent changes, see foot note to the text of the rule

2. **Evidence on commission, when may be read as evidence in the suit.**—The practice on the original side of the High Court of Calcutta is that evidence taken on commission does not become evidence in the suit, until the same has been tendered and read as evidence by the party on whose behalf it was taken,<sup>1</sup> while the practice of the mofussil Courts in Calcutta is that such evidence is treated as evidence in the suit, though it is not formally tendered in evidence as it is part of the record.<sup>2</sup> See also the undermentioned case<sup>3</sup>

A party wishing to rely on evidence taken on commission cannot, without the consent of the party against whom he offers it, have it read as evidence in the suit, unless he is able to show that the circumstances mentioned in clause (a) exist at the time the evidence is sought to be read, or unless he is able to persuade the Court to dispense with the proof of such circumstances.<sup>4</sup> Such evidence can be read at the

Order 26 Rule 8 — Note 2

4. (\*30) AIR 1930 Sind 89 (90)  
(31) AIR 1931 Cal 116 (117) 60 Cal 1331 (It has to be accepted by Court after hearing opposite party)  
(\*27) AIR 1927 Cal 43 (41) (Court has discretion to dispense with the proof of circumstances mentioned in clause (a))  
(\*70) 5 Beng L R 252 (253)  
(\*23) AIR 1923 P O 73 (76) (PC)  
(74) 22 Bath W R 331 (333)  
(\*29) AIR 1923 Cal 341 (343)

**O. 26 R. 8**  
**Notes 2-4**

instance of either party to the suit and not necessarily by the party who applied for a commission.

The fact that the evidence was taken on commission in the absence of the opposite party is no sufficient ground for refusing to admit it in evidence. But if the commission was issued for examining a particular witness and in spite of objection by the other side another witness was also examined, the Court would be justified in ignoring the evidence of such person.

In the undermentioned case<sup>1</sup> it was held by the Calcutta High Court that the expression 'beyond the jurisdiction of the Court' has reference to the question whether the witness is within the reach of the compelling or disciplinary powers of the Court in his capacity of a witness or potential witness and that the matter therefore would fall within the purview of O 16 R 19 which lays down that no witness is to be ordered to attend in person unless he is resident within a certain distance from the Court which extends to as much as 200 miles provided that for five sixths of the distance there are adequate transport facilities for the witness in the way of railway or other communications. Hence, it was held in the above case that the mere fact that the witness was resident beyond the territorial limits of the jurisdiction of the Court is not sufficient to hold that he is beyond the jurisdiction of the Court within the meaning of this rule.

See also Note 1 to Section 75 *ante*

**3 Objection to admissibility of evidence.** — Objection to the admissibility of the deposition of witnesses examined on commission should be taken in the trial Court itself.<sup>1</sup> See also the undermentioned case.\*

**4. Admissibility of documents.** — Where a document is produced before the Commissioner and no objection is taken as to its admissibility, no such objection can be taken after the return of the commission at the time of the trial of the suit.<sup>1</sup> But if the document is objected to before the Commissioner, the party objecting is not precluded from urging other grounds of objection than those taken before the Commissioner at the time of trial.<sup>2</sup>

(28) AIR 1928 Cal 421 (423) 55 Cal 748

(58) 10 South W R 385 (386)

(37) AIR 1937 Cal 163 (166) 68 Cal 914 (Evidence taken on commission—Before using it for any other purpose Court should first decide whether or not to use it as evidence in suit—Court should not use it to decide whether or not to order witness to attend in person)

(33) AIR 1933 Nag 530 (533) (Witness living beyond jurisdiction of Court, examined on commission—Consent of party not necessary to make it admissible)

[See (33) AIR 1933 Sind 327 (327) 27 S and L R 194 (Commissioner's report is only a piece of evidence—Objection to report should be couched not even though the Commissioner is dead)]

5 (26) AIR 1926 Sind 34 (35)

6 (63) 10 South W R 238 (237)

7 (30) AIR 1930 Cal 718 (720) 47 Cal 553

8. (37) AIR 1937 Cal 163 (165) 68 Cal 914

#### Note 3

1 (29) AIR 1929 Cal 591 (592)

2 (33) AIR 1933 All 541 (554) (Pardana bin Lady while being examined on commission tutored by somebody—Court may exclude evidence but cannot insist on personal attendance of the Lady)

#### Note 4

1 (30) 6 Cal L R p 109 (111 112)

[See also (30) AIR 1935 Mad 555 (520) (Hundi exhibited before Commissioner—He gave identifying mark—Admissibility in evidence not considered—No objection raised—Issue of admissibility pending before Court—Hundi held not 'admitted in evidence within the Stamp Act')]

2 (33) 9 Cal 333 (340 341)

**R. 9. [S 392]** In any suit in which the Court deems a Commission to make local investigations the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or, annual net profits, the Court may issue<sup>a</sup> a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court

Provided that, where the *Provincial Government* has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules

[1877, Ss 392, 393, 398, 399, 409, 1859, Ss 180, 306.]

<sup>a</sup> Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for Local Government

### Local Amendment

#### CALCUTTA

Omit PROVISOR

### Synopsis

- |   |  |
|---|--|
| 1 Legislative changes   | 6 Admissibility of report of Commissioner<br>See Note 4 to Rule 10 |
| 2 Scope of the Rule   | 7 Interference with the report See<br>Note 10 to Rule 10           |
| 3 Local investigation by the Judge                                | 8 Form   |
| 4 Power of Commissioner to take evidence<br>See Note 3 to Rule 10 | 9 Appeal from order directing local investigation                  |
| 10 " Such person as it thinks fit                                 | 11 Revision  |

### Other Topics (miscellaneous)

- |   |  |
|---|--|
| May issue See Note 2  | Commission — When should not issue See<br>Note 2             |
| Selection of Commissioner — Discretion of Court<br>See Note 5 | Local investigation — Its object and necessity<br>See Note 2 |
| Application when to be made See Note 2                        |  |

1. **Legislative changes** — The words "or proceeding" which occurred in the old Section after the words "in any suit" and the words "and the same cannot be conveniently conducted by the Judge in person" have now been omitted

2. **Scope of the Rule** — The object of local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot<sup>1</sup> and to elucidate any point which is left doubtful on the evidence taken before the Court<sup>2</sup> Cases of boundary disputes and

<sup>1</sup>—Commission must be issued under O 39 R. 7  
and not under this rule.]

**O. 26 R. 9**  
**Notes 2-5**

disputes about the identity of lands are instances when a Court may order a local investigation under this rule<sup>3</sup>

The Court has a discretion to order a local investigation or not, it is not bound to order it in all cases<sup>4</sup>. An application under this rule should be made at the hearing of the suit. It cannot be made after the case is closed<sup>5</sup>.

The presiding officer or officers in enquiries under the undermentioned Acts have been empowered to issue commissions for local investigation in accordance with this rule.

An Appellate Court has the power to issue a commission for a local investigation under this rule read with Section 107<sup>6</sup>.

Though this rule does not provide for the presence of the parties when a commission is issued, yet, natural justice requires that such commission should not be issued behind the back of one of the parties concerned<sup>7</sup>.

### 3. Local investigation by the Judge. — See Order 18 Rule 18

By Section 144 of the Oudh Rent Act (XXII of 1886), the Court may, in inquiries under that Act, make a local investigation, instead of issuing a commission under this rule.

### 4. Power of Commissioner to take evidence. — See Note 3 to Rule 10 *infra*

5. "Such person as it thinks fit." — Under the Code of 1859, a commission had to be issued, in the first instance, to an officer of the Court and only when there was no such officer, to any other suitable person<sup>1</sup>. There is no such preference under this rule. Under the General Rules of the Allahabad High Court, however, commissions other than commissions for the examination of witnesses or of accounts, should not be issued to persons other than Civil Court *amins* except when such a course is impracticable, and in every case a person other than a Civil Court *amin* is employed, the Court should record its reasons therefor<sup>2</sup>.

3. (1909) 2 Ind Cas 847 (848) 5 Low Bur Rul 1 (72) 17 Suth W R 472 (474) (Question of possession before date of suit — Local investigation ought not to have been ordered)

[See (72) 17 Suth W R 230 (232) (Court not justified in ordering local investigation when the issue is whether the parties are man and wife)]

4 (66) 5 Suth W R 248 (248)  
(68) 10 Suth W R 13 (44)  
(62) 1862 Suth W R 19 (20) (PB)  
(1865) 11 Suth W R Act 2, 153 (154) (Court not bound to order *suo motu*)  
(86) 12 Cal 43 (47) (Do)  
(36) AIR 1938 Nag 530 (532)

[See also (1864) 1 Suth W R 102 (103) (Successor of a Judge should not interfere with order for local investigation made by his predecessor)]

5 Bourke, O O 243

6 (19) AIR 1919 Oudh 126 (126)

7. The Chota Nagpur Tenancy Act (VI of 1903) S 265 (3), the Bengal Tenancy Act (VIII of 1885), S 31 (b) and S 158 (2), the Orissa Tenancy Act (II of 1913), S 36 (b) and S 210

8. (1932) AIR 1932 All 270 (271)

9. (38) AIR 1938 Nag 530 (532) (But defect is only irregularity curable under S 90 of the Code)

#### Note 5

1. (67) 7 Suth W R 27 (28)  
(1864) 1864 Suth W R Cas 171 (172)

(67) 8 Suth W R 6 (7)

(70) 13 Suth W R 284 (284)

(70) 13 Suth W R 113 (114)

(66) 6 Suth W R Act 81 (81)

(67) 8 Suth W R 331 (332) (Report by *shari* to *dar* — Ministerial officer)

(69) 12 Suth W R 209 (210) (Do)

(82) 11 Cal L Rcp 533 (537) (The District Judge can appoint *Munsif* to be Commissioner)

(66) 6 Suth W R 62 (63) (Report by ministerial officer — *Sheristadar*)

(72) 17 Suth W R 200 (201) (But a Sub-Judge whose judgment is in appeal cannot be ordered to go and inspect)

2. (29) AIR 1923 All 446 (447)



The rule does not contemplate the issue of a commission to more than one person. But if more than one is appointed provision should be made for meeting any difference in opinion that may arise between them.<sup>1</sup> O. 26 R. 9 Notes 5-10

**6. Admissibility of report of Commissioner.** — See Note 1 to Rule 10

**7. Interference with the report** — See Note 10 to Rule 10

**8 Form** — For the form of commission for local investigation, see Appendix II, Form No 9

**9 Appeal from order directing local investigation.** — An order under this rule is not appealable under O 43 R 1. Nor is it a judgment within Clause 15 of the Letters Patent.<sup>1</sup> The discretion exercised by the Court under this rule cannot be interfered with in appeal or second appeal.<sup>2</sup>

**10. Revision** — According to the High Court of Patna<sup>1</sup> where the order directing a local investigation would be a calamitous waste of time and money and would be determining the rights of parties on an improper basis, the High Court would interfere in revision. But the High Court of Madras in the undermentioned case<sup>2</sup> refused to interfere with an order directing a Commissioner to ascertain the mesne profits on the ground that the applicant had a remedy by way of appeal from the final decree.

## R. 10. [S 393] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court. O 26 R. 10

**Procedure of Commissioner**

inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court

**Report and depositions to be evidence in suit**

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit<sup>3</sup> and shall form

**Commissioner may be examined in person**

part of the record<sup>4</sup>; but the Court or, with the permission of the Court, any of the parties to

the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his

3 (91) 1 C P L R 160 (161)

(12) 13 Ind Cas 194 (197) (Cal)

Note 9

1 (25) AIR 1925 Rang 290 (291) 3 Rang 293

(67) 7 Suth W R 425 (425)

(1862) 1869 Marsh 469

2 (32) AIR 1932 All 270 (271)

(1862) 1 Ind Jour (O S) 8

(1864) 1 Suth W R II 141 (142)

(74) 22 Suth W R II 183 (184)

(1864) 1 Suth W R 249 (250)

(1864) 1 Suth W R 193 (196)

(69) 12 Suth W R 76 (76)

(94) 21 Cal 504 (512 513) 21 Ind App 39 (PC)

Court has only to see if subordinate Court exercises discretion judiciously or capriciously.)

[See also (33) AIR 1938 Nag 330 (332) (Irregularity not causing prejudice to defendant — Decree cannot be varied in second appeal)]

Note 10

1 (24) AIR 1904 Pat 761 (764)

2 (23) AIR 1923 Mad 43 (43)

O. 26 R. 10  
Notes 1-3

report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

[1877, Ss. 392, 393, 398, 399; 1859, S. 180.]

### Synopsis

1. Legislative changes.
2. Scope of the Rule.
3. Functions and powers of the Commissioner.
4. Admissibility of the report of the Commissioner.
5. Examination of the Commissioner.

6. Objections to Commissioner's report.
7. Commissioner's report, how far binding on the Court.
8. Further evidence after the Commissioner's report.
9. Sub-rule (3).
10. Interference with the report.

### Other Topics (miscellaneous)

Evidentiary value of the Commissioner's report "Shall be evidence in the suit" See Notes 3 and 4  
See Notes 3, 4 and 10  
Return of commission, whether should be on file before orders are passed See Note 4 "Shall form part of the record" See Note 4

#### 1. Legislative changes. —

The words "or as to his report" have been added in the concluding part of sub rule (2) Sub rule (3) is new

2. **Scope of the Rule.** — Sub rule (2) is "intended to afford protection to the Commissioner who is a *quasi* judicial officer and such protection is afforded on grounds of public policy so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination"<sup>1</sup>

This rule applies to suits under the Tenancy Acts<sup>2</sup>

3. **Functions and powers of the Commissioner.**—The provisions of Order 26 do not amplify Section 75 of the Code and the Court cannot delegate to the Commissioner the trial of any *material issue* which it is itself bound to try<sup>3</sup> In other words, a Judge cannot depute to the Commissioner functions which he can and should discharge himself<sup>3</sup> All that the Court can depute a Commissioner to do is to inspect a disputed land, to prepare a map or to obtain information with regard to physical features of the property inspected<sup>3</sup> It is not the intention of the Legislature to allow witnesses to be

#### Order 26 Rule 10 — Note 2

2. [See (90) 17 Cal 277 (280)  
(68) 1 Beng L R (S N) 2 (2)  
(17) AIR 1917 All 70 (70) 39 All 694 (Agra  
Tenancy Act)]

#### Note 3

(74) 21 Suth W R 240 (281)  
(35) AIR 1935 Mad 988 (890)  
[See also (72) 17 Suth W R 469 (470)]  
2. (70) 14 Suth W R 190 (190)  
(32) 17 Suth W R 473n (473n)  
(75) 23 Suth W R 250 (257)  
(1910) Suth W R 181 (181)

O. 26 R. 10  
Notes 3-4

examined by the Commissioner in such cases, unless the nature of evidence is such that it ought to be taken only on the spot,<sup>4</sup> or unless the parties agree and accept the same.<sup>5</sup> Thus, the statements regarding a right of way, made by village officers to a Commissioner appointed to prepare a map, are not evidence.<sup>6</sup>

Any evidence taken by the Commissioner contrary to instructions cannot be looked into. Thus, where a Commissioner who was appointed to ascertain the amount of mesne profits entered into the question of possession of the land, recorded evidence and arrived at a finding it was held that the procedure was *ultra vires*.<sup>7</sup> If evidence is taken by him within the scope of his authority, such evidence should be reduced to writing. Information given by witnesses and not reduced to writing is not legal evidence.<sup>8</sup>

A Commissioner is bound to record the state of things as actually existing and not draw upon his own imagination or make surmises.<sup>10</sup>

Notice should be given to the parties of the time when local investigation will be held.<sup>11</sup>

**4. Admissibility of the report of the Commissioner.** — The report of the Commissioner together with the evidence if any, recorded by him is legal evidence in the suit.<sup>1</sup> But the evidence alone without the report of the Commissioner cannot be received as evidence in the suit.<sup>2</sup> The Court is not justified in refusing to consider the report unless the local investigation is incomplete or inconclusive.<sup>3</sup>

The report however, is not *per se* evidence in any other suit unless its accuracy

(72) 17 Suth W R 282 (288)

4 (68) 9 Suth W R 83 (86)

(72) 17 Suth W R 282 (288)

5. (21) AIR 1921 Cal 368 (367)

(69) 2 Beng L R App 3 (4)

6 (1000) 24 Bom 43 (45)

7. (75) 24 Suth W R 208 (209)

positions attached to it to make it legal evidence)

(74) 22 Suth W R 350 (350)

(68) 9 Suth W R 601 (601)

(73) 19 Suth W R 213 (214)

(68) 9 Suth W R 494 (495)

(71) 15 Suth W R 291 (292)

(70) 14 Suth W R 493 (494) (Report only evidence on the point to which the commission refers)

(90) 17 Cal 281 (284) (Report cannot be rejected because a remuneration is not paid)

9 (25) AIR 1925 Mad 145 (147) 47 Mad 600

10. (70) 14 Suth W R 269 (270)

11 (69) 12 Suth W R 189 (190)

[See also (84) AIR 1934 Mad 548 (549)]

Note 4

(96) 163 Ind Cas 36 (37) (Mad)

[See also (1864) 1 Suth W R 93 (93) (Court is at liberty to adopt a portion of the report and reject

case)]

2. (70) 14 Suth W R 397 (399)

giving Commissioner too extensive powers)

(67) 8 Suth W R 237 (238)

(69) 12 Suth W R 136 (136, 137)

(67) 7 Suth W R 43 (44) (It is not necessary that the Commissioner's report must have de-

termined the facts, but it must be a report of facts.)

O. 26 R. 10 is proved in the ordinary way<sup>4</sup>  
Notes 4-8

**5. Examination of the Commissioner.** — The parties are entitled to take objection to the report of the Commissioner and substantiate the same by examining the Commissioner or other witnesses<sup>1</sup> But there must be some real ground for examining the Commissioner<sup>2</sup> If the report is attacked on grounds which require explanation, it is necessary that the Commissioner also should be examined<sup>3</sup> It is against established practice to find fault with his report behind his back and to reject it *in toto*<sup>4</sup>

**6. Objections to Commissioner's report.** — The Court must fix a date to enable the parties to file objections, if any, to the report of the Commissioner<sup>1</sup> and is bound to enquire into such objections when filed<sup>2</sup> unless the parties agree to, or accept the report<sup>3</sup> A party refusing to appear before the Commissioner has, however, been held not entitled to object to the report<sup>4</sup>

Objections to the report of the Commissioner should be taken in the trial Court and cannot be raised for the first time in appeal,<sup>5</sup> although the Appellate Court has power to consider whether the report was *outside or within* the scope of the warrant of commission<sup>6</sup>

**7. Commissioner's report, how far binding on the Court.** — A Commissioner's report is only *evidence* in the case It is in no way *binding* on the Court The Court has full power to arrive at its own conclusion even at variance with the report<sup>1</sup> In fact, the report ought not to be made the sole basis and foundation for the judgment in disregard of the other evidence in the case<sup>2</sup>

**8. Further evidence after the Commissioner's report.** — The rule does not contemplate the tender of further evidence after the receipt of the report of the Commissioner except the examination of the Commissioner himself It does not however prohibit further evidence The point has to be decided on general principles according to the facts and circumstances of each case<sup>1</sup> It was held that the party cannot at the

party objecting to the map prepared by the Commissioner—Court cannot question its correctness ]]

4. (82) 12 Cal L Rep 50 (52)  
(128) AIR 1928 Cal 63 (64).  
(86) AIR 1936 Oudh 192 (102) (The report does not fall within S 35 of Evidence Act.)  
(34) AIR 1934 Lah 890 (892) 16 Lah 377. (Do)

#### Note 5

1. (17) AIR 1917 Lah 57 (58)  
(29) AIR 1929 Lah 782 (783)  
2. (19) AIR 1919 Cal 946 (947)  
3. (20) AIR 1920 Cal 863 (864)  
(75) 24 Suth W R 342 (342)  
(15) AIR 1915 Cal 280 (282) (Permission cannot be arbitrarily withheld)  
4. (17) AIR 1917 Pat 278 (279)

#### Note 6

1. (74) 21 Suth W R 11 (3) (Court should also give notice to parties of the date so fixed)  
2. (63) 11 Suth W R 95 (95)  
(67) 8 Suth W R 172 (173)  
3. (13) 19 Ind Cas 570 (571) 6 Sind L R 256.  
(69) 11 Suth W R 155 (155)  
(70) 14 Suth W R 418 (418)  
(See also (70) 14 Suth W R 331 (332) (Neither

4. (20) AIR 1920 Cal 863 (864)  
(66) 6 Suth W R 180 (180)  
5. (74) 2 Ind App 34 (87) (PC)  
(68) 9 Suth W R 267 (267)  
(82) 1882 Pun Re No 101, page 455  
6. (29) AIR 1929 Mad 492 (492)

#### Note 7

- 1  
(

Commissioner and directing him to do so )  
(72) 17 Suth W R 270 (270)  
(38) AIR 1938 Pat 569 (570) 17 Pat 353

2. (75) 21 Suth W R 339 (339)  
(67) 8 Suth W R 464 (464)  
(See also (74) 21 Suth W R 231 (231) (Value of the report depends upon the evidence on which it is founded.))

#### Note 8

1. (1900) 27 Cal 951 (966) 27 Ind App 110 (PC)

last moment adduces fresh evidence after going on with the trial of the case without objection and with the knowledge that the investigation was carelessly done<sup>2</sup>

O. 26 R. 10  
Notes 8-10

**9. Sub-rule (3).** — The Court has a discretion to order a fresh commission or not and is not bound to do so in every case where the result of the local investigation is found to be unsatisfactory it can decide the case on the evidence<sup>1</sup>

Sub rule (3) contemplates a *further enquiry* by the same Commissioner already appointed, it does not contemplate the issue of a fresh commission covering the same ground<sup>2</sup> But where the Court is so dissatisfied with the whole proceedings of the Commissioner that it thinks it better to discard the whole record and start afresh, it may do so<sup>3</sup> Thus where the Court is of opinion, on considering the objections of the parties, if any, that the Commissioner has so misconceived his duties as to render his report valueless, it may wipe out and supersede the first report by a specific order to that effect<sup>4</sup> and may issue a fresh commission<sup>5</sup> The mere filing of objections to the report is no ground for issuing a fresh commission<sup>6</sup> When the Court issues a fresh commission it is not bound to wipe out off the record the report of the first Commissioner<sup>7</sup>

**10. Interference with the report.** — The Court ought not to interfere with the result of a long and careful local investigation except upon clearly defined and sufficient grounds<sup>1</sup> It has been laid down by their Lordships of the Privy Council (and followed in a number of decisions of the High Courts in India) that an Appellate Court should not interfere with the finding of the trial Court based on a careful local investigation except upon very strong grounds<sup>2</sup> But disregard of the report of the

2. (12) 16 Ind Cas 89 (40) (Cal)

#### Note 9

1 (19) AIR 1919 Cal 95 (97)

(17) AIR 1917 Cal 573 (573) (The case was one which could not be decided without an investigation on the spot — The case was therefore remanded for further investigation)

(19) AIR 1919 Cal 673 (673) (No error of law is committed by decision on evidence on record and High Court will not interfere in second appeal)

(35) AIR 1938 Pat 569 (570) 17 Pat 358

2. (29) AIR 1929 Mad 661 (663) (Issue of successive commissions condemned)

(33) AIR 1933 All 65 (65)

(29) AIR 1929 All 446 (447) (The practice of appointing successive Commissioners whenever objections are filed to their reports condemned)

(32) AIR 1932 Mad 482 (484) 55 Mad 656 (Issue of successive commissions condemned)

(30) AIR 1930 Mad 236 (238)

(31) AIR 1931 Mad 73 (74) 54 Mad 239

[See also (35) AIR 1935 All 422 (423) (There is no error of law in appointing more than one Commissioner — If the report of one Commissioner is unsatisfactory in certain respect it is permissible for the Court to remit the case to the same Commissioner or to appoint another Commissioner)]

3 (29) AIR 1929 Mad 661 (663)

4 (31) AIR 1931 Mad 73 (76) 54 Mad 239

(30) AIR 1930 Mad 236 (238)

(75) 23 South W R 93 (93)

5 (22) AIR 1922 Mad 219 (220) 45 Mad 79

(26) AIR 1926 Pat 159 (160)

(29) AIR 1929 Pat 101 (109) (Examination by Commissioner wrongly proceeded after the death of a party — Illegal — Fresh commission may be issued)

(83) AIR 1933 All 65 (65)

(29) AIR 1929 All 446 (447)

6 (30) AIR 1930 Mad 236 (238)

(22) AIR 1922 Mad 219 (220) 45 Mad 79

7. (37) AIR 1937 Pat 670 (671)

#### Note 10

[See however (01) 5 Cal W N 631 (70...]

O. 26 R. 10  
Note 10

Commissioner is not such an error or defect "affecting the merits of the case" within the meaning of Section 100 as to justify interference in second appeal.<sup>3</sup>

In *Kessowji Issur v G I P Railway Company*,<sup>4</sup> the Privy Council has held that an Appellate Court should not, as a result of an inspection of the spot of accident, reverse the decision of the trial Court based on recorded evidence.

## COMMISSIONS TO EXAMINE ACCOUNTS

O. 26 R. 11

**R. 11. [S. 394.]** In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

[1877, Ss 394, 395, 400; 1859, S. 181.]

### Synopsis

1. Commissioner to examine accounts.
2. "Is necessary."
3. Power of Commissioner to decide questions of law

4. Disobedience of order made by Commissioner.
5. Non-payment of Commissioner's fees
6. Appeal.
7. Form.

**1. Commissioner to examine accounts.** — In a suit for accounts the usual and proper procedure is first of all to ascertain whether the defendant is *liable* to account. If the accounts are complicated and require an examination, then the Court may appoint a commission under this rule.<sup>1</sup> Where a case is remanded to the lower Court for taking accounts, it has got jurisdiction to appoint a Commissioner for such purpose.<sup>2</sup>

The Court may issue a commission even without the consent of parties.<sup>3</sup>

Under Section 265 of the Chota Nagpur Tenancy Act (VI of 1908), the Deputy Commissioner is empowered to issue commissions to examine accounts in any suit, appeal or proceeding pending before him.

**2. "Is necessary."** — Before an order for the appointment of a Commissioner can be made, the examination or adjustment of accounts must be considered *necessary*.<sup>4</sup>

**3. Power of Commissioner to decide questions of law.** — The Court cannot delegate its judicial powers to a Commissioner in the matter of taking evidence and

3. (94) 21 Cal 504 (511, 512) 21 Ind App 39 (P C)

4 (07) 31 Bom 381 (392) 34 Ind App 115 (P C)

#### Order 26 Rule 11 — Note 1

1. (81) 7 Cal 654 (656, 657)
- (26) AIR 1926 Cal 349 (350)
- (72-72) 1872 1892 Low Bur Ral 309
- (97) 20 Mad 313 (316)

[See (75) 24 Suth W R 70 (70) (The case lays down the procedure to be observed in a judicial inquiry into accounts)]

2. (34) AIR 1934 Pat 35 (37).
3. (74) 1 Ind App 346 (362) (P C)

#### Note 2

- 1 (25) AIR 1925 Cal 1069 (1072) 52 Cal 766
- (81) 11 Cal 754 (758) (If taking of accounts by Judge would occasion a waste of public time, Court can issue commission with necessary instructions)
- (29) AIR 1929 Pat 626 (627) (Commission issued for taking accounts from a guardian of property)
- (73) 19 Suth W R 14 (15) (Held, not necessary

it is necessary to examine the accounts —

determining issues<sup>1</sup> Thus, it is for the Court and not the Commissioner to decide as to the truth or falsity of the account books<sup>2</sup> or as to whether a certain contract was or was not authorized<sup>3</sup> Similarly, the duty of determining in whose possession the account books are cannot be delegated to the Commissioner<sup>4</sup> So also, it is not open to the Court to refer to the Commissioner the question as to whether the dealings between the parties constituted in law, a mutual, open and current account between them<sup>5</sup> Their Lordships of the Privy Council<sup>6</sup> have held that it is irregular to appoint a Commissioner to give findings on mixed questions of law and fact, such as, for instance, the nature of a contract The Commissioner can determine only the extent, or the quantum and not the factum of liability<sup>7</sup> The function of the Commissioner is to place himself as an assistant to the Court so as to enable the Court to understand and appreciate the accounts and come to a decision<sup>8</sup>

1 Commissioner has no power of review either under Section 151 or under Order 47 Rule 1<sup>9</sup>

The High Court of Bombay has held in the undermentioned case<sup>10</sup> that a Commissioner appointed by a Judge on the original side of the High Court can decide questions of law arising while accounts are taken

**4. Disobedience of order made by Commissioner.** — A Commissioner is an officer of the Court and the Court can issue an attachment to compel a party to obey his order<sup>1</sup>

**5. Non-payment of Commissioner's fees.** — The suit should not be dismissed for failure to deposit the Commissioner's fee<sup>1</sup>

**6. Appeal.** — An order under this rule is not a decree and is not appealable<sup>1</sup> nor is the order one appealable under O 43 R 1 The High Court of Calcutta has, however, held in the undermentioned cases<sup>2</sup> that an order giving directions to the Commissioner amounts to a decree and is appealable See Notes to Section 2, sub section (2)

**7. Form.** — For the form of a commission to examine accounts, see Appendix H, Form No 9

### Note 3

1. (26) AIR 1926 Lah 145 (146)
2. (25) AIR 1925 Sind 205 (265)
3. (24) AIR 1924 Sind 9 (10) 17 Sind L R 316  
[See also (24) AIR 1924 Mad 406 (408 409)  
(Powers and functions of Official Referee as compared to a commissioner under this rule discussed)]
4. (30) AIR 1936 Lah 458 (460)
5. (38) AIR 1938 Rang 270 (270 271) (All that can be referred to the Commissioner is an enquiry into the nature and course of dealings and the amount if any, due)
6. (31) AIR 1931 P C 186 (140) 58 Ind App 178 53 All 190 (PC)
7. (25) AIR 1925 Cal 1063 (1072) 52 Cal 766  
(29) AIR 1929 Cal 418 (422)  
[See (34) AIR 1934 Pat 35 (37, 38) (But if question of quantum involves question of

liability Commissioner can determine both)]  
8 (07) 6 Cal L Jour 105 (108)  
9 (24) AIR 1924 Bom 231 (232) 47 Bom 593  
(But if he re opens an inquiry, it must be on grounds analogous to those mentioned in O 47, Rule 1)

10. (16) AIR 1916 Bom 181 (182) 41 Bom 719

### Note 4

1. (73) 10 Bom II C R O C 4 (6).

### Note 5

1. (81) 3 Mad 259 (259)

### Note 6

1. (14) AIR 1914 Bom 36 (38) 38 Bom 392  
[See also (84) 8 Bom 287 (294)]
2. (96) 23 Cal 406 (408)  
(02) 29 Cal 758 (766, 768) (FB)  
(04) 31 Cal 722 (724) (Stay also can be granted)

O.26 R.12

**R. 12. [S. 395.]** (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Court to give Commissioner necessary instructions.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Proceedings and report to be evidence. Court may direct further enquiry.

[1877, Ss. 394, 395, 400; 1859, S. 181.]

### Synopsis

1. Scope of the Rule.

2. "Shall be evidence in the suit."

3. Objections to the Commissioner's report.

4. Powers and duties of the Appellate Court.

### Other Topics (miscellaneous)

Commissioner's report, application to vary See Note 8

Evidentiary value of the Commissioner's report See Note 2.

Instructions to Commissioner See Note 1

**1. Scope of the Rule.**—The Court is bound to furnish the Commissioner with the requisite proceedings and issue definite instructions as to what he should do. The Commissioner may, if necessary, apply for enlargement of time fixed for the return<sup>1</sup>

The rule contemplates the appointment of only one Commissioner. But the appointment of more than one is only a mere irregularity<sup>2</sup>

**2. "Shall be evidence in the suit."**—The report of the Commissioner together with the evidence, if any, taken by the Commissioner is evidence in the suit<sup>3</sup> unless the Court is dissatisfied with it and directs a further enquiry. But the report has not the effect of a decision in the case<sup>4</sup>

The Court is not bound to take any other evidence than that furnished by the report, where it sees no reason to doubt its correctness<sup>5</sup>

**3. Objections to the Commissioner's report.**—A party is entitled to file objections to the report of the Commissioner and the Court is bound to give him a reasonable opportunity to produce evidence in support of his objections<sup>6</sup>. But where

#### Order 26 Rule 12 — Note 1

1. (92) 15 J 2 Dom P J 318 (31s)

2. (70) 1570 Pun Re No. 40.

#### Note 2

1. (71) 3 N W P H C R 217 (233)

(s2) 1852 Pun Re 161, page 405

[See (78) 3 Lon 161 (170)]

2. (01) 5 Cal W N 623 (707)

3. (70) 1570 Pun Re No. 40

[See however (32) AIR 1932 All 1-3 (120) 53 All 54. "There is nothing in O 26 to prevent a Court from accepting evidence on a de facto point, though Commissioner is appointed to inspect accounts"]

#### Note 3

1. (29) AIR 1929 Lah 702 (703)

(34) AIR 1934 Pat 35 (33) [The Court must consider the objections and come to an ad hoc final conclusion]



the reference to a Commissioner has been made by *consent*, the parties are bound by it and cannot go behind the consent so given <sup>2</sup>

O. 26 R. 12  
Notes 3-4

Objections to the report must be taken in the trial Court and cannot be raised for the first time in appeal <sup>3</sup>

**5. Powers and duties of the Appellate Court.** — While the Commissioner's report which has been affirmed by the trial Court should have great weight given to it and should not be capriciously deviated from, it is not absolutely binding on the Appellate Court <sup>1</sup> The Appellate Court is entitled, therefore, whenever necessary, to scrutinize the report and make such further enquiries into the matter as it may deem proper <sup>2</sup>

## COMMISSIONS TO MAKE PARTITIONS

**R. 13. [S. 396.]** Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the

O. 26 R. 13

Commission to make partition of immovable property.

partition or separation according to the rights as declared in such decree.

[1877, S. 396.]

### Synopsis

1 Legislative changes.

2 Scope of the Rule

3. "Such person as it thinks fit."

4 Appeal

**1. Legislative changes.** — The word "person" has been substituted for the word "persons" which occurred in the old Section in order to negative the view that had been held under the old Code that the Court could not appoint a single Commissioner <sup>1</sup>

**2. Scope of the Rule.** — As has been seen in Note 9 to Rule 10, the Court has

('22) AIR 1922 Mad 219 (220) 45 Mad 79  
(14) AIR 1914 Lah 339 (341) (Commissioner may be examined to substantiate objections)

*Report of Commissioner for taking accounts—Objections to the report—Revision—Practice in High Courts—Motion to vary report should be made within twenty days of the filing of the report*  
(89) 13 Bom 368 (369 370) (But if the Court allows further time then within further time so allowed)

(97) 24 Cal 437 (439) (Notice should be accompanied with grounds of objections)  
(85) 9 Bom 250 (252) (Court has discretion to extend time for making such motion)

(75) 1 Bom 153 (161) (Objections to the report must be decided on the same evidence as was before the Commissioner)

2. ('74) 1 Ind App 346 (362) (PC)

('14) AIR 1914 Lah 339 (341)

3. ('74) 2 Ind App 34 (37) (PC).

('20) AIR 1920 Low Bur 31 (34)

(1863) 1 Mad H C R 418 (419)

('69) 11 Suth W R 3 (3)

('15) AIR 1915 Lah 144 (145) (Cannot be raised in second appeal)

#### Note 4\*

1. ('70) 6 Mad H C R 36 (37) (1 Mad H C R 1 and 1 Mad H C R 418 dissented from as being bad law)

2. ('01) 5 Cal W N 692 (701 706 707)

('27) AIR 1927 Lah 736 (734) (Decree based on incomplete report set aside)

(69) 11 Bom H C R A O 149 (151)

[But see ('98) 8 Mad L Jour 133 (134) (Proceeds according to Rule 292 of the Rules of Practice on the Original Side)]

#### Order 26 Rule 13 — Note 1

1 ('07) 29 All 235 (236)

(04) 6 Bom L R 556 (587)

(93) 1893 Pun Re No 121, page 481

[But see ('81) 7 Cal 313 (320)]

**O. 26 R. 13**    a discretion in the matter of issuing a commission. It is not, under this rule, bound to  
**Notes 2-4**    appoint a Commissioner in every case<sup>1</sup>

The essential difference between an arbitrator and a Commissioner appointed under this rule is that the latter merely submits his report for the approval of the Court, whereas the former has a final authority to settle all matters of difference between the parties. Further, the former is selected by the parties and therefore his decision cannot be questioned except on the limited grounds specified in Schedule II, whereas the latter is selected by the Court and the parties are therefore at liberty to challenge his report<sup>2</sup>

An application for the appointment of a Commissioner is not governed by any rules of limitation<sup>3</sup>

Where an order dismissing the suit for default is passed after a preliminary decree for partition, the order though illegal cannot be ignored unless expressly set aside or revoked. Nor does an order under this rule appointing a Commissioner to make a partition amount to an order setting aside the dismissal of the suit for default<sup>4</sup>

By Section 12 of the Bengal Estates Partition Act (V of 1897), a Civil Court passing a decree for an undivided share of an estate governed by this Act may cause the same to be executed as prescribed by this rule

3. "Such person as it thinks fit."—The choice of the Commissioner lies with the Court. But a relation of one of the parties or their pleaders should not be appointed except with the consent of the other party<sup>5</sup>

4. Appeal. — An order issuing a commission under this rule is not appealable under O 43 R 1. Nor is the order one passed in execution within the meaning of S 47<sup>6</sup>

**O. 26 R. 14**

**R. 14. [S. 396.]** (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign

#### Note 3

1. (3) 4 Ind Cas 1131 (1132) 31 Mad 540
2. (14) AIR 1914 Oudh 183 (184)
- (27) AIR 1927 Pat 135 (137)
- (39) AIR 1939 Pat 526 (527) 18 Pat 193
3. (3) 28 Mad 127 (129)
4. (36) AIR 1936 Lah 575 (576)

#### Note 3

1. (17) AIR 1917 All 148 (149)

#### Note 4

1. (19) AIR 1919 Mad 42 (43)
- (16) AIR 1916 Val 509 (510) (Application for commission is only a step in aid in suit and is not barred by any limitation)
- (7) 17 Mad L Jour 144 (144)
- (93) 20 All 311 (313, 314).
- (97) 24 Cal 725 (735, 733) (FB)

separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds.<sup>5</sup> Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall<sup>4</sup> confirm, vary or set aside<sup>5</sup> the same.

0.26 R.14

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

[1877, S. 396 (2) and (3).]

### Local Amendment

#### PATNA

*Substitute* the following for sub rules (2) and (3) :

"(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds. The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report, a schedule showing the plots and areas allotted to each party and also, unless otherwise directed by the Court, a map showing in different colours, the plots or portions of plots allotted to each party. In the event of a plot being sub divided, the area of each sub plot shall be given in the schedule and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports shall confirm, vary or set aside the same

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree shall incorporate in the decree the schedule, and the map, if any, mentioned in sub rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. When the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit "

### Synopsis

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes</li> <li>2. Mode of effecting partition.</li> <li>3. Partition of revenue-paying immovable property.</li> <li>4. Partition of joint family dwelling-house.</li> <li>5. Allotment of shares.</li> </ol> | <ol style="list-style-type: none"> <li>6. Objections to Commissioner's report.</li> <li>7. Resistance to Commissioner.</li> <li>8. Issue of a new commission.</li> <li>9. Decree.</li> <li>10. Final decree to be engrossed on stamp paper.</li> <li>11. Preliminary decree in a partition suit — Appeal.</li> </ol> |
|--|--|

O. 26 R. 14  
Notes 1-4

### Other Topics (miscellaneous)

Appeal See Note 9

Confirm vary or set aside See Notes 4 and 11

Motes and bounds See Note 5

Partition Act IV of 1893 See Note 4

**1. Legislative changes.** — In sub rule (1), the words 'after such enquiry as may be necessary have been substituted for 'ascertain and inspect the property and shall'.

Sub rule (3) is almost new

In sub rule (3), the words "or the Commissioners shall prepare and sign separate reports have been newly added and the words 'shall confirm, vary or set aside the same' have been substituted for the words 'shall either quash the same'. The object of the latter amendment was to negative the view taken in *Janki v Gouri* (1906) 1 L R 28 Allahabad 75, that the Court had no power to vary the report

**2 Mode of effecting partition.** — It is not contemplated by the rule that the Commissioner should propose a number of schemes and ask the Court to choose any one of them<sup>1</sup> only the shares as ascertained by the decree have to be worked out by him. But the Court may, in the case of a joint Hindu family with the consent of all the coparceners order that any part of the property should remain joint<sup>2</sup>. Where a partition cannot be made without destroying the intrinsic value of the property<sup>3</sup> or where it would be inconvenient to disturb the exclusive possession of one co-sharer<sup>4</sup> the Court may also award a money compensation instead of dividing the properties.

**3. Partition of revenue-paying immovable property.** — A partition of revenue paying land which has the effect of breaking up the joint liability of the sharers for revenue cannot be effected by the Civil Court<sup>1</sup> see Section 54 *ante*. Therefore when a *revenue paying estate* has to be partitioned into several *revenue paying estates* such partition can be done only by the Collector because the revenue is affected<sup>2</sup>. But where no allotment of separate revenue is asked for, the Civil Court is competent to allot the shares leaving the whole estate liable for the whole revenue<sup>3</sup>. The reason is that the jurisdiction of the Civil Court is excluded only on questions affecting the right of the Government to assess and collect in its own way the public revenue<sup>4</sup>.

**4. Partition of joint family dwelling-house.** — In the case of partition of non revenue paying immovable property such as a joint family dwelling house the Court can actually fix the particular area, rooms or part of the house to be allotted to the respective sharers<sup>1</sup>.

For cases under the Partition Act, IV of 1893, see the undermentioned cases<sup>2</sup>

#### Order 26 Rule 14 — Note 2

- 1 (01) 6 Bom L R 550 (587)
- 2 (78) 3 Cal 514 (516)
- 3 (84) 10 Cal 675 (676)
- (81) 8 Cal L R 259 (260) (Compensation allowed to co-sharer enhancing value of portion)
- 4 (77) 25 Suth W R 335 (342)
- (11) 11 Ind Cas 370 (371), (Cal)

#### Note 3

- 1 (82) 8 Cal 649 (651)
- (82) 8 Cal 637 (645)
- (74) 22 Suth W R 11 (11)

- (74) 22 Suth W R 333 (333)
- (76) 1876 Pan Re No 14 page 19
- 2 (89) 16 Cal 203 ("0 )
- (78) 2 Cal L R 134 (136)
- 3 (97) 24 Cal 725 (734 735 745) (F D)
- (81) 7 Cal 153 (155)
- (83) 15 Cal 193 (201)
- 4 (83) 15 Cal 193 (200)

#### Note 4

- 1 (06) 23 All 75 (76)
- 2 (03) 32 Bom 103 (105) (Power to sell)
- (01) 24 Mad 632 (641) (Power to sell under Section 2)

and for cases regarding valuation of suits, see the decisions cited below<sup>3</sup>

O. 26 R. 14  
Notes 4-8

**5. Allotment of shares.** — The duty of the Commissioner is not to give possession but to allot the shares and prepare a report fixing the shares and distinguishing the same by metes and bounds if so ordered<sup>1</sup> The Court after considering the rights and objections of the different parties should make the final allotment<sup>2</sup> A casting of lots for an equitable distribution of shares is not opposed to the rule and can be resorted to by the Courts<sup>3</sup>

An order of the Court approving the allotment and division made by a Commissioner has been held to be binding on the parties, even though a fresh decree is not passed in accordance with the report<sup>4</sup>

**6. Objections to Commissioner's report.** — Objections to the report can be filed within the period fixed by the Court<sup>1</sup> When they are not so filed in the trial Court they cannot be raised for the first time in appeal<sup>2</sup> But the High Court has power to see whether the Commissioner has exceeded his jurisdiction or acted within the scope of his warrant of commission<sup>3</sup>

The provision in this rule requiring the Court to hear the objections to the report of the Commissioner implies that evidence can be let in to support the objections<sup>4</sup>

**7. Resistance to Commissioner.** — As already seen in Note 4 to Rule 11, Commissioners are officers of the Court and a process of attachment can be issued by the Court to enforce the orders of the Commissioner But the Court is not justified in dismissing the suit when the Commissioner is resisted in executing his warrant of commission<sup>1</sup>

**8. Issue of a new commission** — Ordinarily a second commission ought not to be issued on the mere objection of a party<sup>1</sup> But where the report is unsatisfactory,<sup>2</sup> or the Commissioner has so misconceived his duties as to render his report useless a second commission may be issued in which case however, the old report should be

(1900) 5 Cal W N 128 (180) {Power to sell under S 2 — Preliminary decrees on report of the commissioner is no bar to proceedings under S 2}

(08) 80 All 324 (328) (F B) {Section 4 applies to Mahomedans}

(99) 23 Bom 77 (79) {Applicability of S 4}

(93) 21 All 409 (411) {Applicability of S 10}

3 (06) 8 Cal L Jour 257 (259) {For purposes of ■ If C P C value of the subject matter of the suit is the value of the whole estate which it is sought to partition}

(85) 8 Mad 235 (236) {Value of whole property determines jurisdiction}

(90) 12 All 506 (509) {Value of share determines jurisdiction}

(84) 8 Bom 31 (34) (Do)

(90) 13 Mad 20 (27) {Case of co owners — Specific share claimed determines jurisdiction}

#### Note 5

1 (98) 20 All 311 (313)

ordered to be built by aamin to separate shares}}

2. (03) 8 Cal L Jour 521 (523) {In this case it was held that the defendants had not sufficient reason for insisting on drawing of lots}

3 (15) AIR 1915 Mad 1171 (1172)

4 (18) 20 Ind Cas 908 (910) (Mad)

#### Note 6

1 (19) AIR 1919 All 403 (403)

(89) 18 Bom 363 (370) {Practice on the Original Side}

2 (20) AIR 1920 Low Bur 31 (34)

(81) 7 Cal 318 (321)

3 (29) AIR 1929 Mad 492 (492)

4

#### Note 7

1 (10) 5 Ind Cas 872 (873) ■ All 319

#### Note 8

1 (22) AIR 1922 Mad 219 (220) 45 Mad 79

2 (26) AIR 1926 Pat 169 (160)

**O. 26 R. 14** superseded <sup>3</sup> A second Commissioner so appointed can rectify the mistakes of the first  
**Notes 8-11** Commissioner <sup>4</sup>

**9. Decree.** — The proceedings contemplated by the rule are proceedings in the suit and not in execution<sup>1</sup> and the Court is bound to pass a *final* decree after perusing the report <sup>2</sup> The High Court of Madras<sup>3</sup> has held that the Court can pass a final decree *suo motu* without an application by the party, the reason being that the suit must be considered *pending* until a final decree is passed Though the *final decree* is appealable no appeal lies against an *order* of the Court confirming or varying the report <sup>4</sup>

**10. Final decree to be engrossed on stamp paper.** — A final decree for partition passed in accordance with the report of the Commissioner must be stamped as an instrument of partition within the meaning of Section 3, clause (15) of the Indian Stamp Act (II of 1899)<sup>1</sup>

**11. Preliminary decree in a partition suit — Appeal.** — Under Section 396 clause (1) of the old Code corresponding to Rule 13 of this Order, it was provided that the Court can issue a commission<sup>2</sup>

and their several rights  
 an ascertainment amounted to a decree<sup>3</sup> and Madras<sup>4</sup> that it did amount to a decree while the Chief Court of the Punjab held that it did not The conflict has now been set at rest by the Legislature by using the words *preliminary decree* in Rule 13 to avoid any possible doubt in the matter

## GENERAL PROVISIONS

**O. 26 R. 15**

**R. 15. [S 397.]** Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued

[1877, S 397; 1859, S. 182 ]

3 ( 22) AIR 1922 Mad 219 (220) 45 Mad 79

4 ( 31) AIR 1931 Cal 170 (170)

Note 9

1 ( 86) 12 Cal 275 (277)

( 00) 1906 Pun Re No 47, page 163

( 95) 22 Cal 425 (432)

2 ( 93) 1523 All W N 93 (93)

( 05) 1905 I un Re No 23 page 99 (Decree —  
 Effect—Is in favour of each share-holder)

3 ( 05) 18 Mad L Jour 23 (74)

( 10) 8 Ind Cas 393 (393) (Mad)

4 ( 26) AIR 1928 Oudh 195 (196)

Note 10

1 ( 05) 23 Bom 366 (368)

( 05) 32 Cal 483 (491)

Note 11

1. ( 86) 12 Cal 202 (212)

( 86) 12 Cal 273 (275)

( 92) 19 Cal 463 (467) (F B)

not (not) in this case

## Local Amendment

## MADRAS

O. 26 R. 15  
Note 1

*Re-number* the existing Rule 15 as Rule 15 (1) and insert the following as sub-rule (2)

"(2) Before executing and returning any commission issued by foreign Courts under the provisions of Section 78, the Court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under Rule 3 of Order 16 "

## Synopsis

1. Expenses of commission.
2. Reduction of Commissioner's bill, when justified

**1. Expenses of commission.**—The rule provides that the Court may, if it thinks fit, order the party requiring the commission to deposit the necessary expenses therefor.<sup>1</sup> The rule is not exhaustive and does not prevent the Court from imposing any terms that it chooses as a condition precedent to the issuing of a commission.<sup>2</sup> Nor does an omission on the part of the Court to require the deposit of the expenses prevent the Commissioner from recovering his remuneration from the party at whose instance he was engaged.<sup>3</sup>

The object of requiring the expenses to be deposited beforehand is, that the Commissioner who is an officer of Court ought not to be driven to a separate suit or execution to get his fees.<sup>4</sup> As to whether an order directing the deposit of fees to the Commissioner is capable of execution, the High Court of Madras<sup>5</sup> has held that it is not capable of execution. The decisions of the High Courts of Calcutta<sup>6</sup> and Lahore<sup>7</sup> are conflicting. An order directing one of the parties to pay a certain sum to the Commissioner cannot be made a part of the decree, the reason being that the Commissioner is not a party to the suit.<sup>8</sup>

But failure to deposit the required fees can afford no ground for rejecting the report<sup>9</sup> or for dismissing the suit.<sup>10</sup>

## Order 26 Rule 15 — Note 1

- (38) 63 Cal L Jour 563 (563)
5. (1900) 10 Mad L Jour 241 (242)
- (196) 11 Mad L Jour 124 (124, 125).
6. (25) AIR 1925 Cal 57 (58) 53 Cal 269 (Can be executed)
- [See (96) 10 Cal W N 234 (236) (Case under the old Code)]
- (13) 31 Ind Cas 191 (191) (Cal) (Cannot be executed)]
7. (26) AIR 1926 Lah 62 (62) (Order cannot be executed)
- (34) AIR 1934 Lah 46 (46) (Order can be executed—Following AIR 1925 Cal 57)
8. (138) AIR 1938 Bang 254 (256)
9. (190) 17 Cas 281 (234)
10. (81) 3 Mad 259 (259).
- [See (90) 11 Mad 510 (511) (Suit dismissed for plaintiff's failure to deposit fees—No issues framed in the suit—No time prescribed for payment of fees—Plaintiff again suing defendant on the same cause of action—*Held*, suit was not barred by *res judicata*)]

by her)]

2. (127) AIR 1927 Cal 907 (907)
3. (182) 4 Mad 399 (401)
- (1865) Bourke III (But the Commissioner has no lien)
- (123) AIR 1923 Cal 436 (437, 438) (But a Commissioner ought not to take a mortgage from the party for his fees)
4. (111) 9 Ind Cas 313 (314) (Cal)

O. 26 R. 15  
Note 2

2. Reduction of Commissioner's bill, when justified. — The reduction or disallowance of the Commissioner's bill is a matter for the trial Court.<sup>1</sup> The Court will not be justified in re opening or reducing the fees fixed in the presence of the parties and paid into Court.<sup>2</sup> See also the undermentioned cases<sup>3</sup>

O. 26 R. 16

Powers of Commissioner.

R. 16. [S. 399.] Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment, —

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;
- (b) call for and examine documents and other things relevant to the subject of inquiry;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order.

### Synopsis

1. Powers of Commissioner.

2. Review. See Note 3 to Rule 11

\*1. Powers of Commissioner. — The provisions of O. 26 R. 16 are permissive in the sense that they vest a discretion in the Commissioner to examine or not to examine a witness.<sup>1</sup> See Note 3 to Rule 10, *supra*

2. Review. — See Note 3 to Rule 11, *supra*.

O. 26 R. 17

Attendance and examination of witnesses before Commissioner.

R. 17. [S. 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses and to the remuneration of, and penalties to be imposed upon, witnesses, shall

### Note 2

1. (19) AIR 1919 Cal 839 (839)

(34) AIR 1934 Pat 316 (318) [It is not right to extend any indulgence to inefficient commissioners whether they are pladers or professional surveyors — For worthless or nominal work by Commissioner no remuneration can be allowed]

negligence or improper motive — Fees held payable of the disallowance

direction by District Judge not to allow more than Rs. 8 per day to Commissioners in order cases — Held there was no implied contract to work on Rs. 8)

Order 26 Rule 15 — Note 1

1. (35) AIR 1933 All 215 (216).



apply to persons required to give evidence or to produce documents under this order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

O. 26 R. 17  
Notes 1-2

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

[1877, S. 399.]

### *Synopsis*

#### 1. Scope of the Rule. | 2. Sub-rule (2).

**1. Scope of the Rule.**—Under this rule the Commissioner is given the powers of Court in regard to the summoning and procuring the attendance of witnesses. The reason is that the Commissioner is a delegate of the Court acting under its authority.<sup>1</sup> Although under O 26 R 16 it is in the discretion of the Commissioner to examine or not to examine a witness, yet, once the Commissioner has decided to examine a witness, the mandatory provisions of this rule come into play and those provisions in their turn attract the provisions of Order 18 of the Code and Section 138 of the Evidence Act. Hence, the parties must be afforded an opportunity of examining, cross examining and re examining the witnesses and it is not open to the Commissioner to examine the witnesses in the absence of the parties without giving them sufficient notice<sup>2</sup> of the time and place when he proposes to examine the witnesses.<sup>2</sup>

**2. Sub-rule (2).**—Sub-rule (2) is new. In the absence of a similar provision under the old Code it was held that if a witness residing outside jurisdiction refused to appear before the Commissioner pursuant to his notice, the only course left to the Commissioner was to return the warrant of commission.<sup>1</sup> Such a contingency has now been obviated.

### **R. 18. [S. 400.] (1)** Where a commission is issued under

O. 26 R. 18

Parties to appear before Commissioner.

this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

[1877, Ss. 394, 395, 400; 1859, S. 181.]

Order 26 Rule 17 — Note 1

2. (39) AIR 1938 All 215 (216, 217).

1. (23) AIR 1923 Oudh 119 (120).

Note 2  
1. (96) 23 Cal 404 (405).

O. 26 R. 18  
Notes 1-2

### Local Amendments

#### ALLAHABAD

In clause (1) *after* the words "agents or pleaders" *substitute* a comma for the full stop, and *add* the following words:

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues"

#### ODDH

In sub-rule (1), *after* the words "agents or pleaders" *substitute* a comma for the full stop, and *add* the following words:

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues"

#### RANGOON

The following shall be *substituted* for sub-rule (1):

"(1) When a commission is issued under this order, the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days."

### Synopsis

1. Parties to appear. ] 2. Form. See Appendix H, Form No 7.

1. Parties to appear. — Under this rule it is obligatory on the part of the Court to order the parties to appear before the Commissioner either in person or by their recognized agents or pleaders. Where a party fails to appear in pursuance of the order of Court, the Court can proceed under O. 17 R. 2<sup>1</sup>

2. Form. — See Appendix H, Form No 7.

*\*Commissions issued at the instance of foreign tribunals.*

O. 26 R. 19

Cases in which High Court may issue commission to examine witness.

**R. 19.** [New.] (1) *If a High Court is satisfied —*

(a) *that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,*

(b) *that the proceeding is of a civil nature, and*

(c) *that the witness is residing within the limits of the High Court's appellate jurisdiction,*

*it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.*

Order 26 Rule 18 — Note I

1. ( 71) 16 34th W R P C 23 (23) (PC).  
(1862) 1862 34th W R P C No 1 (2)

(2) *Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub rule (1) —* O. 26 R. 19

- (a) *by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the [Central Government], or*
- (b) *by a letter of request issued by the foreign Court and transmitted to the High Court through the [Central Government], or*
- (c) *by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding*

a. Rules 19 to 22 and the heading were inserted by the Code of Civil Procedure (Amendment) Act 1932 (X of 1932) Section 3

b. Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for Governor General in Council

Application for  
commission

**R. 20.** [New] *The High Court may issue a commission under rule 19 —* O. 26 R. 20

- (a) *upon application by a party to the proceeding before the foreign Court, or*
- (b) *upon an application by a law officer of the [Provincial Government] acting under instructions from the [Provincial Government]*

a. Substituted by the Government of India (Adaptation of Indian Laws) Order 1937, for Local Government

**R. 21.** [New] *A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where [ \* \* \* ] the witness resides within the local limits of [the ordinary original civil jurisdiction of the High Court], to any person whom the Court thinks fit to execute the commission* O. 26 R. 21

To whom commission may be issued

a. The words *The High Court* is established under the Indian High Courts Act 1861 or the Government of India Act 1915 and repealed by the Government of India (Adaptation of Indian Laws) Order 1937

b. Substituted by *abd* for *its ordinary original civil jurisdiction*

O. 26 R. 22

**R. 22.** [New.] *The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the [Central Government], along with the letter of request for transmission to the foreign Court.*

*Issue, execution and return of commissions, and transmission of evidence to foreign Court*

<sup>a</sup> Substituted by the Government of India (Adaptation of Indian Laws) Order 1937, for the Governor General in Council

### Local Amendments

#### MADRAS

Insert the following as Order 26 A (new)

#### 'ORDER XXVIA

O 26A R 1  
(Madras)

Rule 1 The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court

O 26A R, 2  
(Madras)

Rule 2 The report of the Commissioner shall be evidence in the suit and shall form part of the record

O 26A R 3  
(Madras)

Rule 3 Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued

#### RANGOON

The following shall be added as Rules 19 to 30 (This is added before the amendments of Rules 19 to 22 by the Indian Legislature in 1932)

*Fees to commissioners for local investigation, and commissioners of partition, or to take accounts or for examination of witnesses*

O 26 R 19  
(Rangoon)

19 Civil Courts in issuing commissions will be guided by the provisions of Rule 15, and subject to the provisions of Rule 23, will exercise their own judgment in fixing a reasonable sum for the expenses of the commission

O 26 R 20  
(Rangoon)

20 Under Government of India Resolution in the Home Department (Judicial, No 10 1101, dated 21st July, 1875), Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces

O 26 R. 21  
(Rangoon)

21 It is to be understood that no part of the fee sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official act which judicial officers are bound to perform when called upon and is not work undertaken for a private body

O 26 R 22  
(Rangoon)

22 In all cases the unexpended balance, which remains after all charges have been deducted should be returned to the Court issuing the commission

Fees to commissioners of partition or to take accounts or to examine witnesses

23 The following fees are to be allowed to commissioners of partition or to take accounts or for the examination of witnesses namely

O 20 H 23  
(Rangoon)

Commissioner's fees for every effective meeting shall not exceed three gold mohurs for the first two hours and one gold mohur for each succeeding hour

*Fees to commissioners for administering an oath or solemn affirmation to a declarant of an affidavit*

24 When under the orders of a Court in the Town of Rangoon or of a District Court an oath or solemn affirmation is administered to a declarant of an affidavit at his request elsewhere than at the Court a fee of Rs 16 shall be paid by the said declarant

O 26 R 24  
(Rangoon)

Provided that —

(a) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorised by the Court by order in writing

(b) if more than one affidavit is taken at the same time and place the fee shall be Rs 8 for each affidavit after the first

(c) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs 80

(d) in pauper suits and appeals when the affidavit of a pauper is taken no fee shall be charged

25 Affidavits taken under Rule 24 shall be taken out of Court hours. The fees shall be retained by the Commissioner for administering the oath or solemn affirmation

O 26 R 25  
(Rangoon)

No fee for administration of oath under the order of a Court

26 No fee shall be charged for the administration of an oath under the order of any Court other than those specified in Rule 24

O 26 R 26  
(Rangoon)

*Commissions issued at the instance of Foreign Tribunals*

27 (1) If a High Court is satisfied —

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it

(b) that the proceeding is of a civil nature and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction it may subject to the provisions of Rule 28 issue a commission for the examination of such witness

(2) Evidence may be given of the matters specified in clauses (a) (b) and (c) of sub rule (1) —

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Governor General in Council or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the Governor General in Council or

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding

O 26 R 27  
(Rangoon)

28 The High Court may issue a commission under Rule 27 —

(a) upon an application by a party to the proceeding before the foreign Court or

O 26 R 28  
(Rangoon)

O. 26 R. 28  
(Rangoon)

(b) upon an application by a law officer of the Local Government acting under instructions from the Local Government

O. 26 R. 29  
(Rangoon)

29 A commission under Rule 27 may be issued to any Court within the local limits of whose jurisdiction the witness resides or, where the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its ordinary original civil jurisdiction, to any person whom the Court thinks fit to execute the commission

O. 26 R. 30  
(Rangoon)

30 The Provisions of Rules 6, 15, 16, 17 and 18 of this order in so far as they are applicable shall apply to the issue, execution and return of such commissions and when any such commission has been duly executed it shall be returned, together with the evidence taken under it to the High Court, which shall forward it to the Governor General in Council along with the letter of request for transmission to the foreign Court

## ORDER XXVII.

### SUITS BY OR AGAINST *the Crown* OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

O. 27 R. 1

R. 1. [New.] In any suit by or against *the Crown*, the <sup>Suits by or against</sup> <sup>the Crown</sup> plaintiff or written statement shall be signed by such person as *the Crown* may, by general or special order, appoint in this behalf, and shall be verified by any person whom *the Crown* may so appoint and who is acquainted with the facts of the case.

[See Sections 79 and 80]

<sup>a</sup> Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the Government

<sup>b</sup> Substituted by *ibid* for the Secretary of State for India in Council

### Synopsis

1 Suits by or against the Crown

2 Notice in suits against the Crown or public officer See Section 80

1. Suits by or against the Crown — In suits by or against the Crown the authority to be named as plaintiff or defendant is as provided for by Section 79

2. Notice in suits against the Crown or public officer. — See Section 80

O. 27 R. 2

R. 2. [S 417] Persons being *ex officio* or otherwise authorized to act for *the Crown* in respect of any judicial proceeding shall be deemed

Persons authorized to act for Crown

to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of *the Crown*.

O. 27 R. 2  
Notes 1-2

[1877, S. 417; 1859, S. 17, cl. (3). See O. 3 R. 2.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for 'the Government'

### Synopsis

1. Scope of the Rule.
2. Collector, if can sue without power of attorney from Financial Commissioner.

**1. Scope of the Rule.** — As to recognized agents generally, see O 3 R 2 Collectors and Personal Assistants to Collectors have been authorized to act for the Government in judicial proceedings But a Personal Assistant is not agent of the Collector It is not permissible for the Personal Assistant to sign a vakalat which purports to be executed by the Collector<sup>1</sup>

**2. Collector, if can sue without power of attorney from Financial Commissioner.** — In the Punjab a Collector is competent to institute a suit on behalf of the Secretary of State for India in Council without obtaining a power of attorney from the Financial Commissioner<sup>1</sup> All Government Pleaders in the Punjab are also authorized to act for Government as their recognized agents.<sup>2</sup>

**R. 3. [S. 418.]** In suits by or *against the Crown*, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert *the appropriate name as provided in section 79, or, if the suit is against the Secretary of State, the words "the Secretary of State."*

O. 27 R. 3.

Plaints in suits by or against Crown.

[1877, S. 418; 1859, S. 36.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "against the Secretary of State for India in Council"

b. Substituted by *ibid* for the words 'the Secretary of State for India in Council'

**\*R. 4. [S. 419]** *The Crown pleader in any Court shall be the agent of the Crown for the purpose of receiving processes against the Crown issued by such Court.*

O. 27 R. 4.

Agent for Crown to receive process.

[1877, S. 419; 1859, Ss. 52, 67.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original rule

Order 27 Rule 2 — Note 1

Note 2

1. { 25 } AIR 1928 Mad 96 (96).

1. { 05 } 1905 Pun Re No 84 page 253  
2. { 28 } AIR 1928 Lah 774 (775) 10 Lah 500

O. 27 R. 4  
Note 1      1. Service of notice where no Crown pleader has been appointed. — See the undermentioned case<sup>1</sup>

O. 27 R. 5      **R. 5. [S. 420.]** The Court, in fixing the day for *the Crown* to answer to the plaint, shall allow a reasonable time for the necessary communication *with the Crown* through the proper channel, and for the issue of instructions to the *Crown pleader* to appear and answer on behalf of *the Crown* or the Government, and may extend the time at its discretion.

[1877, S. 420; 1859, S. 67. See O. 5 R. 6.]

- a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Secretary of State for India in Council."
- b Substituted by *ibid* for "Government"
- c Substituted by *ibid* for "with the Government"
- d Substituted by *ibid* for "Government pleader"
- e Substituted by *ibid* for "the said Secretary of State for India in Council"

#### MADRAS

#### Local Amendment

*Substitute the following*  
"5. The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the channel and for the issue of instructions to the answer on behalf of the said Secretary of State for and may extend the time at its discretion."

*Note* This local amendment was made before the rule was amended by the Government of India (Adaptation of Indian Laws) Order, 1937.

O. 27 R. 6      **R. 6. [S. 421.]** The Court may also, in any case in which the *Crown pleader* is not accompanied by any person on the part of *the Crown*, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

[1877, S. 421; 1859, S. 67. See O. 10 R. 4.]

- a Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Government pleader"
- b Substituted by *ibid* for "the Secretary of State for India in Council"

Order 27 Rule 4 — Note 1  
1. (39) AIR 1933 All 277 (278, 279) 1 L R (1939)  
All 322 (Agent for the Secretary of State in

respect of cases concerning East India Railway  
— Absence of a Crown pleader — Service on Agent  
of East India Railway held sufficient)



**R. 7. [S 423.]** (1) Where the defendant is a public officer O. 27 R. 7

Extension of time to  
enable public officer to  
make reference to Crown

and, on receiving the summons, considers it proper to make a reference to *the Crown* before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

[1877, S 423; 1859, S 69 See S 2, sub section 17.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for the Government

1. **Suit against public officer** — A suit against a public officer should be brought in his personal and not in his official name<sup>1</sup>

**R. 8. [Ss 426, 427]** (1) Where *the Crown* undertakes O. 27 R. 8

Procedure in suits  
against public officer

the defence of a suit against a public officer, *the Crown pleader*, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits

(2) Where no application under sub rule (1) is made by *the Crown pleader* on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties.

*Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree*

[1877, S 427; 1859, S 71]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for the Government

b. Substituted by *ibid* for the Government pleader

1 **Scope of the Rule** — As to the maintainability of suits against public officers see Section 9 Note 58

Order 27 Rule 7 — Note 1

1 (27) AIR 1927 Bom 521 (523 525) 51 Bom 549



he shall in lieu of a *talalatnama* file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be as nearly as may be, in the terms of the following form

O 27 R. 9  
(Allahabad)

TITLE OF THE SUIT, ETC

I, A B, Government Pleader appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces or as the case may be) Respondent (or etc), in the suit

Or, on behalf of the Government [which under O 27 R 8 (1) of Act V of 1908 has undertaken the defence of the suit] respondent (or etc) in the suit

*Note* This local amendment was made before Rule 8 was amended by the Government of India (Adaptation of Indian Laws) Order 1937

## ORDER XXVIII.

### SUIT BY OR AGAINST MILITARY <sup>or</sup> Naval MEN <sup>or</sup> Airmen

R. 1. [S 465] (1) Where any officer, *'soldier, sailor or*

O. 28 R. 1

Officers (soldiers sailors or airmen) who cannot obtain leave may authorize any person to sue or defend for them

*airman* actually *'serving under the Crown* in *'such capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit*

in person, he may authorize any person to sue or defend in his stead

(2) The authority shall be in writing and shall be signed by the officer, *'soldier, sailor or airman* in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer, *'soldier, sailor or airman* is serving in military, *'naval, 'or air force* staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer, *'soldier, sailor or airman* by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person

*Explanation* — In this Order the expression "commanding officer" means the officer in actual command for the time being of

O 28 R.1  
Note 1

any regiment, corps, *"ship*, detachment or depot to which the officer, *'soldier, sailor or airman* belongs

[1877, S 465, 1859, S 19 ]

- a Inserted by the Amending Act XXXV of 1934 Section 2 and Schedule
- b Inserted by the Repealing and Amending Act X of 1927 Section 2 and Schedule I
- c The words *soldier or airman* were substituted by Section 2 and Schedule I *ibid* for *or soldier* and the word *sailor* was inserted by Act XXXV of 1934 Section 2 and Schedule
- d Substituted by the Government of India (Adaptation of Indian Laws) Order 1937 for serving the Government
- e Substituted by Act XXXV of 1934 Section 2 and Schedule for *a military or air force*
- f The words *soldier or airman* were substituted by the Repealing and Amending Act X of 1927 for *or soldier* and *or a soldier* and the word *sailor* was inserted by the Amending Act XXXV of 1934
- g Inserted by Act XXXV of 1934 Section 2 and Schedule
- h Inserted by Act X of 1927 Section 2 and Schedule I

### Local Amendment

#### RANGOON

For the heading the words *Suits by or against the members of His Majesty's Military Naval or Air forces* shall be *substituted*

In Rule 1 for the words *officer soldier sailor or airman* wherever they appear the words *member of His Majesty's military naval or air forces* shall be *substituted*

1 Amendments after 1908 — The following amendments have been introduced by the Repealing and Amending Act X of 1927

(1) The words *or Airmen* have been added after the words *Military Men* in the heading

(2) The words *soldier or airman* have been substituted for the words *or soldier* wherever they occur and the words *or air force* have been inserted after the word *military*

See also foot notes to the text of the rule

O 28 R 2

R. 2. [S 466 ] Any person authorized by an officer,

Person so authorized  
may act personally or  
appoint pleader

*"soldier, sailor or airman* to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, *"soldier, sailor or airman* could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, *"soldier, sailor or airman*

[1877, S 466, 1859, S 20 ]

- a The words *soldier or airman* were substituted by the Repealing and Amending Act X of 1927 for *or soldier* and the word *sailor* was inserted by the Amending Act XXXV of 1934

## RANGOON

## Local Amendment

O. 28 R. 2  
Note 1

For Rule 2, the following shall be substituted

"Any person authorized by a member of His Majesty's military, naval or air forces to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as such member of His Majesty's forces could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such member of His Majesty's forces."

1. Amendments after 1908. — See the foot-note to the text of the rule

### R. 3. [S. 467.] Processes served upon any person autho-

O. 28 R. 3

Service on person  
so authorized or on  
his pleader, to be good  
service.

...rized by an officer, \*soldier, sailor or airman  
under rule 1 or upon any pleader appointed as  
aforesaid by such person shall be as effectual as  
if they had been served on the party in person.

[1877, S. 467; 1859, S. 20. See O. 3 R. 5.]

a. See the foot note to the text of Rule 2 above

## Local Amendment

## RANGOON

For Rule 3, the following shall be substituted

"Processes served upon any person authorized by a member of His Majesty's military, naval or air forces under Rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person"

1. Service on soldiers. — *Vide* Notes under O. 5 Rules 23 and 29.

For changes in the rule, see the foot note to the text of Rule 2 above

## ORDER XXIX.

## SUITS BY OR AGAINST CORPORATIONS

### R. 1. [S. 435.] In suits by or against a corporation, any

O. 29 R. 1

Subscription and verifi-  
cation of pleading

...pleading may be signed and verified on behalf  
of the corporation by the secretary or by any  
director or other principal officer of the corporation who is able to  
depose to the facts of the case.

[1877, S. 435; 1859, S. 26. See O. 6 R. 14.]

O.29 R.1  
Notes 1-2

## Synopsis

- |  |  |
|--|--|
| 1. Legislative changes.  | 5. Foreign corporation.                              |
| 2. Suits by or against corporations.   | 6. "Other principal officer of the corporation"      |
| 3. Suit by or against unregistered company.  | 7. "Who is able to depose to the facts of the case." |
| 4. Companies authorized to sue and be sued in the name of an officer or secretary. | 8. Subscription and verification of pleadings        |

*Other Topics (miscellaneous)*

Company authorized to sue and be sued in the name of an officer or trustee " See Note 1

Suit should be dismissed See Note 3

**1. Legislative changes.** — The words "or by a company authorized to sue or be sued in the name of an officer or of a trustee" which occurred in the old Sect on after the word "corporation" have now been omitted. The reason for the omission is that most companies nowadays are registered, and companies which are *unregistered* but which are authorized by law to sue must be very few, if any indeed exist, and no special treatment is necessary in respect of these<sup>1</sup>

**2. Suits by or against corporations.** — This Order deals with the subscription and verification of pleadings in suits by or against corporations, it says nothing about the manner in which the suit itself is to be framed<sup>1</sup> There is nothing in this rule or Order to suggest that the cause title of the plaint should also contain the particulars showing the names and description or place of residence of the person who purports to verify or sign the pleadings<sup>2</sup>

A "corporation" is a fictitious or imaginary person invested by law with the attribute of perpetuity<sup>3</sup> For the purposes of this Order it may be stated to be a body authorized by law to act as one individual and constituted either by prescription, by the Letters Patent, or by an act of the Legislature<sup>4</sup> A corporation by prescription is one which has existed as a corporation "from a time whereof the memory of man runneth not to the contrary, and therefore, is looked upon in law to be well created" In other words, it is a corporation of such antiquity that the consent of the sovereign may be presumed<sup>5</sup> A *registered* company under the Companies Act is a corporation,<sup>6</sup> but not an *unregistered* one, unless it is authorized by law to act as an individual. Unregistered companies so authorized are, as has been seen in Note 1, now practically non-existent

A corporation must sue or be sued, not in the names of its agents or servants but in its own corporate name,<sup>7</sup> and, in the case of registered companies, in the form

**Order 29 Rule 1 — Note 1**

1 See Notes on Clauses

**Note 2**

- 1 (21) AIR 1921 Pat 465 (485)  
2 (33) AIR 1933 Sind 102 (102) . 26 Sind L R 431  
3 Goode's Law of Real Property, 5th Edn., page 39  
4 Digby's Law of Real Property, 5th Edition page 218 foot-note I  
4. (17) AIR 1917 Low Bur 36 (37)

- [See also (90) 14 Bom 256 (259, 260)]  
5 (95) 20 All 167 (169)  
6. (26) 19 Cal 41 (44)  
(85) 1655 Pan Re No. 43, page 81  
7. (95) 17 All 292 (293)  
(65) 10 Suth W R 366 (367)  
(33) AIR 1933 Lah 203 (204) 14 Lah 330  
(71) 15 Suth W R 534 (535)  
(16) AIR 1916 Cal 818 (819) 43 Cal 441 (445)  
(13) 13 Ind Cas 555 (556) (Lah) (Amendment not allowed as the error was *judicial in error* after objection)  
[See however (23) AIR 1923 Pat 553 (560)]

given in Appendix A, First Schedule, Form No 2<sup>9</sup> and described as "the A B Company, Limited having its registered office at ' or as "A B, agent of C D Company" is not in conformity with the rule<sup>10</sup> Where in a suit against two companies, the description given was "the Indian General S N R Co, Ltd, and the Rivers S N Co, Ltd, by then joint agent A B Rogers" it was held that the suit was substantially against A B Rogers and not against the companies referred to<sup>11</sup> Where, however, relief is really sought against the company, and the error is *merely one of misdescription*, a suit, though nominally against the agent, may be treated as in substance one against the company<sup>12</sup> Similarly, where in a suit by a municipal body, the plaintiff was described as "A B, Chairman of the Municipal Board of . . ." but the intention was clear that it was the *Municipal Board* that was suing, it was held that the defect was merely one of form and could not be a ground in appeal for the reversal of the decree<sup>13</sup>

This rule merely authorizes the persons mentioned therein to sign and verify pleadings on behalf of a corporation The rule does not authorize such persons to *institute* suits on behalf of the corporation<sup>14</sup>

Where the manager of a company is authorized by the articles of association to file suits with the previous sanction of the executive board, a suit instituted by him without such sanction is unauthorized and the fact that the act of the manager is ratified after the period of limitation by a resolution of the board of directors is of no avail<sup>15</sup>

**3. Suit by or against unregistered company.** — A suit by or against an unregistered company or unincorporated body of persons must be brought in the names of, or against *all* the members of the company or body<sup>1</sup> Thus, an unregistered club or society cannot sue in the name of its secretary<sup>2</sup> A suit brought in the names of some only of the members of such a society will be dismissed<sup>3</sup> It was observed by the High Court of Calcutta in the undermentioned case<sup>4</sup> that where it appeared that the plaintiff did not know of what persons the company in question was composed, he might sue the company in the name under which it was carrying on the business, provided he had stated in the plaint that he was unable to give a better description of the defendant

8 (21) AIR 1921 Pat 485 (485) (Amendment disallowed and suit dismissed)

(33) AIR 1933 Lah 93 (93)

(33) AIR 1933 Lah 456 (457) (State Bank of Native State which is not corporation cannot sue in British Indian Court through its secretary)

11 L R 431 ]

12 (26) AIR 1926 Pat 40 (42) 8 Pat 128

13 (24) AIR 1924 Oudh 809 (810)

[See also (39) AIR 1933 Cal 178 (179) (Where the plaintiff in a suit against a municipality, sues the chairman only instead of the municipal commissioners as required by the local Municipal Act it is merely a technical flaw and no importance should be attached to it specially when the municipal commissioners duly appear and defend the suit in the Court)]

14 (35) AIR 1935 Lah 345 (346) 17 Lah 35

15 (36) AIR 1936 Lah 321 (322)

Note 3

1. (25) AIR 1925 All 337 (338) 47 All 342





invalid merely because he happens to be an *am mulkhtar* of the corporation.<sup>3</sup>

Where the plaint is signed and verified by an officer other than those specified in the rule, the Court may, in its discretion, allow the plaint to be amended by filing a properly signed and verified copy of the plaint.<sup>4</sup>

7. "Who is able to depose to the facts of the case." — It is not necessary that the principal officer of the corporation should verify the plaint from actual personal knowledge, he may verify upon his information and belief.<sup>1</sup> According to the rules of the Calcutta High Court,<sup>2</sup> it is necessary that the fitness of the person verifying the pleading on behalf of the corporation should be proved by an affidavit at the time of presenting the pleading. But, the Bombay High Court<sup>3</sup> has held that it is not necessary, in a suit by a corporation that the plaintiffs should state in the body of the plaint or by an affidavit that the person verifying was a principal officer of the plaintiffs able to depose to the facts of the case. An insufficiency of verification is not a ground in appeal, for dismissing the proceedings had in the first Court in the absence of any prejudice caused to any person by such defect.<sup>4</sup>

8. Subscription and verification of pleadings. — A plaint, on behalf of the corporation, may, under this rule, be signed and verified either —

- (a) by the secretary, or
- (b) by a director of the corporation, or
- (c) by other principal officer of the corporation.<sup>1</sup>

A Registrar of a Joint Stock Company is not a proper person to represent the company, he not being one of the persons specified.<sup>2</sup> There is a conflict of opinions as to whether the provisions contained in O 6 R 14 apply to cases within this rule, so as to enable a plaint by a corporation to be signed and verified by a person duly authorized by it, where, by reason of absence or other good cause it could not be signed by the persons specified in this rule. In *Delhi and London Bank Ltd v Oldham*,<sup>3</sup> their Lordships of the Privy Council observed as follows

Their Lordships are of opinion that Section 51 of the Code (now O 6 R 14) which regulates proceedings taken by or on behalf of ordinary plaintiffs does not apply to such a case as the present, but that this case must be decided with reference only to Section 435, which expressly applies to corporations.<sup>4</sup>

The High Court of Bombay<sup>5</sup> has held that the said decision of the Privy Council must be taken to apply to the particular facts of that case and that it is not an authority for the proposition that O 6 R 14 does not apply to cases governed by this rule, and they have consequently held that an agent holding a power of attorney is entitled to sign and verify the plaint on behalf of a corporation under the provisions

A plaint in the absence of the secretary is a principal officer.]

- 3. (14) AIR 1914 Cal 782 (782)
- 4. (27) AIR 1927 Sind 263 (263) (Reversed on another point by AIR 1931 Sind 178)

#### Note 7

- 1. (35) 9 Cal W N 603 (603, 610)
- 2. (27) AIR 1927 Cal 780 (780, 781) (22 Cal 68 Dist)
- 3. (36) AIR 1936 Bom 419 (421) I L M (1937) Bom 85
- 4. (1900) 5 Cal W N 91 (95)

#### Note 8

- 1. (56) 12 Cal 41 (44)
- (33) AIR 1913 Sind 102 (102) 26 Sind L R 431
- (66) 6 Suth W R Civ Rf 21 (25) (Secretary of a Government aided school can maintain an

**O. 29 R. 1** of Order 6 Rule 14 The High Court of Lahore<sup>5</sup> and the Judicial Commissioner's Court  
**Note ■** of Sind<sup>6</sup> are also of the same opinion

To enable a principal officer of a corporation to verify a plaint or a written statement, it is not necessary that permission of the Court should be obtained for that purpose, but, according to the Calcutta High Court,<sup>7</sup> it should be shown by a statement in the plaint or in the written statement or by an affidavit, that the person purporting to verify is a principal officer of the corporation and is able to depose to the facts of the case. See also Note 7

Where the defence raises the question of the competency of the director to sign and verify the plaint, the defendants are entitled so to cross examine him ■ to expose all the facts bearing on that question<sup>8</sup>

### Local Amendment

#### MADRAS

*Insert the following as Rule 1A:*

**O. 29 R. 1A**  
**(Madras)**

"1A In suits against a local authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance"

**O. 29 R. 2**

**R. 2. [S. 436.]** Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served —

*Service on corporation.*

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

[1877, S. 436; 1859, S. 63. See O. 5.]

**1. Service on corporation.** — The mode of service provided by this rule can be availed of only in cases where there is no mode of service provided by any other

(39) AIR 1939 Bom 347 (349) I L R (1939) Bom 295 (O 29 R 1, C P Code, is only a permissive rule and does not exclude the operation of O 6 Rr 14 and 15 of the Code A plaintiff sued by the constituted agent of a party, who holds a power of attorney is properly signed)

[See also (36) AIR 1936 Bom 418 (420) I L R (1937) Bom 55 (O 29 R 1 does not exclude the operation of the provisions of O 6 Rr 14 and 15—De facto secretary of a firm who verifies a plaint in the absence of secretary is a

principal officer)]

5 (25) AIR 1925 Lah 338 (339)

(32) 185 Ind Cas 41 (41) (Lah)

6. (31) AIR 1931 Sind 178 (179) 26 Sind L R 58 (Reversing A I R 1927 Sind 263)

7

1'

8. (31) AIR 1931 Harg 64 (55)

statute<sup>1</sup> In the case of foreign companies the place where the corporation carries on business means the *principal place of business* in British India<sup>2</sup> A Railway Company must be deemed to dwell at its principal office<sup>3</sup> Service at the registered office of a company is essential<sup>4</sup> though the Secretary may accept service elsewhere than at the registered office<sup>5</sup> But service on the solicitor of the company is not sufficient unless the company accepts service and enters appearance<sup>6</sup>

0.29 R.2

The mode of service prescribed by the rule can be availed of only after the suit has been properly framed and the person on whom the service is effected must be a person entitled to receive the notice in respect of the company or the companies sued<sup>7</sup> The Judicial Commissioner's Court of Sind has held in the undermentioned case<sup>8</sup> that where a corporation is sued as a defendant the plaint should be accompanied by an application under this rule duly stamped, stating in what manner and on whom the plaintiff wishes the summons to be served

**R. 3. [S. 436]** The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer

0.29 R.3

Power to require personal attendance of officer of corporation

material questions relating to the suit

[1877, S 436, 1859, S 63]

## ORDER XXX.

### SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN

**R. 1. [New.]** Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of

0.30 R.1

Suing of partners in name of firm

#### Order 29 Rule 2 — Note 1

- |  |  |
|--|--|
| 1 (28) AIR 1928 Sind 111 (113 114) (Foreign Company)                               | v Richardson (1909) 33 J 716 Vignes v Stephens Smith & Co Ltd                      |
| (10) 7 Ind Cas 982 (985) (Bom) (Company registered under the Indian Companies Act) | 5 (1878) 8 Ch D 163 (189 190) In Lx parte Railway Steel and Plant and Co Re Taylor |
| ■ (28) AIR 1928 Sind 111 (113)   | 6 (1890) 63 LT 96 Re Denver United Breweries                                       |
| 3 (1862) 1 Hyde 217 (217)  | 7 (16) AIR 1916 Cal 818 (819) 42 Cal 441   |
| 4 (1902) 1 K B 91 (93) Pears & Gunston and Tea                                     | 8 (33) AIR 1933 Sind 102 (103) 26 Sind LR 431                                      |

O 30 R. 1  
Note 1

the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons

[R S C, O. 48A, R 1]

### Local Amendments

#### LAHORE

Add the following Explanation

*Explanation* — This rule applies to a joint Hindu family trading partnership

#### N. W. F. P.

Add the following Explanation

*Explanation* — The rule applies to a joint Hindu family trading partnership

#### SIND

Add the following as an Explanation

*Explanation* — This rule applies to a joint Hindu family trading partnership

### Synopsis

- |  |   |
|--|---|
| 1 Scope of the Rule  | 9 Suit by firm on promissory note                       |
| 2 "Any two or more persons"                                | 10 "At the time of the accruing of the cause of action" |
| 3 "Firm," meaning of                                       | 11 Suit against firm — Reference to arbitration         |
| 4 Minor  | 11a Suit in name of firm — Compromise                   |
| 5 Suit against manager and owner of the firm See O 30 R 10 | 12 Statement of names and addresses                     |
| 6 Carrying on business in British India                    | 13 Subscription and verification                        |
| 7. "May sue or be sued in the name of the firm"            | 14 Death of partner before suit                         |
| 8 Firm as 'agriculturist'                                  | 15 Suit against individual partners                     |

### Other Topics (miscellaneous)

Foreign firm See Note 6      Partners and partner hip See Notes 1 and 2

**1. Scope of the Rule** — It is a general principle of law that a plaintiff who wishes to obtain a decree against several persons must make them all parties to the suit. Where A makes a promise to B, C and D the right to enforce the promise rests with them all under the provisions of the Contract Act Section 15, so that all of them are necessary parties to a suit to enforce such promise<sup>1</sup>. It was accordingly held under the old Code, which did not contain any provisions corresponding to this Order, that in suits by or against firms, all the members composing the firm were necessary parties.

#### Order 30 Rule 1 — Note 1

- 1 (7) AIR 1928 Ben 131 (137)  
2 (6) 35 Sath W R 115 (119)  
(65) 7 Cal L Jour 246 (264)

- (07) 4 Low Bar R d 23 (4)  
(65) 2 Sath W R 130 (132)  
(186) 1 Lon. H C R 53 (46)  
(7) 3 Sath W R 45 (47)

This Order has been newly introduced into the present Code and provides, as it were, an exception to the provisions of Section 45, Contract Act, in that it allows two or more partners alone to sue, provided the suit is brought *in the name of the firm*.<sup>3</sup> A firm as such, has no existence in law, it is a mere abbreviated name for the partners of which it consists, and not a *legal entity* as a corporation,<sup>4</sup> and when a suit is brought against a firm, it is precisely as though it were brought in the name of *all* the partners.<sup>5</sup> The effect of using the name of the firm is simply to bring all the partners before the Court and the procedure indicated in this rule is adopted only as a convenient method for denoting the persons who constitute the firm at the time of the accrual of the cause of action.<sup>6</sup> A decree against a firm in the name of the firm has the same effect as a decree against all the partners.<sup>7</sup> This is made clear by the various rules of this Order. Thus, Rule 2 provides that in a suit brought in the name of the firm, the plaintiff shall, on a written demand of the defendants, declare, in writing, the names and residences of the partners and that, on such a declaration being made, the suit will proceed as if *all the partners had been named* as plaintiffs in the plaint. Rule 6 provides that where persons are sued as partners in the name of their firm, they *shall appear individually* in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. But the Order merely provides a new procedure and does not affect the plaintiff's right of bringing a suit against a firm by impleading all or any of the members as defendants thereto in conjunction with the firm.<sup>8</sup> Where a suit is to be brought against *A and B* as partners of the firm *A, B & Co*, the proper form is not to sue them as "*A, B & Co*, by partners *A and B*" but to sue as follows —

- "1 *A B & Co*, a firm  
2 *A*, a partner in the firm  
3 *B*, a partner in the firm"

Where the plaint describes the plaintiff as the "*firm X through B*, the proprietor of the said firm," and the plaint is signed by *B*, the plaintiff cannot be deemed to be

(99) 21 All 846 (847)  
[*See also* (1919) 4 Bom 700 (702) (Suit against a firm)]

3. (27) AIR 1927 Lah 115 (116) 8 Lah 1  
(17) AIR 1917 Pat 246 (246)  
[*See* (19) AIR 1919 Mad 957 (959) 41 Mad 922]

6. (27) AIR 1927 Lah 115 (116) 8 Lah 1.

(26) AIR 1926 Sind 75 (76)

[*See also* (39) AIR 1933 All 69 (71) I L R (1933) All 100 (The policy underlying O 30 is no more than to afford facilities in the joinder of parties who may be numerous.)

7. (26) AIR 1926 Sind 75 (76)

[*See also* (32) AIR 1932 Bom 375 (378) (Same rule holds good in the case of an award)]

8. (30) AIR 1930 Pat 232 (240) 11 Pat 717.

9. (25) AIR 1925 Bom 491 (495)

(31) AIR 1931 Sind 121 (122) 25 Sind LR 104

[*See* (24) AIR 1924 Bom 155 (156).

(35) AIR 1935 Rang 209 (209) (The correct way of bringing a suit under O 30 R 1 is to bring it in the name of the firm as plaintiff, and no other name should be mentioned as plaintiff at the head of the plaint, but in the signature and verification of the plaint, the

Bank

partner in a firm, suing in name of firm —  
Proper form of suit would be to name only the

O 30 R 1  
Notes 1-3

suing in the *firm's* name but in his own name and the mere fact of the firm's name being mentioned in no way affects the matter<sup>10</sup>

The provisions of this Order apply only to a firm or contractual partnership and do not apply to a joint Hindu family business. Therefore an undivided Hindu family carrying on business is not entitled to sue as a firm under this Order<sup>11</sup> Further the provisions of this Order assume that the firm is legally constituted and do not have any bearing on the question of the maintainability of a suit against an illegal association<sup>12</sup>

This Order applies only to suits by or against partners and persons carrying on business in names other than their own. The execution of decrees against firms and the attachment of partnership property are dealt with in O 21 Rules 49 and 50

Where a decree is obtained in the name of a firm as to whether a payment of the decree amount to one of the partners is a valid discharge see Note 8 to Order 21 Rule 15 *ante*

2. "Any two or more persons" — This rule applies only where there are *two or more persons* carrying on business in the name of a firm. One single person carrying on business in the name of a firm cannot sue in the name of the firm<sup>1</sup> Nor can one of several partners carrying on business in the name of a firm sue in his own name on a cause of action which has arisen in favour of the firm<sup>2</sup> But he can institute a suit in the name of the firm in such cases and this rule does not bar him from doing so<sup>3</sup>

3 "Firm," meaning of — Under Section 4 of the Indian Partnership Act IX of 1932 (Section 239 of the Contract Act 1872) persons who have entered into partnership with one another are called individually partners and collectively a firm. In the earlier part of the same Section it is enacted that partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. A firm is thus a short, collective name for the individual members who constitute the partners<sup>4</sup> and as has been seen in Note 1 above is not a legal entity or an artificial person as a corporation. It follows that a

firm in the cause title as the plaintiff without saying through M but the addition of those words does not matter )

on the ground on the technical ground )

10 { 36 } AIR 1936 Pat 140 (141) (What is contemplated by O 30 R 1 is that two or more persons under a firm name may sue without mentioning the names of the individuals )

{ 36 } AIR 1936 Pat 140 (141)

{ 36 } 39 Bom L R 529 (530) (He can however be sued in a firm name)

11 { 34 } AIR 1934 Cal 810 (812) 61 Cal 975  
{ 38 } AIR 1933 Lah 663 (664) (Such a firm must sue and be sued in the name of its members )  
{ 36 } AIR 1936 Nag 292 (292) 1 L R (1937) Nag 423

{ 35 } AIR 1935 Rang 240 (243) (But where a sole proprietor brings a suit in a firm name the plaint can be amended even at the appellate stage in proper cases.)

{ 38 } AIR 1938 Pat 270 (270)  
{ See also { 33 } AIR 1933 Bom 304 (305)  
{ 30 } AIR 1935 All 250 (251) }

2 { 95 } AIR 1955 Sind 181 (182) 17 S and LR 141  
( 100 C T L R 479 (488) (Mad)

3

12 { 34 } AIR 1934 Lah 882 (883) (Suit against such an illegal association is not maintainable as its existence cannot be recognized by law )

#### Note 2

1 { 14 } AIR 1914 All 474 (474)  
{ 31 } AIR 1934 Lah 157 (15 ) (The defect in form can be removed by amendment and suit should

the suit will be allowed to proceed )

{ 32 } AIR 1932 Cal 100 (100)

firm cannot, as such, enter into a contract and be a member of a partnership<sup>3</sup> nor can it be a party to a reference under the Arbitration Act.<sup>4</sup> It cannot appear in any suit as a firm, if, however, a partner is made a co defendant along with the firm he may put in a separate defence for himself and one on behalf of the firm.<sup>5</sup>

A, B and C carry on business as a firm X. They enter into a partnership with D. Then A sues D in the name of the firm X for a dissolution of the partnership with D and for accounts. Such a suit is maintainable. Though the firm X as such cannot enter into a partnership with another, the individual partners therein, A, B and C can do so and the suit as brought must be deemed to be one on behalf of all three of them.<sup>6</sup>

Before the passing of the Partnership Act of 1932, the insolvency of one of the partners in a firm did not cause a dissolution of the firm and hence, a suit could be instituted in the name of the firm even after the insolvency of one of the partners.<sup>7</sup>

4. **Minor.** — Section 30 of the Indian Partnership Act, IX of 1932 (Section 247 of the Contract Act, 1872) provides that a person, who is under the age of majority according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm, but the share of such a minor in the property of the firm is liable for the obligations of the firm. The person under the age of majority cannot, under the Indian law, become a partner by contract, and cannot be one of that group of persons called a "firm," inasmuch as a contract by a minor is void.<sup>1</sup> In this view, the share, of which S. 247 speaks, is no more than a right to participate in the property of the firm after its obligations are satisfied.<sup>2</sup> If a suit is brought under Order 30 against a firm where a minor has been admitted to some kind of benefit, the minor cannot be regarded as a party to the suit.<sup>3</sup> Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of Order 32 and no sanction is necessary under the provisions thereof where the matter in dispute in such suit is referred to arbitration.<sup>4</sup> According to the law of England a contract by a minor is only voidable and not void. He may be a partner though he cannot be made personally liable for the debts of the firm. A judgment against the firm may be executed against the partnership property including the share of the minor.<sup>5</sup>

5. **Suit against manager and owner of the firm.** — See O. 30 R. 10, *infra*.

6. **"Carrying on business in British India."** — The rule clearly indicates that an action can only be brought by or against a firm in the firm name in which the

Mad 28 (When all the owners of a business are minors, there is no partnership as contemplated by the Partnership Act and a suit against them in the firm name cannot be brought.)

2. (22) AIR 1922 P C 237 (232, 240) 40 Cal 560, 49 Ind App 108 (PC)

3. (36) AIR 1936 Mad 707 (708, 709) 1 I L R (1937) Mad 28

4. (23) AIR 1923 Lah 103 (104).

(23) AIR 1923 Lah 212 (213) (Suit by one firm against another — Reference to arbitration by representatives)

5. (1894) 1894 A C 607 (611), Lovell v. Beauchamp.

(1893) 1 Q B 534 (535, 536), Harris v. Beauchamp Bros.

[See also (36) AIR 1936 Oudh 245 (246)]

3. (27) AIR 1927 Bom 423 (430).

4. (1892) 51 L J Ch 853 (854), Taylor v. Collier

5. (38) AIR 1938 All 69 (73) 1 I L R (1938) All 100

6. (37) AIR 1937 Nag 314 (316) 1 I L R (1937) Nag

23 (In this case it was observed that even if the firm is dissolved, it continues to exist for all purposes necessary for its winding up, including the recovery of moneys due to it, by suit or otherwise.)

Note 4

1. (36) AIR 1936 Mad 707 (708, 709), 1 I L R (1937)

**O. 30 R. 1**  
**Notes 1-3**

suing in the *firm's* name but in his own name and the mere fact of the firm's name being mentioned in no way affects the matter <sup>10</sup>

The provisions of this Order apply only to a firm or contractual partnership and do not apply to a joint Hindu family business. Therefore an undivided Hindu family carrying on business is not entitled to sue as a firm under this Order <sup>11</sup> Further, the provisions of this Order assume that the "firm" is legally constituted and do not have any bearing on the question of the maintainability of a suit against an illegal association <sup>12</sup>

This Order applies only to suits by or against partners and persons carrying on business in names other than their own. The execution of decrees against firms and the attachment of partnership property are dealt with in O. 21 Rules 49 and 50

Where a decree is obtained in the name of a firm, as to whether a payment of the decree amount to one of the partners is a valid discharge, see Note 8 to Order 21, Rule 15, *ante*

2. "Any two or more persons." — This rule applies only where there are two or more persons carrying on business in the name of a firm. One single person carrying on business in the name of a firm cannot sue in the name of the firm <sup>1</sup> Nor can one of several partners carrying on business in the name of a firm, sue in his own name on a cause of action which has arisen in favour of the firm <sup>2</sup> But he can institute a suit in the name of the firm in such cases, and this rule does not bar him from doing so <sup>3</sup>

3. "Firm," meaning of. — Under Section 4 of the Indian Partnership Act, IX of 1932, (Section 239 of the Contract Act, 1872), "persons who have entered into partnership with one another are called individually 'partners' and collectively a 'firm'" In the earlier part of the same Section it is enacted that "partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. A "firm" is thus a short, collective name for the individual members who constitute the partners<sup>1</sup> and, as has been seen in Note 1 above, is not a legal entity or an artificial person as a corporation. It follows that a

firm in the cause title as the plaintiff without saying "through it" but the addition of those words does not matter ]

10. (36) AIR 1936 Pat 140 (141) (What is contemplated by O. 30 R. 1 is that two or more persons under a firm name may sue without mentioning the names of the individuals)

11. (34) AIR 1934 Cal 810 (812) 61 Cal 975

(38) AIR 1938 Lah 563 (564) (Such a firm must sue and be sued in the name of its members)

(86) AIR 1936 Nag 292 (292) 1 L R (1937) Nag 423

(38) AIR 1938 Pat 270 (270)

[See also (33) AIR 1933 Bom 304 (305)

(35) AIR 1935 All 280 (281)]

12. (34) AIR 1934 Lah 882 (883) (Suit against such an illegal association is not maintainable as its existence cannot be recognized by law)

**Note 2**

1. (14) AIR 1914 All 474 (474)

(34) AIR 1934 Lah 157 (157) (The defect in form can be removed by amendment and suit should

not be thrown out on the technical ground ]

"proprietor brings a suit in a firm name, — plaintiff can be amended, even at the appellate stage in proper cases)

2. (25) AIR 1925 Sind 181 (182) 17 Sind L R 221

(190) C Ind Cas 438 (1908) (Mad).

3



disclosure of the names of those partners under Rule 3<sup>2</sup> An addition of one of the partners after the period of limitation, or the correction of the name of a wrong representative of the firm who has been made a party to the suit will not amount to an addition or substitution of a new party to the suit within the meaning of Section 22 of the Limitation Act<sup>3</sup>

**O. 30 R. 1**  
**Notes 7-11**

The cause of action in respect of a contract with a firm vests in all the partners jointly, and if, after the contract one of the partners retires and a stranger comes in, the new partnership cannot enforce the contract entered into by the old. Nor can it, by substituting the names of the old partners, alter the period of limitation for instituting the suit or avoid the bar of limitation<sup>4</sup> Where a firm continues to be known by its old name even after the original partners are dead though occasionally the name of the actual head of the firm is also added to the old name, the omission of the latter's name in a suit by the firm does not amount to any misdescription<sup>5</sup> It has been held in the undermentioned case<sup>6</sup> that in a suit for libel made against a firm all the partners should join as plaintiffs

**8. Firm as "agriculturist."** — A firm can be an "agriculturist" within the meaning of Section 2, Dekkhan Agriculturists' Relief Act (XVII of 1879), only when, by itself or by its servants, or by its tenants it earns its livelihood wholly or principally by agriculture carried on within the limits of a district to which the Act extends. The mere fact that an individual partner or even all the partners of the firm earn their livelihood from an agricultural income does not make the firm an "agriculturist." A plaintiff suing a firm which, by itself, does not earn its livelihood by agriculture must be sued only at the place where it carries on business and not where the individual partners reside<sup>1</sup>

**9. Suit by firm on promissory note.** — Where a promissory note is executed to A, a partner of a firm, for a debt due to the firm, A is personally entitled to sue on the note although the benefit of the decree would result to the partnership firm<sup>1</sup> The firm is also entitled to sue on the note, though it is advisable, before suit, to get the instrument endorsed in its name<sup>2</sup> Where A sues individually to recover a debt due to the firm consisting of partners A and B, the correct procedure, if B will not join A as co plaintiff, is to make him a defendant<sup>3</sup>

**10. "At the time of the accruing of the cause of action."** — A suit may be brought under this rule in the name of a firm which has been dissolved before the date of the suit, provided the cause of action has arisen before the date of the dissolution<sup>1</sup>

**11. Suit against firm — Reference to arbitration.** — Where a reference is made to arbitration in a suit in which a firm is a party, all the members of the firm who are sought to be bound, must join in making the reference, sub rule (2) of this

<sup>2</sup> ('16) AIR 1916 Mad 649 (649)

<sup>3</sup> ('16) AIR 1916 Mad 649 (649)

(28) AIR 1929 Nag 319 (321)

[See also (35) AIR 1935 Sind 225 (226, 227).]

#### Note 8

1. (29) AIR 1929 Bom 373 (379) 53 Bom 787  
(31) AIR 1931 Sind 121 (122) 25 Sind LR 104

#### Note 9

1. (29) AIR 1929 Bom 177 (177) 53 Bom 110  
2. (28) AIR 1928 Cal 148 (150, 151) 55 Cal 551.  
3. (25) AIR 1925 Lah 504 (505)

**O.30 R.1** rule does not empower one partner alone to refer the case to arbitration so as to bind the other partners who have not agreed to, or joined in, the application for reference.<sup>1</sup> A proceeding before an arbitrator under the Arbitration Act is not a suit and, therefore, the provisions of Order 30 do not apply thereto.<sup>2</sup>

**11a. Suit in name of firm — Compromise.** — Although a suit is instituted in the name of a firm, all the partners are in reality plaintiffs and it cannot be compromised by one of the partners alone.<sup>1</sup>

**12. Statement of names and addresses.** — Both Rules 1 and 2 provide for the disclosure of the names of partners. Under Rule 1 *any party* may apply to the Court for a statement of the names and addresses of the partners to be furnished as directed by the Court. Under Rule 2, a *defendant* may, on demand in writing, without recourse to Court, ask the plaintiff or his pleader to declare in writing the names and places of residence of the partners. Where a statement under Rule 1, or a declaration under Rule 2 is made, the Court cannot direct a cross examination on such statement or declaration nor can it direct the trial of an issue as to who were the partners of the firm at the time of the accruing of the cause of action. But the statement or declaration, as the case may be, will be treated as embodied in the plaint and will be a necessary part of the cause of action.<sup>1</sup>

**13. Subscription and verification.** — It is quite sufficient, under the provisions of sub rule (2) that, in suits by or against a firm, the pleading on behalf of the firm is signed and verified by one of the partners composing the firm. It is not necessary that it should be signed by two or more persons, though under sub rule (1) no suit can be brought in the name of a firm unless it consists of two or more partners.<sup>1</sup>

**14. Death of partner before suit.** — A suit may be brought against a firm in the name of the firm, even though one of the partners is dead before the institution of the suit,<sup>1</sup> inasmuch as the suit must be deemed to be against the surviving partners. The judgment so obtained against the firm, though enforceable against the partnership property, cannot be enforced against the *private estate* of the deceased partner, unless his legal representatives are actually made parties.<sup>2</sup>

**15. Suit against individual partners.** — This rule does not affect, in any way, the operation of Section 43 of the Contract Act. In a suit upon a contract made by a partner on behalf of the partnership, the promisee can compel all or any one of the partners to perform the whole of the promise.<sup>1</sup> As has been seen in Note 1, an individual partner may be sued personally along with the firm.<sup>2</sup>

times to exist for all purposes necessary for winding up of the firm.]

**Note 11**

1. (26) AIR 1926 All 238 (240) 48 All 239

(32) AIR 1932 Bom 516 (519)

2. (29) AIR 1929 Lah 228 (229, 230).

**Note 11a**

1. (33) AIR 1933 Lah 618 (620)

**Note 12**

1. (1905) 1 K B 46 (50, 51), Abrahams and Co v. Dunlop Pneumatic Tyre Co

**Note 13**

1. (14) AIR 1914 All 474 (474)

(28) AIR 1923 Nag 137 (137)

(11) 9 Ind Cas 450 (450) (Low Bur)

(74) 12 Beng L R 35 (36)

(70) 5 Beng L R 83 (80)

(32) AIR 1932 Nag 137 (138) 28 Nag L R 116

(35) AIR 1935 Rang 200 (210) {Corr ct way of

bringing the suit is to mention only the firm at the head of the plaint but subscription and verification to be by a partner in the firm describing himself as such}

**Note 14**

1. (28) 112 Ind Cas 715 (717) (All)

2. (21) AIR 1924 Bom 103 (111)

**Note 15**

1. (27) AIR 1927 Lah 819 (821) 11 Lah 217.

2. (1882) 30 W R (Lug) 701, Taylor v. Collard & Co.

**R. 2.** [Now.] (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader

O. 30 R. 2

Disclosure of partners' names

shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint.

Provided that all the proceedings shall nevertheless continue in the name of the firm

[R S C, O 48A, R 2]

### Synopsis

1 Scope of the Rule

2 Disclosure of partners' names

3 Proceedings to continue in the name of firm see Rule 6 Note 2

**1. Scope of the Rule** — This rule applies only to suits instituted by and not against partners in the name of the firm in other words it applies only to the case of plaintiffs suing in the name of the firm<sup>1</sup> Sub rule (3) of this rule does not control the provisions of O 21 R 50 and does not apply to anything that follows after the suit has reached the stage of a decree<sup>2</sup> nor does it in any way contradict the provisions of O 30, Rule 4 and it is therefore not necessary to join the legal representatives of a deceased partner as parties to the suit<sup>3</sup>

**2. Disclosure of partners' names** — An incomplete disclosure or a wrong declaration of the names of the partners is not a fatal defect to the suit the proper procedure in such a case is not to dismiss the suit but to allow a further declaration making a full disclosure<sup>1</sup> The effect of such a fresh declaration is equivalent to that of the addition of a party and therefore it should be made before the expiry of the period of limitation<sup>2</sup> A suit for dissolution of a partnership existing between an individual on the one hand and a different partnership on the other may be instituted against such

#### Order 30 Rule 2 — Note 1

1 { 27) AIR 1927 Bom 417 (449) 51 Bom 794

2 { 27) AIR 1927 Bom 417 (449) 51 Bom 794

3 { 23) AIR 1929 Cal 11 (14)

{ 21) AIR 1921 Cal 722 (725)

#### Note 2

1. { 30) AIR 1930 Bom 1 0 (150) 51 Bom 255

{ 34) AIR 1931 Cal 253 (255) 60 Cal 1217

{ 14) AIR 1914 Cal 53 (54) 21 Ind Cas 636 (639)

51 Cal 581

2 { 34) AIR 1931 Cal 253 (255) 60 Cal 1217

{ See however { 37) AIR 1937 Rang 137 (135)

{ Person suing as managing partner of firm —

cannot be dismissed as bad for non joinder —  
AIR 1931 Cal 253, Distinguished ]]

**O. 30 R. 3** partnership without disclosing in the plaint the names of the individual partners  
**Notes 2-3** thereof<sup>2</sup>

**3** Proceedings to continue in the name of firm — See Rule 6, Note 2 *infra*

**O. 30 R. 3**

**R. 3.** [New.] Where persons are sued as partners in the name of their firm, the summons shall be served either —

Service

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India.

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable

[R S C, O 48A R. 3]

### Synopsis

- 1 Scope of the Rule
- 2 Dissolution of partnership before suit
- 3 Service by registered post
- 4 "Person having partnership business"
- 5 Successive services

- 6 "Principal place at which the partnership business is carried on"
- 7 "As the Court may direct"
- 8 Mortgage suit
- 9 Ex parte decree against firm
- 10 Notice as to capacity in which partner is sued See Rule 6

### Other Topics (miscellaneous)

Deemed good service See Note 1  
 First service on manager—Subsequent service on partners—Time for appearance to be counted from what date stated See Note 5

Proviso—Dissolved firm See Note 2  
 Whether all or any of the partners are within or without British India See Note 1

**1** Scope of  
 of their firm and

application to suits against partners not brought in the name of their firm

**3** (23) AIR 1929 Sind 7 (9)

[See also (36) AIR 1936 Lah 78 (79) (Suit by firm partners in which have become partners in another firm for dissolution of latter partnership—Names of partners in plaintiffs partnership disclosed under R 2 — The suit can proceed as if the partners had been originally

joined as plaintiffs in the suit)]

**Order 30 Rule 3 — Note 1**

**1** (25) AIR 1925 Cal 1136 (1137)  
 (39) AIR 1939 Pesh 9 (11) (Notice under O 21 R 66 must be served on the judgment debtors in such cases)

the firm is an existing one or has not been dissolved to the knowledge of the plaintiff before the date of suit, there are two modes of service prescribed by this rule :

- (a) upon any one or more of the partners, or
- (b) upon the manager of the business at the principal place thereof within British India.

A service effected in one of the above modes is a good service *against the firm*, and a decree can be passed against it,<sup>2</sup> it is immaterial that all the partners are not individually served,<sup>3</sup> or that all or any of them resides outside British India.<sup>4</sup> If the summons be not served in either of the two modes mentioned above, the service is irregular and no decree can be passed against the firm.<sup>5</sup> But though the firm is properly served by adopting the above modes of service, it is not sufficient to make a member who has not been *actually* served, a person "who has been individually served as a partner" within the meaning of O 21 R 50.<sup>6</sup> That rule provides that a decree obtained against a firm may be executed—

- (a) against the *partnership assets*,
- (b) against any person *personally* who has been individually served with summons and has failed to appear,
- (c) against any person *personally* who has appeared in his own name under Rules 5 and 7 of Order 30, or who has admitted in the pleadings that he is, or who has been adjudged to be, a partner,
- (d) *with the leave of the Court*, against any person *personally* as being a partner of the firm, even though he has not appeared or been individually served in the prescribed manner.

As to the mode of service to be adopted in cases where the firm has been dissolved before the institution of the suit and the effect of not complying with the rule of service so prescribed, see Note 2 below.

See also the undermentioned cases.<sup>7</sup>

**2. Dissolution of partnership before suit.** — The proviso to this rule deals with the method of service to be adopted where the firm has been dissolved before the date of the suit. If the plaintiff, at the time of instituting the suit, is not aware of the dissolution, the proviso has no application and a service effected in one of the modes mentioned in clause (a) or clause (b) of the rule is good service against the firm, and a decree passed against it can be executed against the partners in the manner prescribed by O 21 R 50. If, however, the plaintiff is aware of the fact of dissolution before the date of the suit, he must, if he seeks to make any person liable as a partner, serve it on such person *individually*. If instead of doing so the service is effected as prescribed by clause (a) or clause (b) only, there will no doubt be a decree *against the firm*, but it cannot be executed, even with the leave of the Court, personally against the partner not

2. (15) AIR 1915 Cal 238 (240)  
(1932) AIR 1932 Sind 199 (200) 26 Sind L R

County Banking Co v Kurlant Pauling & Co  
6. (1886) 17 Q B D 755 (758), In Re Ide  
(1927) AIR 1917 Bom 581 (592) 51 Bom 986

3. (25) AIR 1925 Bom 331 (332).  
(1926) AIR 1926 Sind 73 (76)  
(71) 7 Bng L R App 58 (58) (Service on one partner for his co partner is good service)

this rule duly stamped stating where, in what

4. (15) AIR 1915 Cal 238 (240)

(1924) AIR 1924 Bom 366 (367)

5. (1894) 1 Q B 784 (788, 790), Worcester City and R. 3 does not apply to such a case.

O.30 R.3  
Note 2

individually served, under sub-rule (2) of O 21 R 50<sup>1</sup> To this extent the proviso to this rule overrides O 21 R 50, which allows a decree against a firm to be executed against a partner personally with the leave of the Court, even though he has not been served individually.<sup>2</sup>

Where a partner *dies* before the institution of the suit, the partnership gets dissolved under the provisions of Section 12 of the Partnership Act, IV of 1932 (Section 253 of the Contract Act). If the plaintiff is aware of the death at the date of the suit he must, if he wishes to make the *private estate* of the deceased partner liable, implead the legal representatives as parties and obtain a decree against them.<sup>3</sup> But the proviso to this rule does not imply that if the plaintiff was not aware of the dissolution by the death of the partner, the latter's legal representatives can be treated as partners themselves and proceeded against under sub rule (2) of O 21 R 50 in respect of the private estate of the deceased partner. It has accordingly been held by a Full Bench of the High Court of Madras<sup>4</sup> that the fact that the plaintiff had no knowledge of the death of the partner before the suit does not affect the question of the liability of the legal representatives in respect of the private estate of the deceased partner and that the scope of O 21 R 50 sub rule (2) cannot be enlarged by a reference to the rule of service prescribed by the proviso. A different view has been taken by the High Court of Bombay. According to that High Court the legal representatives can be proceeded against under sub rule (2) of O 21 R 50, in respect of the private estate of the deceased partner.<sup>5</sup> The Sindh Judicial Commissioner's Court has also held in similar view.<sup>6</sup> It is submitted that the Bombay view is not correct. Sub rule (2) of O 21 R 50 applies only to execution against a person as being a partner of the firm and the legal representatives are, in no sense, the partners of the firm.<sup>7</sup>

In *Ellis v Wadson*<sup>8</sup> Romer, L J, observed as follows

Suppose a partner dies before action is brought and an action is brought against the firm in the firm's name. The dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued though the legal personal representatives of a dead man can be sued in a proper case.

If the legal representatives of the deceased partner are not added expressly as defendants and the action is brought against the firm in the firm's name then judgment can only be obtained against the surviving partners and be enforced against them and against the partnership assets. I have so far dealt with the case of the death of a partner before action. Now what happens if a partner dies between service of writ and the trial of the action and judgment? In that case equally the dead man's estate is not bound. Judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets.<sup>9</sup>

Where a suit is instituted against a firm which has been dissolved before the date of the suit, the date of the institution for the purpose of limitation is the date of the suit and not the date of the service of summons individually upon a partner, subsequent to the institution of the suit.<sup>9</sup>

#### Note 2

1 (25) AIR 1925 Bom 331 (332)

(1894) 1 Q B 792 (795) Wigram v Cox & Co

(1883) 10 Q B D 436 (449-450) Davis v Morris

(33) 43 Cal W N 820 (821)

(36) AIR 1936 Sind 34 (39) (Property of dissolved firm can be proceeded against)

[See also (36) AIR 1936 Sind 206 (207) 30 Sind

11000]

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The mere fact that in cases covered by the proviso, service of summons individually on all the partners in the dissolved partnership is required does not mean that in such cases there cannot be a decree both against the firm as well as against the individual partners who have been served <sup>10</sup>

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Notes 2-9

**3. Service by registered post.**—As has been seen in Note 1, a summons can be served in suits against a firm only in the modes specified in clauses (a) and (b) of the rule. Therefore, where service by registered post has been ordered, the registered letter should be addressed to a *partner* or to the *manager* of the business and not to the *firm*, name at the place where the business is carried on <sup>11</sup>

**4. "Person having . . . partnership business."**—The person "having at the time of service, the control and management of the partnership business" must be a *servant* of the firm, a receiver or a manager appointed *by the Court* is not such a person as is referred to in clause (b) of the rule <sup>1</sup>

**5. Successive services.**—Where more than one service is effected, the time for appearance by the firm runs from the last service. In a case where service was effected on the person in control of the business and five days later, upon a partner, and judgment in default of appearance was signed on the first service before the eight days had elapsed from service on the partner, the judgment was set aside <sup>1</sup>

**6. "Principal place at which the partnership business is carried on."**—Where a suit is filed against a firm, service on an agent at the principal place of business of the firm within jurisdiction is good service on the firm, whether any members of the firm are within jurisdiction or not <sup>1</sup>. But where the mandate to the bailiff is to serve the summons *at the place of the business* of the firm on the manager or managing partner, without specifying the name of the person to be served, it is not within the competence of the bailiff to effect service by the affixture of summons at the *residence* of the managing partner <sup>2</sup>. Where the manager at the place of business refuses to accept service, a copy of the summons may be affixed on the premises <sup>3</sup>

**7. "As the Court may direct."**—These words do not occur in the corresponding English rule. According to the latter, the plaintiff has an *option* to serve the summons upon a partner or upon the manager. Under the present rule, the plaintiff has no such option but should obtain the directions of the Court as to the method of service to be followed. If the method prescribed in each particular case is followed and service is so effected, then *prima facie* there has been good service on the firm <sup>1</sup>

**8. Mortgage suit.**—A mortgage suit by or against a firm is on the same footing as other suits relating to the properties of the firm and service of summons or notice on the manager of the firm is service on all the partners of the firm <sup>1</sup>

**9. Ex parte decree against firm.**—In *ex parte* decree passed against a firm

10. (36) AIR 1936 Sind 206 (203) 30 Sind L R 296  
Note 3

1. (22) AIR 1922 Cal 330 (300-301) 49 Cal 394  
(Service of summons in suit against a dissolved firm is by serving on the partner charged as liable as principal)

1. (1897) 1 Q B 14 (17-16) In re Flowers & Co  
Note 5

1. (1890) 25 Q B D 543 (544) Alden v Beckley  
Note 6

1. (14) AIR 1914 Mad 550 (502) 18 Ind Cas 169

(191) 37 Mad 163

2. (26) AIR 1926 Sind 205 (209)

3. (09) 1 Ind Cas 118 (120) (Cal)

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Cal th-  
out Court a directions, is not a defect or irregularity which affects the jurisdiction of the Court.]

Note 8

1. (11) 12 Ind Cas 623 (600) (All).

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Notes 9-10

after due service under this rule cannot be set aside on the allegation of a partner that he was not duly served "It can never be said that a decree against the firm is *ex parte* against one of the partners because he has not appeared"

10. Notice as to capacity in which partner is sued. — See Rule 5 *infra*.

O. 30 R. 4

**R. 4. [New.]** (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have —

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

**1. Joinder of legal representatives.** — Under Section 45 of the Contract Act, where a person has made a promise to two or more persons, then, unless a contrary intention appears from the him and them, with them :

with the representative of such deceased person, jointly with him or and after the death of the last survivor, with the representatives of all jointly Where therefore a contract is made in favour of A and B, A alone cannot enforce the contract without impleading the legal representatives of B, in case B dies before suit In applying this rule to cases of suits by or against partners in respect of partnership debts, there was, however, a conflict of opinions among the High Courts All the High Courts except the Calcutta High Court held that in the case of such suits the legal representatives of a deceased partner need not be impleaded as parties<sup>1</sup> The High Court of Calcutta<sup>2</sup> held that the general rule applied to this class of suits also and that the legal representatives were necessary parties This conflict has now been set at rest by the enactment of O 30 R 4, modifying the operation of Section 45 of the Contract Act so far as the frame of suits relating to partnership is concerned, and making it clear that the Calcutta view ought not to prevail<sup>3</sup> But the rule will enable a decree to be obtained only against the partnership assets, and cannot be carried further so as to alter the substantive law laid down in Section 45 and fix liability on the private estate

**Note B**

1. (21) AIR 1924 Bom 366 (367).

Order 30 Rule 4 — Note 1

∴

[See ( 97) 21 Bom 412 (421, 422) ]

2. ( 91) 18 Cal 86 (90)

[See also ( 93) 1 Ind Cas 254 (256) (Cal) ]

3. (27) AIR 1927 Bom 531 (537, 540, 531) 51 Bom 986

(14) AIR 1914 Low Bur 58 (60, 61) 8 Low Bur

representatives of deceased partner



of the deceased partner. If the plaintiff wishes to fix such liability, he is bound to make the legal representatives of the deceased partner also parties.<sup>4</sup>

There is a conflict of opinions as to whether this rule applies where the suit is not brought in the name of the firm, but by one or more partners in respect of the partnership. It was held by the Calcutta High Court in the undermentioned case<sup>5</sup> that the suit need not be brought in the name of the firm, and that this rule was enacted to simply uphold the view of the High Courts under the old Code that, in suits on behalf of a partnership the legal representatives of a deceased partner were not necessary parties. The High Court of Rangoon<sup>6</sup> has held that where the suit could not be brought in the firm name by reason of the firm having no name at all, this rule does not become inapplicable. The High Courts of Allahabad,<sup>7</sup> Lahore<sup>8</sup> and Patna<sup>9</sup> and the Judicial Commissioner's Court of Sind,<sup>10</sup> and the Calcutta High Court itself in a later case,<sup>11</sup> have held that the rule applies only when the suit is brought in the name of the firm.

Sub rule (2) of this rule is intended to safeguard the rights of the legal representatives in case, for instance there should be any collusion between debtors to the estate and the surviving partners. Similarly, sub rule (2) (b) may enable them to claim contribution from the surviving partners under Section 43 of the Contract Act, in the event of there being a partnership liability.<sup>12</sup>

It follows from what has been stated in the above paragraphs that where a partner dies during the pendency of the suit the suit does not abate but can be proceeded with by or against the firm.<sup>13</sup> This principle will not, however, apply unless two or more persons constituted a firm where the sole proprietor dies, the suit will abate unless the legal representatives are brought on the record within the limitation period.<sup>14</sup>

A person who sues some of the partners in their individual capacity, cannot be permitted to prove his case against them as partners of the firm.<sup>15</sup>

The rule does not apply to a joint Hindu family firm.<sup>16</sup>

O. 30 R. 4  
Note 1

## R. 5. [New] Where a summons is issued to a firm and is

O. 30 R. 5

Notice in what capacity served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

### [R S C, O 48A, R 4]

- |  |  |
|--|--|
| 4 (27) AIR 1927 Bom 551 (557) 51 Bom 966<br>(31) AIR 1931 All 65 (69) 52 All 964               | firm by reason of its having ceased to exist on      |
| 5. (18) 21 Ind Cas 509 (510) (Cal)   |  |
| 6 (29) AIR 1929 Rang 310 (311) 7 Rang 559  |  |
| 7. (32) 135 Ind Cas 245 (246) (All)  |  |
| 8 (27) AIR 1927 Lah 115 (117) 8 Lah 1  |  |
| (33) AIR 1933 Lah 356 (359) 14 Lah 543   |  |
| (O 30 R 4 is only permissive. It is followed,<br>O 30 R 4 applies but not otherwise.)          |  |
| 9 (35) AIR 1935 Lat 121 (122) (Suit could not<br>have been brought in this case in the name of | 15 (15) AIR 1915 Lah 167 (168) 1915 Pun Re<br>No 76  |
|  | 16 (36) AIR 1936 Nag 292 (293) ILR (1937)<br>Nag 423 |

O.30 R.5  
Notes 1-5

## Synopsis

- |   |   |   |
|---|---|---|
| 1. Notice, in what capacity served.           | } | 4. Appearance under protest. See Rule 8 |
| 2. Service on manager. See Rule 3             |   | 5. Form of notice.                      |
| 3. Person served both as manager and partner. |   |   |

**1. Notice, in what capacity served.** — "The object of the notice as to the capacity of the person served is obvious, namely, the Legislature intended to remove the possibility of dispute as to the character in which a particular person has been served. If there is a notice in writing, the person served is apprised of the character in which he is sought to be made liable. It is worthy of note that the language used is, not that the person served shall be *presumed* to be served as a partner, but that the person shall be *deemed* to be served as a partner. . . . In the absence of a notice consequently, the person must be deemed to have been served as a partner, and if in reality not a partner he should proceed in accordance with R. 8<sup>1</sup>. The failure to give notice under this rule will expose the plaintiff to the risk of being liable for costs in case the defendant appears under protest under Rule 8<sup>2</sup>.

**2. Service on manager.** — See Rule 3 *ante*

**3. Person served both as manager and partner.** — Where there is doubt whether the person served is a partner or not, notice may be given that he is served both as a partner in the firm and as the person having the control or management of the partnership business there. This double form of notice has this advantage, namely, that if the person appears denying that he is a partner, judgment can still be signed in default of a proper appearance upon the service on him as the manager or controller. The assets of the firm will be liable in execution.

As the Order applies only to suits, notices served on the judgment debtor during the course of arbitration proceedings as a managing partner of the firm will not enable the decree holder to take execution at once against him without leave of the Court under Order 21 Rule 50, sub rule (2)<sup>1</sup>.

**4. Appearance under protest.** — See Rule 8, *infra*

**5. Form of Notice.** — See Form Nos. 23C and 23D of Appendix B to the English Rules of the Supreme Court

O.30 R.6

## R. 6. [New.] Where persons are sued as partners in the

name of their firm, they shall appear individually in their own names, but all subsequent

proceedings shall, nevertheless, continue in the name of the firm.

[R. S. C., O. 48A, R. 5.]

## Synopsis

- |   |   |                                    |
|---|---|------------------------------------|
| 1. Appearance of partners.  | } | 3. Defence in suits against firms. |
| 2. "All subsequent proceedings shall continue in the name of the firm." |   | 4. Decree in suits against firms.  |
|   |   | 5. Revision.                       |

**1. Appearance of partners.** — As has been seen in Note 1 to Rule 1 *ante*, a firm, as such, has no existence in law. It cannot, consequently, appear as such in a suit

Order 30 Rule 5 — Note 1

1. (15) AIR 1915 Cal 233 (240)

(28) AIR 1928 Lah 528 (629)

2. (26) AIR 1926 Sind 61 (53)

Note 3

1. (29) AIR 1929 Lah 223 (223, 230)

against partners in the name of the firm. It is, therefore, enacted by this rule that the partners should appear *individually* in their own names, though all the subsequent proceedings should continue in the name of the firm. The word "individually" does not mean "in person" and, therefore, no partner can be compelled to appear *in person*.<sup>1</sup> He can appear by an agent or a solicitor or a pleader and such appearance will be an *individual* appearance within the meaning of the rule.<sup>2</sup> Under this rule the appearance of one partner is appearance of the firm, that is, of all the partners of the firm.<sup>3</sup> The fact that the firm has been represented by the appearance of one partner does not disentitle another partner from putting in his appearance, the reason is that if such partner considers that his rights will not be adequately represented by the other partner who has appeared or who has been impleaded, or that his interests are adverse to those of such partner, it is just and fair that he should be allowed to appear *individually* and resist the claim.<sup>4</sup>

Where a partner does not appear in the suit and has not also been served *individually* with a summons in the suit, the decree obtained against the firm cannot be executed against him *personally* except with the leave of the Court under O 21 R 50, sub rule (2). If he does appear under the provisions of this rule, execution can at once issue against him *personally* under O 21 R 50 sub rule (1).

The only persons who can appear under this rule are persons who allege that they are partners of the firm sued against and persons who are sued as partners but who deny that they are such (see Rule 8). A person merely served as manager cannot appear under this rule (see Rule 7).

2. "All subsequent proceedings shall continue in the name of the firm."  
— Where persons are sued as partners in the name of their firm, they should under this rule appear *individually* in their own names, but all subsequent proceedings are nevertheless to continue in the name of the firm.<sup>1</sup>

3. *Defence in suits against firms.* — Each partner appearing *individually* can put in a separate written statement but each written statement is the written statement of the firm. It is only when a person is sued *personally* along with the firm that he may put in a *personal defence*.<sup>1</sup> Where a person was served as a partner and not *individually* and he put in a written statement in his *own name*, but there was nothing *individual* in the defence, it was held that there was only a technical flaw which could be corrected by the Court.<sup>2</sup>

Where several partners *individually* appear and put in separate written statements and such written statements are inconsistent with one another, the plaintiff is bound to meet all the defences and is bound to show that none of the defences prevents a decree being passed against the firm.<sup>3</sup>

#### Order 30 Rule 6 — Note 1

1. ('19) AIR 1919 Lah 296 (297) 1918 Pun Re

written statement on behalf of firm is signed by one partner, another partner entering appearance can take part in the conduct of the case by examining or cross-examining witnesses, etc.)

#### Note 2

1. ('25) AIR 1925 Bom 494 (496)  
(33) AIR 1933 All 523 (524) 55 All 719

('21) AIR 1921 Cal 723 (725) (Even though the names of the partners are disclosed as required by R 2 the proceedings continue in the name of the firm)

#### Note 3

1. ('25) AIR 1925 Bom 494 (496)

2. ('29) AIR 1929 Smt 194 (1)

3. (1839) 1 Q B 714 (717), 1.

warrant of attorney is given by one partner to enter appearance on his behalf, the warrant of attorney is and is intended to be on behalf of the firm)

4. ('30) AIR 1930 All 701 (702) 52 All 951

('33) AIR 1933 All 523 (525) 53 All 719 (Where

O. 30 R. 6  
Notes 4-5

4. Decree in suits against firms. — The firm being sued in the *firm name*, judgment can be passed against it only in *that name* and not against the individual partners, though it may be enforced against them personally under O 21 R 50. The judgment must follow the writ, *i e.*, the decree must be against the firm in the *firm name* and if one of the partners fails to appear no decree can be passed against him separately for default of appearance<sup>1</sup>. But the judgment has the effect of a judgment against all the partners as partners<sup>2</sup> and therefore, the assets of the firm are primarily liable to satisfy the decree. Whether a particular partner is also personally liable to satisfy the decree can only be decided in execution under O 21 R 50<sup>3</sup>. A judgment entered against a firm may be a ground for a valid cause of action against an individual partner and an action may be brought upon it against him<sup>4</sup>.

5. Revision. — Where a Court refuses to allow a partner, who has entered appearance but has not filed a separate statement, to take part in the conduct of the case against the firm, it acts illegally in the exercise of its jurisdiction and the order is open to revision<sup>5</sup>.

O. 30 R. 7

R. 7. [New.] Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

[R. S. C., O. 48A, R. 6.]

1. Scope of the Rule. — A person served as manager is under no obligation to appear in Court unless he is a partner<sup>1</sup>. This rule is to be read subject to Rule 5 above. It contemplates only a case where a person is served as a manager and not a case where the person served is deemed to be served as a partner<sup>2</sup>.

The object of the rule is to avoid unnecessary delay caused by the appearance of persons who are neither partners nor their agents.

O. 30 R. 8

R. 8. [New.] Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

[R. S. C., O. 48A, R. 7.]

Note 4  
1. (1882) 8 Q B D 474 (477, 478), *Jackson v. Litchfield*  
2. (1899) 1 Q B D 566 (570), *In Re Frances Handford & Co*  
3. (24) AIR 1924 Bom 366 (367).

4. (1892) 9 Q B D 355 (356), *Clark & Sons v. Cullen*

Note 5

1. (33) AIR 1933 All 523 (525) 55 All 719 (The order is a case decided within the meaning of S 115, C P. C.)

Order 30 Rule 7 — Note 1

1. (26) AIR 1926 Sind 51 (52).  
2. (15) AIR 1915 Cal 238 (242).

*Synopsis*O. 30 R. 8  
Notes 1-3

## 1. Scope of the Rule.

2. Party appearing under protest not entitled to file written statement on his own behalf.

3. Party appearing under protest, if can question liability of firm.

4. Defence of party entering appearance under protest in proceeding under Order 21, Rule 50.

**1. Scope of the Rule.**— This rule enables a person who is served with summons as a partner under Rule 3 to appear under protest and deny that he is a partner. The effect of such an appearance has nothing to do with the merits of the suit but it nullifies the service altogether as regards the firm<sup>1</sup>. But the plaintiff is not precluded thereby from otherwise serving the summons on the firm. He may disregard the appearance of the person denying that he is a partner and may again effect service upon a partner or partners or upon the manager of the business as required by Rule 3, or he can contend that the person served was a partner at the time the cause of action accrued, and apply on that basis either to have the appearance entered struck out, or to have the denial of partnership struck out of the appearance<sup>2</sup>. According to the High Court of Bombay<sup>3</sup> the person protesting that he is not a partner has a right to have the issue as to whether he was a partner of the defendant firm, tried in the suit itself and not be left hanging over him until execution proceedings are taken out against him under O 21 R 50. On the other hand in the undermentioned case of the Calcutta High Court,<sup>4</sup> Mr. Justice Buckland was of the opinion that an inquiry of the kind prior to judgment is not within the contemplation of the rule, inasmuch as there is an express provision in O 21 R 50 for the decision of the question before according leave to proceed in execution. The Judicial Commissioner's Court of Sind has, also, taken the same view<sup>5</sup>. See also the case cited below<sup>6</sup>.

**2. Party appearing under protest not entitled to file written statement on his own behalf.**— A party who has been served as a partner under Rule 3, and entered appearance under protest, is not entitled to file a written statement on his own behalf denying that he is a partner<sup>1</sup>.

**3. Party appearing under protest, if can question liability of firm.**— A defendant entering appearance under protest is not precluded from taking alternative defences, namely, that he is not a partner and that, assuming that he is a partner, the firm is not liable<sup>1</sup>. It was held in England in the undermentioned case<sup>2</sup> that under the corresponding rule (O 48A R 7) of the Rules of the Supreme Court, such a defence was not open to the defendant. That rule, however, has been substituted by a new

to appearance of a person who wishes to enter appearance under protest in a summary suit under O 37.)

( 32 ) AIR 1932 Bom 269 (269) (But if plaintiff does not apply to strike off appearance under protest, it is open to Court to make provision for the costs of protesting party in the suit.)

3. ( 21 ) AIR 1921 Bom 49 (49)

[See however ( 32 ) AIR 1932 Bom 269 (269, 270)]

4. ( 27 ) AIR 1927 Cal 753 (753 760) 54 Cal 1057

5. ( 32 ) AIR 1932 Sind 139 (200, 201) 26 Sind L R 229

names should be struck out.—Court not deciding issue.—There is no irregular exercise of jurisdiction.)

## Note 2

1. ( 27 ) AIR 1927 Cal 753 (760) 54 Cal 1057.

## Note 3

1. ( 26 ) AIR 1926 Sind 151 (154, 156).

(But see ( 32 ) AIR 1932 Sind 199 (201) . 26 Sind L R 229 )]

2. (1925) 2 K B 127 (131), *Wear and Co. v. Mc-  
Nassar & Co*

O 30 R 8  
Notes 3-4

rule in 1929 under which such a defence is now permitted in England That English case therefore has now been rendered obsolete in England

4 Defence of party entering appearance under protest in proceeding under O 21 R 50 — A files a suit against a firm and serves B with a summons as a partner of the defendant firm B appears under protest stating that he is not a partner and a decree is passed in his absence against the firm A then seeks to execute the decree personally against B under the provisions of O 21 R 50 sub rule (1) B can in such proceedings defend him self on the ground that he is not a partner of the firm He can also take any other defence if it is open to him unless to allow him to do so would be to negative any rule of procedure<sup>1</sup>

O 30 R 9

R. 9. [New] This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common, but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just

[R S C, O 48A, R 10]

1 Scope of the Rule — The general rule of procedure is that a person cannot be both a plaintiff and a defendant<sup>1</sup> This rule provides an exception to that rule<sup>2</sup> and makes this Order applicable to suits between firms and one or more of the partners therein and to suits between firms having one or more partners in common<sup>3</sup> A suit may also be by one firm against another when all the members of one firm are members of the other<sup>4</sup> The rule does not alter the substantive law as it existed before<sup>5</sup> and does not lay down when and under what circumstances suits can be laid as between partners<sup>6</sup> It only lays down the possibility of such suits and the procedure to be followed therein<sup>7</sup> No suit will lie as between partners or between firms having common partners for recovery of moneys due on accounts without asking for accounts<sup>8</sup> But an action for the balance of a settled account will not be barred merely because there are other unsettled accounts between the parties<sup>9</sup>

One of the directors of a company who has been excluded from acting as a director by the other directors can maintain an action in his own name on the ground of individual injury to himself<sup>10</sup>

#### Note 4

1 (30) AIR 1930 Cal 53 (54) 56 Cal 704 (Alterative personal defence under the U P Court of Wards Act allowed as such defence would not be a challenge of the decree itself)

(32) AIR 1932 Bom 334 (335) (idea of not being a partner and in the alternative that partner who had no authority to borrow — Alternative decrees—)

5 (1923) 2 Ch 421 (435) Meyer & Co v Eater

# R. 10. [ New ] Any person carrying on business in a name or style other than his own name may be

Suit against person carrying on business in name other than his own

sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply

[ R. S C, O. 48A, R. 11 ]

## Synopsis

- 1 Scope of the Rule
- 2 Non resident foreigner
- 3 ' All Rules under this Order shall apply ''

**1. Scope of the Rule** — In order to maintain a suit against a firm in the name of the firm there must be *two or more persons* who are alleged or who claim, to be partners therein<sup>1</sup> A *single* person cannot constitute a firm though he is carrying on business in a name or style other than his own This is made clear by the use of the words as if it were a firm and so far as the nature of the case will permit in this rule<sup>2</sup> Such a person cannot therefore *sue* in the name of a firm but must sue in his own name<sup>3</sup> Where however he files a suit in the name of the firm but is willing to amend the plaint by inserting the words (plaintiff) carrying on business under the name and style of (firm) the amendment should be allowed on terms that he should pay all the costs incurred up to the date of the amendment<sup>4</sup> Where the title of the plaint mentioned the plaintiff as A owner of the shop O there is no misdescription inasmuch as the plaintiff is A and not the shop O<sup>5</sup>

But though a single person trading in a firm name cannot *sue* in the name of a firm he *can be sued* in that name under the provisions of this rule<sup>6</sup> But the business must be carried on in British India and must be an *existing* one at the time when the suit is instituted<sup>7</sup> If the sole proprietor dies no suit can be brought against him in the name of the firm for such a suit will be only a suit against a dead person and therefore a nullity<sup>8</sup> The proper form of the suit will be against the legal representatives of the deceased proprietor<sup>9</sup> Similarly if he dies pending the suit it will abate unless his legal representatives are brought on the record within the prescribed period of limitation (90 days from the date of his death)<sup>10</sup>

This rule only applies to the case of a *single* individual carrying on business in a name or style other than his own Where the sole proprietor of a business dies and the business is then carried on by the guardian of his minor sons on their behalf, this rule does not apply<sup>11</sup>

### Order 30 Rule 10 — Note 1

- 1 See Notes to Rule 1 ante
- (30) AIR 1930 Bom 216 (216)
- 2 (24) AIR Bom 10J (111)
- 3 (80) AIR 1930 Bom 216 (216)
- (30) AIR 1936 1 at 134 (196)
- (33) AIR 1939 Sind 172 (173) ILR (1939) Har 275
- [See (34) AIR 1934 Lah 147 (147) (Person

(30) AIR 1936 1 at 134 (196)

[See also (34) AIR 1934 Mad 366 (367) 57 Mad

1934

**A. I. R. 1938 Lahore 315 at 316.**

'The learned counsel for the present respondents also quoted A I R. 1932 All 446, A. I. R. 1933 All. 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr Chitaley's Criminal Procedure Code, (1st Edn) vol 1, p 676."

**A. I. R. 1938 Lahore 220 at 222.**

"(The amended Rule will be found printed at pp 252 3 of Chitaley's Code of Civil Procedure, Edn 2)"

**A. I. R. 1938 Calcutta 730 at 733 =****I. L. R. (1939) 1 Cal. 112 at 120.**

"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act (1st Edn., 1938), pp. 567 to 572."

**A. I. R. 1938 Calcutta 287 at 289 & 290 =****I. L. R. (1938) 1 Cal. 53 at 58 and 60.**

"In the Note to Messrs Chitaley and Annaji Rao's Code of Civil Procedure, (2nd Edn) at p 1859, I find the following comment 'The first . . . parties'.

"The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions'."

**A. I. R. 1937 Rangoon 391 at 392.**

'The learned authors of the Code of Criminal Procedure by Chitaley and Annajao, Edn 1, vol 1, at p. 200 say 'Thus an . . . Proviso'

'I agree with this view.'"

**A. I. R. 1937 Peshawar 81 at 81.**

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the Commentary in Chitaley's Civil Procedure Code (2nd Edn) certainly indicates the contrary"

**A. I. R. 1937 Peshawar 51 at 51.**

"On p. 1490 of Mr Chitaley's commentary on the Civil Procedure Code (Edn 1) it is noted that 'where a plaint is presented on the re opening date after court holidays and

the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of

stated appears to me to be correct'

**A. I. R. 1937 Peshawar 13 at 15.**

"In this connexion we may quote the following Note No 4 from Mr. Chitaley's Commentary (2nd Edn p 1853) under R 53 which is as follows 'Other decrees — A decree . . . . . this rule'."

**A I. R. 1937 Oudh 481 at 483 =****I. L. R. 13 Luck. 560 at 565 & 566.**

"Messrs. Chitaley and Annaji Rao in their Commentary on the Code (2nd Edn p. 2347) express the opinion that the present cl (d) of R. 5 of O. 33 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 All 601, and other cases."

**A. I. R. 1937 Nagpur 268 at 269 =****I. L. R. 1937 Nag. 519 at 520.**

"It appears that the weight of authority is in favour of the view that the Appellate Court has such powers. The dissentients from that view are limited to the High Courts of Allahabad and Rangoon and the Chief Court of Oudh. See also Chitaley and Rao's Code of Civil Procedure, (2nd Edn) vol 1, page 712"

**A. I. R. 1937 Nagpur 216 at 217 =****I. L. R. 1938 Nag. 280 at 282.**

"In Chitaley and Rao's Civil Procedure Code, Edn 2, p. 2094 under O. 22, R 1, it is remarked

"If, in the first Court, the . . . . . either party."

"I agree with these remarks which would apply to a dismissal of the suit in appeal. It is further remarked on the authority of 34 Mad loc. cit that the appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main reliefs. I accordingly uphold the contention of the respondent"



**A. I. R. 1937 Nagpur 50 at 53 =**

**I. L. R. 1937 Nag. 277 at 284.**

"This question has been well discussed in Note 10 under S. 162, p 804, of Chitaley and Annaji Rao's recent Commentary on the Criminal Procedure Code (1st Edn). The learned author's favour the view of the Madras and Calcutta High Courts which is in accordance with the opinion expressed above."

**A. I. R. 1937 Lahore 41 at 49 =**

**I. L. R. 1937 Lah. 11 at 33.**

"I find it stated in Chitaley and Annaji Rao's Code of Civil Procedure (2nd Edn p 612) that this section (i.e., S 80) like S 79 enacts only a rule of procedure. With this view I agree"

**A. I. R. 1937 Calcutta 222 at 224.**

"On this point there is a considerable

**A. I. R. 1937 Allahabad 82 at 87.**

"The balance of authority seems to be that an Appellate Court has no power under it to interfere to the prejudice of a person who was a party to a suit, but who was not impleaded in the appeal *vide* 'Code of Civil Procedure,' Chitaley and Annaji Rao, Vol 3, pp. 3003 3004 (1st Edn). I am, therefore, of opinion that defendants 27 ought not to have been impleaded"

**A. I. R. 1936 Peshawar 209 at 210.**

"We have been referred to Note (7) under S 48 in Chitaley's Commentary on the Civil Procedure Code (1st Edn) where the distinction between a fresh application and an application in continuation of a previous application is illustrated"

**A. I. R. 1936 Peshawar 37 at 37.**

"Counsel for the appellants quotes from Chitaley's Commentary (Civil P. C., 2nd Edn, p 3005) to the effect that where the question of costs has been referred to the arbitrator, or where the whole matter in dispute has been referred to the arbitrator, the arbitrator has authority to award costs in the award"

**A. I. R. 1936 Nagpur 228 at 230 =**

**I. L. R. 1937 Nag 230 at 234.**

"The point is well summed up at pages 2469 and 2470 of Chitaley and Rao's Code of Criminal Procedure, (1st Edn) vol. 3, and the learned authors rightly point out that the view of the High Courts, excepting Rangoon, is consistent with the principles underlying sub section 3 of the section"

for  
Code, vol 3, p 2318, 2nd Edn"

**A. I. R. 1934 Peshawar 94 at 95.**

"He (D J) quotes from Chitaley (1st Edn, p 1240) as follows 'All co promisees . . . as parties.'"

"I have no disagreement with this statement of the law, but in the present case the

following effect

"Where several . . . of suits."

"That statement of the law applies to the facts of the present case."

**A. I. R. 1934 Peshawar 57 at 61.**

"These conflicting views are noted on pp 746 and 747 of Chitaley's Civil Procedure Code." (1st Edn)

**A. I. R. 1934 Peshawar 40 at 42.**

"The argument is based on Chitaley's Commentary, 1st Edition, page 1888 under O. 21, R. 15 of the Code, which is supported by *Gopendra Krishna v. Mott Lal*, A. I. R. 1928 Cal. 559"

**A. I. R. 1934 Allahabad 253 at 255.**

cedure Code, (1st Edn), vol. 1, pp. 4 and 5."

**A. I. R. 1933 Peshawar 61 at 62.**

"The law on the subject is lucidly summed up in Chitaley's Commentary on Civil Procedure Code, (1st Edn), vol. 1, p. 192, and is stated as follows. 'A party . . . . . them'."

**A. I. R. 1938 Lahore 345 at 346.**

"The learned counsel for the present respondents also quoted A. I. R. 1932 All. 446, A. I. R. 1933 All. 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr. Chitaley's Criminal Procedure Code, (1st Edn.) vol. 1, p. 676."

**A. I. R. 1938 Lahore 220 at 222.**

"(The amended Rule will be found printed at pp. 252 & 3 of Chitaley's Code of Civil Procedure, Edn. 2)"

**A. I. R. 1938 Calcutta 730 at 733 =****I. L. R. (1939) 1 Cal. 112 at 120.**

"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act (1st Edn., 1938), pp. 557 to 572."

**A. I. R. 1938 Calcutta 287 at 289 & 290 =****I. L. R. (1938) 1 Cal. 53 at 58 and 60.**

"In the note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, (2nd Edn.) at p. 1888, I find the following comment: 'The first . . . parties'."

"The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions."

**A. I. R. 1937 Rangoon 391 at 392.**

"The learned authors of the Code of Criminal Procedure by Chitaley and Annaji Rao, Edn. 1, vol. 1, at p. 200 say 'Thus an . . . proviso.'"

"I agree with this view."

**A. I. R. 1937 Peshawar 81 at 81.**

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the Commentary in Chitaley's Civil Procedure Code (2nd Edn.) certainly indicates the contrary."

**A. I. R. 1937 Peshawar 41 at 41.**

"On p. 1480 of Mr. Chitaley's commentary on the Civil Procedure Code (Edn. 1) it is noted that 'where a plaint is presented on the re opening date after court holidays and

the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of

stated appears to me to be correct."

**A. I. R. 1937 Peshawar 13 at 15.**

"In this connexion we may quote the following Note No. 4 from Mr. Chitaley's Commentary (2nd Edn. p. 1835) under R. 63 which is as follows. 'Other decrees. — A decree . . . this rule'."

**A. I. R. 1937 Oudh 481 at 483 =****I. L. R. 13 Luck. 560 at 565 & 566.**

"Messrs. Chitaley and Annaji Rao in their Commentary on the Code (2nd Edn. p. 2347) express the opinion that the present cl. (d) of R. 5 of O. 39 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 All. 661, and other cases."

**A. I. R. 1937 Nagpur 268 at 269 =****I. L. R. 1937 Nag. 519 at 520.**

"It appears that the weight of authority is in favour of the view that the Appellate Court has such powers. The dissentients from that view are limited to the High Courts of Allahabad and Rangoon and the Chief Court of Oudh. See also Chitaley and Rao's Code of Civil Procedure, (2nd Edn.) Vol. I, page 712."

**A. I. R. 1937 Nagpur 216 at 217 =****I. L. R. 1938 Nag. 280 at 282.**

"In Chitaley and Rao's Civil Procedure Code, Edn. 2, p. 2091 under O. 22, R. 1, it is remarked

"If, in the first Court, the . . . . .  
 . . . . . either party."

"I agree with these remarks which would apply to a dismissal of the suit in appeal. It is further remarked on the authority of 34 Mad. loc. cit. that the appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main reliefs. I accordingly uphold the contention of the respondent."

